

**IN THE MATTER OF AN ARBITRATION UNDER THE
DOMINICAN REPUBLIC CENTRAL AMERICA FREE TRADE AGREEMENT AND
THE UNCITRAL RULES OF ARBITRATION (2010)**

BETWEEN:

**DAVID R. AVEN, SAMUEL D. AVEN, CAROLYN J. PARK, ERIC A. PARK, JEFFREY
S. SHIOLENO, DAVID A. JANNEY AND ROGER RAGUSO (United States of America)**

(Claimants)

v

THE REPUBLIC OF COSTA RICA

(Respondent)

CLAIMANTS' POST-HEARING BRIEF

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I. INTRODUCTION AND SCOPE OF THE CLAIMANTS' POST-HEARING BRIEF

A. Introduction

1. The Claimants submit this post-hearing brief (the “**Claimants’ Post-Hearing Brief**”) in these proceedings against the Respondent pursuant to paragraph 45 of Procedural Order No. 5, dated November 25, 2016, as amended by agreement between the Parties and confirmed by the Tribunal at the Hearing on February 7, 2017.
2. The Claimants’ Post-Hearing Brief summarizes the Claimants’ case as previously stated in their written submissions and in oral evidence and submissions at the hearings in Washington D.C. on December 5-12, 2016 and February 7, 2017 (the “**Hearing**”). Accordingly, the Claimants’ Post-Hearing Brief should be read alongside the Claimants’ written submissions (namely, their Notice of Arbitration dated January 24, 2014, their Memorial dated November 27, 2015, their Reply Memorial dated August 5, 2016 and the witness statement of Jorge Antonio Briceño dated November 18, 2016 and accompanying exhibits and the transcripts of their oral submissions at the Hearing).
3. Defined terms used but not defined in this Post-Hearing Brief shall have the meanings ascribed to them in the Claimants’ previous written submissions in these proceedings.
4. The Claimants’ Post-Hearing Brief will focus on the written and oral evidence which supports the Claimants’ claims, in particular by: (i) providing a summary of the key fact and expert witness evidence; (ii) outlining the law applicable to the Claimants’ claims; (iii) summarising the Claimants’ claims for breach of Articles 10.5, 10.7 and Annex 10B of the DR-CAFTA; (iv) summarising the Claimants’ claims for breach of Articles 10.7 and Annex 10D of the DR-CAFTA; (v) commenting on the weight of the counter-evidence submitted by the Respondent; (vi) dealing with the Respondent’s erroneous

interpretation of applicable law; (vii) addressing the Respondent's *post-hoc* defenses and demonstrating why they must fail; and (viii) summarising the Claimants' damages claim.

B. What this case is really about

5. The Parties have already written extensively on the issues before the Tribunal in this case and for that reason, the Claimants will not repeat each and every relevant fact and allegation in this Post-Hearing Brief. Instead, the Claimants will focus on the key issues which the Tribunal will have in mind during deliberations (including answers to the Tribunal's questions of February 14, 2017 (the "**Tribunal's Closing Questions**") and the issues that were developed by the Parties in oral testimony and submissions at the Hearing). Attached as Annex C to this Post-Hearing Brief is a list mapping the whereabouts of the Claimants' answers to the Tribunal's Closing Questions.

6. As the Claimants have already explained in their Memorial and Reply Memorial and in the Witness Statements of Mr Aven, Mr Shioleno, Mr Janney and Mr Damjanac, their investment was a family affair.¹ In the hope of capitalising on a booming Costa Rican real estate market identified by Mr Janney on one of his humanitarian missions, and following Mr Aven's several visits to Costa Rica, the Claimants decided to explore investment opportunities together. Mr Aven, having viewed a number of properties on the Central Pacific coast, was eventually taken by a local agent to see a site at Esterillos Oeste. The site was by all accounts a special property framed by what Mr Janney refers to as the most beautiful beach on the central coast.² The property also clearly presented a prime investment opportunity. The 37-hectare plot is well served by public roads, has a topography suited to development, excellent ocean views and access to the beach.³

¹ See David Aven Witness Statement para. 28.

² English Transcript, 361:1-2.

³ English Transcript, 497:2; 498:15.

7. With an ideal site identified, the Claimants invested in the parcels of land to be used for the Las Olas Project through a number of Enterprises⁴ in which each Claimant investor held shares in different proportions.⁵ Title to the land was eventually acquired in April and May 2002 following the execution of an Option Agreement with the site's previous owner.⁶ As Mr Aven described in his written and oral testimony, the Claimants' approach, before and after the 2008 financial crisis, was to develop Las Olas without taking on any debt. Before 2008, this may have looked unnecessarily conservative, since others were leveraging their development projects with substantial debt-investment from banks and the like, thereby enabling the developers to build more ambitiously. But the wisdom of the Claimants' approach became clear in the aftermath of the financial crisis: whilst others suddenly had to sell at a loss in order to deal with exposure to a now-unsustainable debt burden, or they had to seek bankruptcy protection, the Claimants were able to hibernate and then adjust their development plans by scaling down but remaining economically viable. However, they did also have the benefit of the possibility of using a bank facility, since in 2006 Bank BCIE (before any significant work had been done on the site) agreed to provide the Claimants with an US\$8million development loan.⁷ Whilst that loan was not used, the fact Bank BCIE made it available confirms that this was viewed as being a viable and serious development project.
8. Although the Claimants did not initially have a firm plan for how best to develop the Project Site, they recognized the excellent beachfront opportunity it represented. In 2004, Mr Aven commissioned a marketing and land planning study for the Project to help produce a conceptual design.⁸ The strength of this design and the increasing confidence in the likely success of the Project,

⁴ See Exhibit C-4.

⁵ See Exhibit C-5.

⁶ See Exhibit C-27.

⁷ See Exhibit C-38

⁸ See Exhibit C-30.

bolstered by the profitability of comparable developments in the area, encouraged the Claimants to move forward with the Las Olas Project.

9. The Claimants did not have a unique insight as to the development potential in the area. One need only look at the 400-home Málaga project built by Rock Construction just 6km from Las Olas, a project at which work started in 2012 and which had completed and sold out by 2016, to see evidence that these projects are absolutely viable.

10. As will be explored in more detail below, the Claimants have always recognized the Respondent's authority to regulate development projects and to legislate to protect the environment for which Costa Rica is famed. In keeping with their sensitivity for the Respondent's environment, the Claimants complied with all legal obligations that applied to them, appointed numerous local experts in order to develop the project in a legally-compliant manner and obtained all necessary environmental and construction permits before commencing work. In fact, as Mr Aven and Mr Damjanac explained in their Witness Statements,⁹ their commitment to the success of Las Olas and to the wider Esterillos Oeste community is evidenced by the contributions the Claimants voluntarily made over the years to help improve local infrastructure. Examples of those contributions include:
 - a. the installation of 1,000 meters of street lighting in Esterillos Oeste, which was put in place in 2006 at a cost to the Claimants of US\$55,000;
 - b. in 2007, a joint undertaking with Cabo Caletes and Costa Developers, to pay for new water pumps and for construction of 4 miles of new water running from the Municipal water pumps to Esterillos Oeste.¹⁰ The Claimants' contribution amounted to US\$160,000; and

⁹ See David Aven First Witness Statement para. 114; and Jovan Damjanac First Witness Statement para. 56.

¹⁰ See Exhibit C-51.

- c. a 2010 payment of US\$100,000 to install storm drains into the streets of Esterillos Oeste.¹¹
11. The Claimants' respect for local laws and the environment is clearly evidenced by the number of permits and authorizations the Claimants diligently obtained before commencing work at Las Olas. As Mr Aven testified at the Hearing, he spent time, money and effort sourcing and appointing appropriate professionals to ensure compliance with local laws and regulations.¹² The good standing and excellent reputation (as confirmed by Mr Mussio in his oral testimony)¹³ of his choice of architectural firms was one part of that. The Respondent's transparent *post-hoc* attempts to paint the Claimants as greedy, insensitive and disrespectful foreign investors must be seen against this backdrop of diligent compliance with local laws and regulations.
12. As the Respondent's own expert on Costa Rican law has acknowledged,¹⁴ SETENA's role as **the** governmental agency with authority over environmental matters is indisputable and its decisions and resolutions, which create rights of third parties and have legal effect, must be respected by public bodies and private entities alike. SETENA's resolutions are legally binding, including on Costa Rica's own agencies, ministries and officers. This theme will be developed further below. It is nonetheless useful at this stage to consider the numerous, critical resolutions willingly issued by that authority, in most cases off the back of physical inspections of the Las Olas Project Site:
- a. On November 23, 2004, SETENA issued (by resolution no. 2164-2004-SETENA) an Environmental Viability to the Villas La Canícula Project¹⁵ (SETENA Administrative File No. 110-2005-SETENA) which covered

¹¹ See David Aven First Witness Statement para. 114; Jovan Damjanac First Witness Statement para. 108; and Exhibit R-532.

¹² English Transcript, 818:17-22, 819:1-6, and 896:13-898:14.

¹³ English Transcript, 382:20-21, and 386:14-16.

¹⁴ See Julio Jurado First Witness Statement, para. 11.

¹⁵ See Exhibit R-9.

both the Condominium Section and part of the Easements Section of the Las Olas Project Site.¹⁶ Amongst other matters, that EV recorded that:

- i. *“Article 19 of the Organic Law of the Environment states: “The resolutions of the National Environmental Technical Secretariat must be well-founded and well-argued. They shall be binding for both individuals and for entities and public organizations.”*
 - ii. *“The party in question is informed that, in conformity with Articles 17, 18, and 19 of the Organic Law of the Environment, the environmental assessment has been completed for the following project.”*
 - iii. *“Any ordinary request to revoke this resolution must be filed with SETENA, and any appeal must be filed with the Ministry of the Environment and Energy, within three days, which period shall begin on the day after notification, in accordance with Articles 342 of the General Law of Public Administration and Article 87 of the Organic Law of the Environment.”*
 - iv. Although the 2004 EV for Villas La Canícula only mentions cadastral plan No. P-741685-01, it in fact covers five different properties, as reflected in SETENA’s file for this project (SETENA Administrative File No. 551-2002-SETENA). The 2004 EV clearly describes the intended project as consisting of *“the construction of 48 villas, in the style of condominiums on 29 hecatres of land with a construction site of 7.5 hectares,”* which is greater than the area of cadastral plan No. P-74185-01.
- b. On March 17, 2006, SETENA issued (by resolution no. 543-2006-SETENA), an Environmental Viability to La Canícula S.A. for the

¹⁶ This is apparent from the EV itself, which records a site of 29 hectares which includes the area where the Easements are located.

Concession.¹⁷ Although this EV related solely to the Concession project, there is evidence on SETENA's file for the Concession (Administrative File No. 551-2002-SETENA) that SETENA considered the Condominium and Easements Sections, as part of the Area of Direct Influence of the Project Area, which extends to between 500 meters and 1 kilometer from the Project Area, when assessing the environmental impact of the Concession project and granting the EV.

- c. On June 2, 2008, SETENA issued (by resolution no. 1597-2008-SETENA), an Environmental Viability to the Condominio Horizontal Residencial Las Olas (that is, the Condominium Section of the Las Olas Project).¹⁸ That EV records that:
 - i. *“On January 10, 2008, Mr. Eduardo Segnini Zamora, member of the Department of Institutional Management, and company officials of the developer conducted a field inspection on the project area.”*
 - ii. *“Article 19 of the Organic Law of the Environment states: ‘The resolutions of the National Environmental Technical Secretariat must be well-founded and well-argued. They shall be binding for both individuals and for entities and public organizations.’”*
 - iii. *“The initial environmental assessment document (called D1) meets the requirements for technical, legal and supplementary information.”*
 - iv. *“At the time of the visit to the project area, neither machinery nor personnel was found working on the construction phase of the project; its construction phase had not begun. The land where the project will be located is defined as flat/rolling, with slopes*

¹⁷ See Exhibit C-36.

¹⁸ See Exhibit C-52.

between 0 and 15%, mainly a DIA (direct influence area). The Project Area contains no permanent or intermittent streams and rivers, and vegetation cover consists of grass with scattered trees and small areas with vegetation cover in the Project Area. The area surrounding the project consists of properties with land use similar to that of the project area, and buildings and homes under construction. Movement of earth without it being carried outside the Project Area is planned.”

- v. *“The basic services of the project will include the following: [...] rainwater will be drained off through an existing stormwater collection system.”*
- vi. *“The applicant has submitted the Technical Studies specified in the Manual of Technical Instruments for the Environmental Impact Assessment Process [...]”*
- vii. *“The initial environmental assessment document (DI), the Environmental Management Plan and the Environmental Commitments Affidavit submitted to this Secretariat meet with the requirements of the Manual on Technical Instruments for the Environmental Impact Assessment Process (EIA Manual Part II)[...]”*
- viii. *“Based on the environmental characteristics of the Project Area and its interaction with the activities to be performed on the project, the frequency of submission of environmental supervision reports to SETENA is established as every two months during the construction phase[...] For the preparation of these reports, according to the format established by this Secretariat, the environmental supervisor will be responsible for conducting the required number of visits, depending on the project characteristics. Based on these reports and the monitoring program, SETENA may*

adjust the bond amount and issue mandatory compliance measures to control the environmental impact of the project, work or activity. The supervisor and the owner must assist SETENA in the inspections it carries out.”

- d. On August 18, 2010, SETENA issued an inspection report recording Mr Juan Diego Pacheco Polanco’s inspection of the Project Site as a result of an environmental complaint lodged against the Project.¹⁹ In that report, he noted that the outcome of his inspection would be communicated to the Project developer and the complainant, Steven Allen Bucelato, neighbor of Esterillos Oeste, by resolution. Amongst other points, Mr Pacheco observed that:
- i. *“In the Project area, there were only two streets of 60 metres in length and 6 metres in diameter – in the South-West corner of the project.”* This confirms that Mr Pacheco considered the Easements Section of the Project as part of his inspection and assessment.
 - ii. *“The Project area was covered with pasture and scattered trees.”* This confirms that Mr Pacheco agreed with what the Claimants held to be true, that the land was pasture²⁰ having been used as grazing land for cattle and not covered in forest.²¹
 - iii. *“No land movements were observed in the project area.”* This refutes Mr Bucelato’s complaint that wetlands had been impacted as a result of filling.
 - iv. *“There was no evidence of bodies of water on the project site.”* Here, Mr Pacheco further corroborates the Claimants’ assertion, that there were no wetlands on the Project Site.

¹⁹ See Exhibit C-78; and Annex A.

²⁰ See David Aven First Witness Statement para. 84, and Minor Arce First Witness Statement para. 12.

²¹ See Respondent’s Counter Memorial para. 6.

- e. On August 19, 2010, SETENA issued a response to the Defensoría's August 13, 2010 letter transmitting Mr Bucelato's environmental complaint against the Las Olas Project.²² In its response, SETENA recommended that Mr Bucelato's complaint be rejected on the bases that there was no evidence of earth works being carried out or of bodies of water on the Project Site, stating:
- i. *“That by means of Official Notice No. ACOPAC-OSRAP-00282-08, of April 2, 2008, Mr. Gerardo Chavarría Amador, Head of the Aguirre-Parrita Sub Regional Office, states that the project area is not inside any protected wild area, as is the case with wetlands, which are considered protected wilderness areas.”*
 - ii. *“That by means of technical report SINAC-67389RNVS-2008 of March 27, 2008, the biologist Gabriel Quesada Avendaño and the Engineer Ronald Vargas Brenes, Director of the SINAC, stated in the conclusions that the Las Olas project does not constitute a clear threat to the Esterillos biological corridor nor does it undermine the biodiversity of the Local National Wildlife Refuge in the least.”*
 - iii. *“The complaint lodged by Mr. Steve Allen Bucelato, a resident of Esterillos, **is rejected** because it is considered that there is no movement of earth in the project area, nor is there evidence of the presence of bodies of water (lakes) or wetlands inside the project area or in areas that link with it.” (emphasis added)*
- f. On September 1, 2010, SETENA resolved (by resolution no. 2086-2010-SETENA) to reject Mr Bucelato's environmental complaint against the

²² See Exhibit C-79.

Las Olas Project, considering, amongst other matters, Mr Pacheco's inspection report.²³ That resolution recorded that:

- i. Physical inspections of the Project Site had taken place on January 10, 2008 – prior to issue of the EV – and August 18, 2010 – following receipt of Mr Bucelato's allegations of environmental damage.
 - ii. *“The Secretariat has processed the environmental complaint against the project in question in accordance with [the applicable provisions Executive Decree 31849-MINAE].”*
 - iii. *“The complaint brought before the SETENA on August 11, 2010 by the Office of the Ombudsman through official letter No. 08949-2010-DHR against the Las Olas Residential Horizontal Condominium project, administrative file D1-1362-2007-SETENA, , as determined in accordance with the functions of this Secretariat [...]”* (emphasis added)
- g. On April 13, 2011, SETENA issued a temporary suspension of the June 2, 2008 EV for the Condominium Section of the Las Olas Project, on the basis of an official communication from SINAC dated November 30, 2010, requesting suspension of the EV in order to investigate allegations concerning an allegedly forged SINAC document (i.e., the shutdown was not made on the basis of alleged concerns over wetlands or forests).²⁴ Amongst other matters, SETENA's resolution stated that:
- i. *“Based on the principle of coordination among the public administration and on the basis of Article 28 of the Organic Environmental Law, the Municipality of Parrita is requested to*

²³ See Exhibit C-83.

²⁴ See Exhibit C-122.

give effect to this temporary suspension until such time as SETENA instructs the Municipality otherwise.” (emphasis added)

- h. On June 8, 2011, SETENA issued a resolution in respect of the EV for the Concession (SETENA file no. D1-0110-2005-SETENA), reflecting the modified layout of the proposed Concession Project.
 - i. On August 23, 2011,²⁵ SETENA issued a further resolution correcting a description of the Concession Project in its earlier, June 8, 2011 resolution.
 - j. On November 15, 2011,²⁶ SETENA issued resolution no. 2850-2011-SETENA, revoking its April 13, 2011 resolution suspending the EV for the Condominium Section of the Project, on the basis that there were no grounds to vitiate the previously issued EV for the Condominium Section:
 - i. *“IT IS RECOMMENDED THAT: Resolution No. 839-2011-SETENA, which was issued at 8:40 a.m. on April 13, 2011, be revoked in all respects in accordance with all the above and with the evidence requested to more efficiently resolve the Administrative File, since there are no grounds or defects justifying Annulment in the Environmental Viability Granted. This is based on Article 153 of the General Law of Public Administration.”* (emphasis added)
13. Against this backdrop, it is impossible to ignore the untenable nature of the Respondent’s position in these proceedings. The Respondent would have the Tribunal believe that, in spite of all of this due diligence, all of these site inspections, all of the studies and reports that SETENA requested and reviewed, the multiple opportunities SETENA had to demand more reports or studies and conduct further inspections, and the investigations it opened into

²⁵ See Exhibit C-138.

²⁶ See Exhibit C-144.

the spurious allegations of environmental harm and reliance on an Allegedly Forged Document, both of which were eventually dismissed, and in the face of SETENA's legally binding resolutions, the Claimants are guilty of duping SETENA into issuing multiple EVs permits on which they should not now be allowed to rely. This is a ridiculous proposition and one which presumably SETENA would not support, since none of its agents or employees was tendered as a witness by the Respondent in these proceedings.

14. The absence of a range of important witnesses (in particular the Respondent's failure to tender anyone from SETENA) was addressed in opening submissions at the Hearing:

14 | Another point to bear in mind is who you will
15 | not be hearing from, who you have not heard from
16 | already in the written Witness Statements, and who
17 | will not be appearing in this Hearing, because it
18 | tells a lot about the Respondent's position and its
19 | case.

20 | The absence of clearly relevant witnesses
21 | means that the Tribunal has been denied the chance to
22 | hear from witnesses with significant and relevant

1 evidence. Crucially, top of the list, we would say,
2 the Respondent has failed to bring any official from
3 SETENA, the Costa Rican autonomous government agency
4 with competence to issue environmental permits and for
5 development projects.

6 SETENA is the agency that the Tribunal should
7 have heard from. In this case, SETENA issued what's
8 called an Environmental Viability, EV--you'll see that
9 abbreviation come up regularly--for the condominium
10 section after a lengthy application process in which
11 the Claimants hired experts from Costa Rica, signaling
12 that the project could move forward.

13 So, SETENA said the project could move
14 forward. It investigated the environmental issues on
15 site and confirmed at the time everything was in
16 order. But you've not got anybody from SETENA before
17 you.

18 The Respondent has made various arguments
19 about the sufficiency of the documentation that was
20 filed by the Claimants in the--in its applications to
21 SETENA, but you're not going to hear from anybody from
22 SETENA to describe whether or not those arguments are

1 correct, whether those assertions are fair or not.

2 We also see nobody from SINAC, the agency with
3 competence to delimitate wetlands and protected areas
4 in Costa Rican law. No one from SINAC is present,
5 despite many officials being named in submissions.

6 There is a name that has cropped up, you'd
7 have seen with regularity in the pleadings, of a
8 private individual, Mr. Steven Bucelato. He is also
9 not here.

10 It is--as we will show, actually, when one
11 examines the documentation carefully, it is
12 Mr. Bucelato's complaints and his complaints alone
13 that underlie all of the attacks on Las Olas. He
14 failed at first. His complaints were roundly
15 rejected; but when he came back in 2011, his
16 complaints were adopted, but only his complaints, and
17 without any technical wherewithal.

18 You'll not see Mr. Bucelato before you,
19 despite the fact that he appeared as a witness in the
20 criminal proceedings in Costa Rica. So, he's--he's a
21 willing witness. He's also somebody that we know
22 those representing the Respondent are still in contact

1 with. And yet, he's not here. You're not able to
2 hear directly from him at all.

3 He is an interesting character. He's a
4 retired musician who lives in the area. He has no
5 qualifications with respect to environmental science
6 or anything close to it; and in the face of multiple
7 expert analyses confirming that there was nothing
8 wrong with the site, he has stubbornly argued that
9 there are wetlands and forests on the site.

10 When asked in the criminal trial to state the
11 basis for believing that the site contained a wetland,
12 Mr. Bucelato replied that, and I am now quoting, "He
13 would personally go in there and get my snakes, my--my
14 amphibians and my turtles. I collect those things."

15 Mr. Bucelato also made other wildly
16 unsupported claims regarding the ecosystem at the
17 site, stating that it included panthers and flamingos,
18 toucans and margays. These are bizarre assertions
19 that have absolutely no basis in fact. But it is his
20 complaint that has been the motor of the attacks
21 adopted by the Respondent on the Claimants. You will
22 also not see anybody from the agency called INTA,

1 including Dr. Cubero, who found in 2011 that the soils
2 at Las Olas did not have the qualities of wetland
3 soil. INTA is the agency with competence for--in
4 respect to soil science. They are the ones who have
5 the expertise and the wherewithal to analyze soil for
6 its qualities, and understand, amongst other things,
7 whether this is the soil one would see in a wetland.
8 They said that there was none; that ends debate; that
9 cannot be a wetland. But you'll not see anybody from
10 INTA, even though their own report confirmed that the
11 soil was not of the right quality.

12 You will also not hear from Christian
13 Bogantes, the MINAE officer who sought bribes from Mr.
14 Aven and from Mr. Damjanac, and who also, by the way,
15 did testify in the criminal proceedings as well.

16 Similarly, you will not hear from important
17 people from the Municipality, namely, Mr. Nelson Masis
18 Campos, who's president of the Municipal council; and
19 Mr. Marvin Mora Chinchilla, who is or was head of the
20 Maritime Terrestrial Zone.

15. The absence of key witnesses and agencies cannot be ignored. If the Respondent could truly demonstrate that SETENA was “*duped*” by the Claimants, as alleged, the best evidence it could have tendered is that of a SETENA employee with direct knowledge of that agency’s procedures and its actions *vis-à-vis* Las Olas. It did not and the Claimants invite the Tribunal to draw a negative inference in this regard. The high point of the Respondent’s “*duping*” case is the Protti Report, which – regrettably – the Tribunal was taken to time and time again during the Hearing. This is unfortunate given the lack of relevance the Protti Report to the issues in dispute in this arbitration – it is a report on water treatment facilities on site that has nothing to do with the presence or otherwise of wetlands at Las Olas, as will be further developed in Section VIII, D, 4 below.
16. This extends to other key witnesses and agencies in the story of Las Olas. None of INTA, MINAE, SINAC, Mr Bogantes, Mr Bucelato, the so-called “*neighbors*” of Las Olas, the members of the Municipal Council who took the decision on March 7, 2011 to suspend all permits for Las Olas, the IGN or the witnesses tendered by the Respondent at the criminal trial of Mr Aven and Mr Damjanac were made available to this Tribunal for questioning. Instead, the Respondent tendered low-ranking local government officials, who were not involved in the ultimate decision making process *vis-à-vis* Las Olas. The Respondent’s decision to keep witnesses who have relevant evidence away from this arbitration is a clever ploy, in that it enables the Respondent to focus the case on irrelevant *post-hoc* issues; but the Claimants believe the Tribunal can and will see through the Respondent’s tactical manipulation of the evidence.
17. The Claimants have already recited in detail, in both oral and written submissions, the background to the Respondent’s unlawful actions *vis-à-vis* the Claimants and their investment and will not repeat that information here. Instead, the Tribunal is directed to the Claimants’ Memorial and Reply Memorial and to Sections V to VII of this Post-Hearing Brief.

18. What has become clear to the Claimants only recently however, is the full extent of Mr Bucelato's meddling and the total failure of the Respondent's different agencies to investigate and conclude on the matter once and for all. Instead, all of the Respondent's various agency investigations (SETENA, SINAC, the TAA, the Environmental Prosecutor, the Defensoría and the Municipality), were allowed to continue for several years and resulted in different, overlapping injunctions and shut down notices, on the basis of one man, and his unsubstantiated, recycled and rejected complaints about alleged wetlands and an Allegedly Forged Document. A detailed summary charting the basis for each agency's investigations and their resulting actions can be found at Annex A. From this document, the true effect of Mr Bucelato's campaign can be observed. For this individual, a disgruntled neighbor with a vendetta against the Project and Mr Aven, to have this effect on the Respondent's agencies, who allowed investigations to spiral out of control without a shred of conclusive evidence and with no regard for the Claimants' due process rights, is outrageous and a clear breach of the Respondent's DR-CAFTA obligations *vis-à-vis* foreign investors.
19. As became clear in cross-examination at the Hearing, Ms Diaz and Ms Vargas's investigations – which are rooted in Mr Bucelato's baseless accusations – were deeply flawed, as can be clearly seen from the summary of their testimony in Section II, A below. This, together with the flawed investigation and prosecution of Mr Aven by Environmental Prosecutor Martínez, who was a decidedly unsatisfactory witness, and Mr Aven's subsequent unjustified referral to INTERPOL have had profound effects on the Claimants' investment and on Mr Aven's financial, emotional and physical well-being, as detailed in Section XI below.
20. The Respondent's own official, the Internal Auditor of the Municipality of Parrita from 2011 to 2013, Mr Briceño, (who, but for the Claimants, would not have been made available to the Tribunal in these proceedings) concluded at the time of the Las Olas shutdown and the ongoing criminal investigation that

the Municipality of Parrita's actions in ordering the suspension of all works at Las Olas based on little more than the threats and accusations of Mr Bucelato, were unlawful. It is not just the Claimants who are making these claims now. As the Tribunal heard from Mr Briceño at the Hearing, he concluded in 2012 that the Municipality had failed to follow basic procedures in numerous respects and therefore had acted unlawfully in shutting down Las Olas and in failing to give effect to the SETENA resolution reversing the suspension of the EV for the Condominium Section. This is explored in more detail in Section V, B, 2. a below and can be seen clearly from Annex A.

21. The Respondent has wilfully sought to mischaracterise the significance the Claimants place on Mr Briceño's testimony. Contrary to the Respondent's suggestions, the Claimants have never argued that Mr Briceño's findings of illegality amount to treaty violations. The salient and inescapable point is that Mr Briceño's illegality findings provide the Tribunal with independent, contemporaneous evidence of the Respondent's failure to follow its own laws and, therefore, the Respondent's breach of the Claimants' legitimate, investment-backed expectations under the DR-CAFTA.
22. The Respondent's attempt to portray this case as one of domestic law, which the Claimants have brought prematurely and wrongly before an international investment tribunal is equally flawed. In so arguing, the Respondent conflates issues of fact involving Costa Rican law principles, and issues of law pursuant to which the DR-CAFTA is engaged. For the avoidance of doubt, the Claimants do not allege that breaches of Costa Rican law, *per se*, constitute treaty violations. Rather, those domestic law violations are evidence of the Respondent's egregious breaches of the DR-CAFTA, which are set out in detail below.
23. One such example is the flawed and arbitrary prosecution of Mr Aven, which will be developed in Section V, D below. This arbitrary and discriminatory treatment of Mr Aven, itself in breach of domestic laws, amounts to a breach

by the Respondent of Article 10.5 of the DR-CAFTA. Even today, the Respondent's breaches are ongoing, with several injunctions in place more than six years after the event, something which the Respondent's own Costa Rican law expert concedes is unlawful, as will be developed in Section V, B below.

24. What is clear is that the Respondent's assertion that this is a domestic case is nothing more than a desperate attempt to escape liability at the international law level. The reality is that the Respondent had ample opportunities to deal with the Claimants' alleged illegalities at the domestic level but did not, as will be developed in Section VI, A below. That, together with the fact that some of the so-called illegalities were not raised by the Respondent until the Rejoinder, speaks volumes as to whether the Respondent really believes what it now argues. The Claimants will address each of the Respondent's alleged "*trail of illegalities*" below. For now, however, it is sufficient to note that all the Respondent's defenses are *post-hoc*.

II. SUMMARY OF THE EVIDENCE

A. Fact Witnesses

25. For the Tribunal's ease of reference, the Claimants set out below a brief summary of each witness's oral testimony at the Hearing.

Mr David Janney, Claimant investor and property developer

26. Mr Janney was a calm and forthright witness, who explained clearly to the Tribunal the value that he, as an experienced developer and someone who is familiar with Costa Rica and with the environmental and ecological characteristics of land for development, would have brought to the Las Olas Project. Mr Janney's insight was of particular use to the Tribunal in describing the state of the land when the Claimants bought it – as cow pasture, with gently rolling hills and fronting a beautiful beach – and explaining the value that

could be added once the relevant environmental and development permits had been obtained.

Mr Jeffrey Shioleno, Claimant investor and property sales and marketing executive

27. Mr Shioleno, another of the Claimants, explained his investment in the Las Olas project as “*sweat equity*” based upon his arrangement with Mr David Aven, with whom he has done business for 38 years. Mr Shioleno described the marketing efforts he contributed between 2005 and 2008 and again from 2010, when the project re-opened after the global financial crisis, including developing marketing concepts, putting together brochures and other marketing literature, running advertising in Florida based newspapers and fielding phone calls from prospective buyers.

Mr Mauricio Mussio, Las Olas Project architect of Mussio & Madrigal

28. Mr Mussio explained his significant experience of dealing with complex residential and commercial developments over many years and his role on the Board of Directors of INVU, the Costa Rican National Institute of Housing and Urban Planning.
29. He described the good faith his firm, as architects, employed in relation to Las Olas by reference to the environmentally sensitive areas that he identified as meriting attention, even though his firm was not in charge of the D1 Application.
30. He also commented on the irrelevance of the Protti Report’s findings to the question of wetlands on the Las Olas Project Site and went on to dismiss the Respondent’s preposterous suggestion that, in spite of the many SETENA and MINAE site inspections, Mussio Madrigal, as project architects and not technical or environmental experts, would somehow have deceived the authorities and covered up the existence of wetlands.

31. Mr Mussio also described the Las Olas Project Site as having multiple “*strong point[s]*,”²⁷ including the presence of public roads on all four sides, a soft topography and being within walking distance of a beautiful beach. For those reasons, Mr Mussio considered that “*this was not a project that at first glance would entail major technical challenges*” and “*this project ha[d] incredible potential.*”²⁸
32. Mr Mussio also confirmed that he was “*100% sure*” that the lack of proper construction and maintenance of the public roads is responsible for the intrusion of water onto the Claimants’ Project Site.²⁹ (The Respondent’s recent construction work on the highway adjacent to the Site would appear to support Mr Mussio’s view.)
33. Finally, in answer to a question from the Tribunal, Mr Mussio explained that prior to the filing of the D1 for the Condominium Section of Las Olas, members of his architectural firm travelled to the township of Parrita in order to discuss with them and seek their consent to the fragmentation plan, which involved developing the Las Olas Project in stages.³⁰

Mr Esteban Bermúdez, Environmental Regent for the Las Olas Condominium Section

34. Mr Bermúdez was a candid witness who explained the role of Environmental Regent to the Tribunal. He confirmed his role in monitoring the Las Olas Condominium Section and preparing and submitting bi-monthly reports to SETENA in accordance with the requirements of the EV.
35. He also explained the concept of SETENA’s shared responsibility in issuing EVs. He observed that the onus is on SETENA to reconcile the documents that have been submitted as part of the D1 Application (including the accompanying studies) with their field inspection, and request further studies

²⁷ English Transcript, 497:8.

²⁸ English Transcript, 498:12-13, 498:19.

²⁹ English Transcript, 476:1-9.

³⁰ English Transcript, 505: 10-15.

should they deem that necessary. He went on to note that from his 16 years' experience of applying for environmental permits, he is aware that when reviewing an application, SETENA will choose whether or not to perform a site inspection based on whether they consider it necessary to do so. The bottom line is that SETENA *"cannot approve a project without knowing what they are approving. They have to visit the site, get familiar with the property, inspect the areas that are going to be affected by the development."*³¹

36. Mr Bermúdez also confirmed that *"according to the regulations, this figure [i.e. the easements] doesn't need an Environmental Impact Assessment because of the size of the project itself."*³²
37. In response to a line of questioning regarding the requirement for an EV for the Easements, Mr Bermúdez explained that *"if the Municipality thought that the easements needed Environmental Viability, they should have asked for one. And they issued the permits without – as I understand, without asking for Environmental Viability."*³³
38. When asked about the Protti Report's findings of poor drainage, Mr Bermúdez noted that he *"did observe that there was some area with poor drainage and that the water was not – the runoff water was not being evacuated because maybe previous water from the main road that goes to Esterillos that kind of created like a – like a dam effect that didn't allow the runoff water that's coming from the land – from the hill, from the hillside – to run off this way through the – through the road. That's what I believe was creating the poor drainage area."*

³¹ English Transcript, 544:21-545:3.

³² English Transcript, 564:5-8.

³³ English Transcript, 577:20 -578:2.

Mr Minor Arce, Costa Rican forestry expert employed by the Claimants to assess the Las Olas Project Site for protected trees and forests

39. Mr Arce reiterated the views he expressed in his written testimony about the lack of methodology applied in the Respondent’s forestry findings at Las Olas. He again explained that the January 3, 2011 SINAC Report, which alleges that 400 trees had been felled at Las Olas, “*is not conclusive*” because “*it doesn’t say what kind of species they are.*”³⁴
40. Mr Arce also criticized Ms Vargas’s April 2009 report, which included a photograph captioned “*forest*” as unreliable “*because the structure [depicted in the photograph] does not indicate that there was a forest. To say there’s a forest, we really need to conduct an exhaustive analysis of a number of characteristics. And we have a doubt that this is a forest.*” He went on to explain that he “*cannot with any certainty say that this photograph – not even I, who have spent 32 years looking at forests, I cannot say that this is a forest that somebody burned. I cannot say that. Looking at the vegetation, I can practically say, looking at it, that it is not a forest.*”³⁵
41. Mr Arce’s thorough approach to forest classification was obvious throughout his testimony. Quite properly, he approached his analysis of the site rigorously, using the correct methodology. His approach to this issue was impeccable and beyond any criticism.

Mr Jovan Damjanac, Las Olas Project sales and marketing lead from January 2010

42. Mr Damjanac, a calm and measured witness, testified about how he became involved in the Las Olas Project, at Mr Aven’s behest, after the global financial crisis of 2008 and the marketing efforts he made throughout 2010. He explained that he believed one of the reasons for Las Olas’s success in 2010 was “*that the buyers who purchased from us or my marketing efforts and my*

³⁴ English Transcript, 636:1-2.

³⁵ English Transcript, 654:18 -655:2.

marketing interactions with them, the buyers believed in me and the project, and I wanted to take care of these people. I wanted to give them something good.”³⁶

43. He also confirmed that he was not involved in the permitting process for Las Olas and that, contrary to the assertion made in C-125 (a letter from the Municipality of Parrita to SETENA) he did not attend the Municipality offices as Project representative to obtain construction permits. Mr Damjanac also challenged the veracity of several documents claiming that he had refused service of several notices relating to Las Olas. He also confirmed that “*once we – when we received Notice of the Injunction, we stopped working on the site.[...] We never did any work after any kind of injunction was issued.[...] We never operated in contravention of an injunction.*”³⁷
44. Mr Damjanac went on to explain that, although the market for real estate in Costa Rica in 2010 was difficult, Las Olas “*were doing it better than most*”³⁸ for a number of reasons, including the great location on the beach, proximity to Jacó and only an hour and a half from San José and the airport. Mr Damjanac described Mr Aven’s business prowess. Unlike many other projects, Mr Damjanac explained that the lack of debt meant that the Las Olas Project survived the global financial crisis in 2008 because they “*weren’t, you know, shackled by mortgage payments.*”³⁹ That deliberate decision to keep the project debt-free turned out to be prescient, and in the aftermath of the 2008 crisis, gave Las Olas an enormous advantage over other development projects, which inevitably struggled with a debt burden to service.
45. Mr Damjanac also recalled the SETENA inspection on August 18, 2010, conducted by Juan Diego Pacheco Polanco, in response to Mr Bucelato’s initial allegations of environmental damage. Mr Damjanac described their encounter:

³⁶ English Transcript, 718:12-16.

³⁷ English Transcript, 698:7-9, 699:4-5, and 700:22-701:1.

³⁸ English Transcript, 711:8-9.

³⁹ English Transcript, 717:14.

18 | Mr. Polanco was a very nice gentleman, and
19 | he basically--you know, I remember his looking at me
20 | and shaking his head like, you know, it was--this is
21 | like a witch hunt, so to speak. He was not surprised
22 | that we had this problem, and he actually attributed

1 | it to a--maybe a disgruntled neighbor, because he
2 | asked me, you know, "Do you have anybody that's an
3 | enemy? Or, "Do you have a neighbor that's an enemy?"

4 | And he just seemed to be sort of--it was
5 | sort of an empathic kind of response from him. He
6 | understand--he understood the problems we were
7 | having, and he sort of conveyed the idea that he was
8 | sorry about it and just shook his head and said,
9 | "There's no wetlands here. You guys don't have any
10 | wetlands."

11 | But he understood why we could be facing a
12 | charge like this due to a disgruntled neighbor, and
13 | the fact that in Costa Rica, it is very easy for
14 | someone to make a claim that's unsubstantiated, but
15 | then it gets the ball rolling on a denuncia process
16 | that could leave you in a legal quagmire for the next
17 | 15 years.

40

Mr Nestor Morera, Mr Aven's criminal defense attorney

46. Mr Morera highlighted the numerous violations of due process that occurred in Costa Rica's prosecution of Mr Aven, including the lack of objectivity in the State's decision to prosecute on the basis of one neighbor's complaint, in spite of years of governmental approvals and permits, all confirming no wetlands. He also observed that, to this day, the Costa Rican authorities in charge of environmental and construction permits have not commenced any form of process to nullify duly granted permits and authorizations.
47. He also explained that in his expert opinion as an experienced criminal lawyer, Prosecutor Martínez's "*gross mistake*" was to pursue Mr Aven in spite of the

⁴⁰ English Transcript, 713:18-714:17.

existence of permits for the development of Las Olas, which meant that there was no evidence of Mr Aven's intent or "*dolo*" to commit a crime.⁴¹

48. Mr Morera also commented on the reasons why Mr Aven's criminal trial had not resumed, citing the Costa Rican government's failure to engage with his requests for security for Mr Aven after the shooting incident, to ensure his safety while in Costa Rica. Mr Morera recalled meeting with Mr Aven and Mr Shioleno after the shooting incident and observing how "*very scared*" they were.⁴²
49. When asked about the ten-day rule by the Tribunal, Mr Morera explained that it is a rule designed to protect the defendant but there exists contradictory authority suggesting that both the prosecution and the defense must be in agreement.⁴³ Mr Morera also explained that, contrary to the Respondent's assertion, the INTERPOL Red Notice process is not automatic and has to be instigated, most likely by someone within the Ministry of Justice.⁴⁴

Mr David Aven, Claimant investor and principal Las Olas Project representative

50. Mr Aven explained the devastating effect the Respondent's actions and the attempt on his life have had, causing him to suffer post-traumatic stress disorder and migraine headaches. He also explained the financial consequences the unlawful shut down of Las Olas has had on the buyers of lots and explained that he and the other Claimant investors intend to reimburse them their deposits if they succeed in these proceedings.
51. Mr Aven went on to explain that he always conducts himself in a truthful manner and that, so far as he was aware, and relying on hired professionals' advice, the D1 Application for the Condominium Section of Las Olas was accurate. Mr Aven also highlighted the absence of SETENA from these

⁴¹ English Transcript, 748:11-15.

⁴² English Transcript, 764:10.

⁴³ English Transcript, 778:1-15.

⁴⁴ English Transcript, 782:14-17.

proceedings in circumstances where he has been accused of “*duping*” that agency. He also noted that none of the Respondent’s allegations of unlawful conduct on the part of the Claimants “*was in the criminal trial record*” and that it “*is all newly created stuff.*”

52. The impact of these baseless and outrageous allegations was made clear: not only has Mr Aven, alongside the other Claimants, lost his own economic interest in the Las Olas development, his reputation has been badly damaged by the Respondent’s targeted attacks on him. As he said in testimony, there are individuals who sank their money into the project, but whose objective of buying a property on Costa Rica’s Pacific coast has been destroyed – these are people who have been caught in the crossfire of the Respondent’s attacks on the Project and who have claims to make against Mr Aven and the other Claimants. Mr Aven explained that he, on behalf of the Claimants collectively, feels a great responsibility to this group of people, despite the fact that the fault for the situation lies with the Respondent, not the Claimants. Furthermore, Mr Aven explained how the unjustified attempt by the Respondent to have him seized and extradited to Costa Rica by way of an INTERPOL Red Notice had devastating consequences for his other business interests, the issuance (even for a relatively short period) of a Red Notice being a matter of public record.
53. Mr Aven confirmed that, other than holding dual nationality on account of his ancestry, he has no connections with Italy and that his dominant residence and all of his personal and economic ties are, and have always been, with the United States.
54. In relation to ownership of the Concession, Mr Aven explained that the arrangement whereby a Costa Rican national owns 51% is compliant with Costa Rican law, allowing foreign nationals to own concession properties. He took legal advice on the matter and he followed that advice, knowing that it was an established practice in Costa Rica – a fact that Constitutional Court Judge Calzada described in an opinion admitted by Dr Jurado during his cross-

examination⁴⁵. While the Respondent now argues such ownership was illegal, there is no evidence that the Municipality ever took any of the legal steps available to it to annul the concession.

55. Mr Aven also clarified, in response to a question from the Tribunal, the basis on which the Easements were separated from the Condominium Section of the Project. He explained how the advice of his attorney was that Costa Rican law permitted properties abutting the public highway (which was the case of the Easement lots) to be subdivided and built on without an EV, provided the relevant construction permits were obtained. He complied with that advice, no more and no less.

Mr Jorge Antonio Briceño Vega, Internal Auditor of the Municipality of Parrita from 2011 to 2013

56. Mr Briceño's Witness Statement describes his serious and legitimate concerns as Municipal Auditor of Parrita that the Municipality's shutdown of the Las Olas Project was in violation of Costa Rican law. He elaborated on these concerns in his testimony at the Hearing while also withstanding the Respondent's unsuccessful attempts to undermine his credibility during cross-examination through a series of improper personal attacks. Mr Briceño's well-founded concerns were based on, among other things, the fact that the only grounds justifying Municipal Council Accord No. AC-03-2362-2011 was a single two-paragraph letter dated March 7, 2011, memorializing a meeting between Mr Bucelato and three other individuals. The substance of the letter was severely lacking, and raised immediate concerns that the Municipality had failed to establish an environmental violation through proper procedures, failed to determine the authenticity of photographs that it allegedly relied upon, and ignored highly relevant agency findings that did not support the shutdown of the Project. These concerns caused him to make recommendations to the Municipality to consider the annulment of Accord No. AC-03-2363-2011 and

⁴⁵ English Transcript, 1513: 5-15 and Claimants' Closing Submissions, slides 45 and 46.

to apply SETENA Resolution 2850-2011, neither of which was followed. Mr Briceño further expressed legitimate concerns that Ms Vargas was acting of her own accord rather than that of the Municipality in taking action against Las Olas – concerns Ms Vargas claims she only became aware of during the course of the arbitration.

57. Rather than take up these fundamental issues, each of which seriously calls into question the Municipality's decisions, the Respondent decided to engage in a series of personal attacks against Mr Briceño during cross-examination. Such attacks were a baseless distraction and a waste of time. Nonetheless, the Respondent continues to claim that Mr Briceño resigned from the Municipality because he received a pension while employed as an internal auditor. However, as Mr Briceño explained during cross-examination, at the time that he became internal auditor, there was no prohibition in Parrita stating that he could not receive a pension. Instead, the prohibition came into effect later in 2011, after which Mr Briceño received a pension for a period of time in error. The State was later reimbursed for that error. The Respondent further accused Mr Briceño of alleged "*involvement*" in politics when in his role as internal auditor. This allegation is particularly egregious, as Mr Briceño's political "*involvement*" largely consisted of a single request to oversee an election, despite not being a member of any political party. The Respondent has failed to draw any connection whatsoever between such political "*involvement*" and the substance of Mr Briceño's Witness Statement and testimony.
58. Finally, the Respondent's attempts to paint Mr Briceño as a low-ranking employee are desperate and misplaced. Mr Briceño's recommendations do in fact have legal effects under Costa Rican law, and as demonstrated by his testimony, those recommendations were based on serious and legitimate concerns regarding incompetence and maladministration within the Municipality. His concerns should not have been dismissed, and the Respondent cannot attempt to hide this mistake by demeaning Mr Briceño's position as a civil servant.

Mr Fernando Zumbado, ex-Minister of Housing for Costa Rica

59. Mr Zumbado, an eminent figure in Costa Rica, having previously served as a minister of State and as the country's ambassador to the United States, was not called by the Respondent for cross-examination. This is perhaps not so surprising a decision from the Respondent, given the corroboration he gives in testimony to the severe problems that exist in the functioning of the Costa Rican justice system. He gave evidence in his statement of the attacks launched on him by way of a baseless prosecution, used as a tool of attack by elements in the State apparatus who opposed him in the sphere of politics. That is not an original experience, it is sadly frequent that criminal prosecution is used as a weapon of politics, but his direct experiences and his authoritative position lend considerable credence to the Claimants' complaints in this arbitration. After all, if an incredibly well-connected native of Costa Rica can be victimised in this way, what chance does a group of foreigners have when a similar attack is launched on them?

Ms Hazel Diaz of La Defensoría de los Habitantes

60. Ms Diaz made a number of statements in her testimony that raise doubts as to whether proper procedures were followed in the receipt and admission of complaints from Mr Bucelato and the neighbors of Las Olas. First of all, Ms Diaz confirmed that, although she speaks of the admissibility process generally in her Witness Statements, she cannot speak to whether it was actually followed in regard to the Bucelato complaints of July 2010 or November 2010. The Claimants' pleadings have already raised serious questions on this precise issue that remain unanswered by any of the Respondent's witnesses, including Ms Diaz. She then referred to certain interactions that may have taken place between the Defensoría and Mr Bucelato after receipt of the July 2010 complaint, which are nowhere to be found within the record or the administrative file. Ms Diaz also attempted to downplay the significance of the eventual dismissal of Mr Bucelato's complaint in September 2010 on a basis of

lack of evidence, refusing to agree that this was a significant development in the case against Las Olas. Finally, Ms Diaz confirmed that, contrary to the statements in her First Witness Statement, the Defensoría’s role is not “*strictly limited to copying verbatim the content of the complaint*” once received, but rather the Defensoría does in fact exercise a degree of discretion in delegating certain questions to various agencies.

Mr Luis Martínez, Environmental Prosecutor

61. Mr Martínez’s testimony was severely damaging to the Respondent’s case and to his own credibility. His testimony further exposed the incompetent, arbitrary, and discriminatory nature of the criminal investigation and trial of Mr Aven. In particular, Mr Martínez admitted that he did not request the entire administrative file pertaining to Las Olas in his original Order of Seizure. As a result, he failed to consider numerous documents demonstrating Mr Aven’s compliance with Costa Rican environmental regulations.
62. Additionally, even the documents that Mr Martínez requested and reviewed revealed that Mr Aven exercised extreme caution in obtaining the requisite environmental permits, such that it would be impossible for a prosecutor to demonstrate that Mr Aven could have intended to commit a crime. This is further reinforced by the fact that even the environmental agencies themselves – including SINAC and INTA – disagreed as to whether a wetland even existed on the Project Site. Mr Martínez made the impossible leap to determine not only that wetlands did exist (despite a wealth of evidence to the contrary), but that Mr Aven also intended to cause harm to the alleged wetlands – this was an egregious overstepping of his prosecutorial discretion.
63. In addition to admitting that he ignored or otherwise failed to review relevant evidence pertaining to Mr Aven, Mr Martínez admitted that he had not seen certain highly relevant documents pertaining to the Municipality of Parrita’s drainage works carried out on the Project Site. The record reflects numerous examples of correspondence, photographs, and reports stating that the

Municipality carried out works in the area of the alleged wetland, which were intended to dry out the alleged wetland. Mr Martínez had no coherent explanation as to how or if this crucial fact was considered in his decision to charge Mr Aven with a crime.

64. These are only a few examples of Mr Martínez's arbitrary and discriminatory approach to Mr Aven's criminal case, which were borne out during his testimony at the Hearing. Other examples, which are discussed in further detail below, include improperly charging Mr Aven under a more serious law carrying a possible prison sentence based on alleged acts that took place prior to that law's effective date, and Mr Martínez's breach of his own mandatory prosecutorial guidelines by levying charges against Mr Aven despite a complete lack of evidence that the site contained wetlands soils – an essential element of a wetlands crime.

Ms Monica Vargas of the Municipality of Parrita

65. Ms Vargas's testimony raised serious questions about the reliability of certain reports issued by her in regard to the conditions of the Las Olas Site. First, in regard to the report issued after her inspection of April 27, 2009, Ms Vargas confirmed that she had little to no familiarity with the contents of the photographic logbook, and in fact was relying on the statements of the individuals who took the photographs (including Mr Bucelato) as to when those photographs were taken and whether they were even taken on the Las Olas Site. Ms Vargas then addressed additional site visits in January and May of 2010 that were, according to her, conducted on the basis of "new claims" that there were works being carried out on site. However, when asked, she could offer no explanation in her testimony as to the absence of any documents or any recordings of any discussions whatsoever regarding these alleged "new claims." Ms Vargas further conceded that statements made in her Report DeGA 091-2009, regarding the alleged existence of soil that can be completely or partially flooded, were actually based on nothing more than her own visual

observations from the boundary of the Project Site, rather than any photographs or other scientific evidence of any kind.

66. Ms Vargas then acknowledged during her testimony the serious and legitimate concerns of Mr Briceño as to whether Ms Vargas's actions in regard to the Las Olas Project were taken in her own name rather than that of the Municipality, and Mr Briceño's insistence that a certificate of good standing be obtained from the Municipality. She claimed that she had not become aware of those concerns until this arbitration, and could not confirm that a certificate had ever been obtained or that any measures were ever taken to alleviate Mr Briceño's concerns. Indeed, the Respondent offered no witnesses that could shed further light on those concerns in regard to the Municipality, other than Ms Vargas, who denied having any awareness until years after the fact.

B. Expert Witnesses

Mr Luis Ortiz

67. Mr Ortiz, as a Costa Rican public law expert, gave vital background to the Costa Rican public administrative state, and clarified some critical points of Costa Rican law at issue in this arbitration. Among other things, Mr Ortiz confirmed that the opinions of the Constitutional Chamber of Costa Rica are final and binding on all bodies of the public administration, as well as all judges, prosecutors, and public servants. This is important because, as Mr Ortiz explained, the Constitutional Chamber has ruled definitively that EVs have inherent effects on third parties, granting rights to their holders. Mr Ortiz also confirmed that construction permits are final acts, which also have inherent effects on third parties, granting rights to their holders. The rights granted by EVs and construction permits are central to this case, because the injunctions and shutdown notices issued by multiple agencies and the Municipality were illegally sustained *for years* – and a number of them continue to this day. As Mr Ortiz explained, this is in flagrant violation of Costa Rican law. Mr Ortiz explained that the Constitutional Chamber has held that a principal procedure

be initiated (to determine whether the EV or construction permits were an absolute and manifest nullity) within a reasonable time after an injunction is issued – interpreted by the Constitutional Chamber itself as *within fifteen days* of issuing the injunction.

68. The points on which Dr Jurado and Mr Ortiz agree are also significant to the Claimants’ case. In particular, the testimony of both legal experts revealed that they agree that Costa Rican law requires a principal proceeding to be initiated within a reasonable time after an injunction is issued, and that the principal proceeding must be concluded within 30 days (for actions under the TAA) or two months (under the General Law of Public Administration (“**LGAP**”)), subject to extension only in exceptional circumstances. Mr Ortiz’s testimony also provided further clarity as to the issue of ownership of the Las Olas Project, confirming that foreign hotel chains and other foreign nationals commonly avail themselves of trust agreements in order to comply with the 51% Rule. Finally, Mr Ortiz confirmed that the Regulation for the National Control of Fragmentation and Urbanization issued by the INVU authorizes the fragmentation of land through the use of easements, and therefore authorizes the Claimants’ practices in regard to Las Olas.⁴⁶

⁴⁶ The Tribunal has asked the Parties to answer the following inquiry in its Question #11: “*Can an injunction issued by one authority (administrative or judicial) be overruled by findings of another?*” The answer is that it depends on the specific context of the administrative or judicial injunctions in question.

As a general matter, an administrative authority cannot overrule an injunction issued by the competent authority. Dr Jurado explained in his First Witness Statement (paragraph 101) that under the LGAP, “*administrative decisions are unilateral statements of will directed at causing a legal effect, carried out in the exercise administrative duties.*” Flowing from this principle and from Articles 59, 128, and 129 of the LGAP, if an administrative authority issues an injunction in an area of its competence, other entities of the public administration cannot overrule it. (See Exhibit R-198).

The issue is slightly different in the case of judicial injunctions issued by the Costa Rican Administrative-Litigation Court, a judicial body with competence to nullify administrative actions (as explained by Dr Jurado in his First Witness Statement, paragraph 135, see also the Administrative Litigation Procedure Code, Exhibit R-248). A judicial injunction issued by the Costa Rican Administrative-Litigation Court would override an administrative injunction, even an injunction by the competent administrative authority. That administrative authority could not override the Costa Rican Administrative-Litigation Court with a subsequent injunction. This is different from the criminal court injunction issued against Las Olas, as the criminal court does not have competence over the annulment of EVs and construction permits – as Dr Jurado confirmed at the Hearing, EVs and construction permits are binding on all public employees, including criminal judges and prosecutors. English Transcript, 1467:1-1468:9.

Attorney General Julio Jurado

69. As the Tribunal is aware, Dr Jurado cannot be considered to be a truly independent expert given his role as Attorney General of the Republic of Costa Rica. He is uniquely tied to the State in this role, and the Tribunal should consider this fact when assessing his evidence. The Claimants make this point without impugning Dr Jurado's integrity, but it is a fact that he is not, and cannot be, independent in this proceeding. He has duties and loyalties to the Costa Rican State that put him in a different category to all the other expert witnesses, including Mr Ortiz. His overall perspective must be heavily influenced by those duties and loyalties, and his testimony should be viewed through that prism,
70. During his testimony, Dr Jurado made a number of important concessions that are damaging to the Respondent's legal case. For example, he admitted that his interpretation of environmental viability permits as "*preparatory acts*" that do not result in a granting of rights or inherent effects is contrary to the opinions of the Constitutional Chamber. Additionally, Dr Jurado conceded that an interim relief injunction – even pertaining to environmental matters – must be limited in time.
71. He further confirmed that a principal procedure must be commenced within a reasonable time after imposition of an injunction, and that a precautionary measure cannot be used *in lieu* of a principal procedure. Dr Jurado's testimony also further called into question the Respondent's hypothetical challenge to the Concession under the 51% Rule. As the Claimants have stated, the alleged breach of the 51% Rule took place nearly fifteen years ago, and the general statute of limitations that applies to actions under the LGAP is four years. Dr Jurado was not aware of the statute of limitations that applies to an action to cancel a concession under the ZMT law, but he admitted that there should in fact be one.

Accordingly, the answer to the Tribunal's question does not speak immediately about the legality of the injunctions in the first instance, which is a critical inquiry in this case.

Judge Rosaura Chinchilla Barboza

72. Judge Chinchilla's testimony revealed that she had based the legal analysis in her expert report on a number of factual assumptions that were entirely incorrect. Specifically, she claimed in her expert report that she had reviewed "*several false documents*" that were submitted by the Claimants in order to obtain permits, despite the fact that it was never proven that the Claimants submitted any false documents, much less "*several false documents.*" In fact, Mr Martínez withdrew charges based on forgery, accepting in the end that there was no evidence to maintain such a charge against Mr Aven.
73. Judge Chinchilla conceded that it was a mistake to cite multiple false documents, as there was only one allegedly forged document at issue. Judge Chinchilla also attempted to base factual conclusions, as a legal expert, on an incomplete review of the record, as she stated that she only reviewed the memorials submitted by the Respondent in drafting her report. Her attempts to make factual conclusions should therefore be viewed by the Tribunal with a high degree of skepticism.
74. Her legal assertions were similarly dubious, in particular her contradictory positions that the parties to a criminal trial are entitled to agree to settle the case through reconciliation, but that agreeing to extend the postponement of a trial more than ten business days would somehow violate principles of democratic participation. These positions cannot be reconciled.

Dr Ricardo Calvo and Dr Robert Langstroth (Environmental Resources Management ("ERM"))

75. In their testimony, Drs Calvo and Langstroth of ERM continued to apply their decades of biodiversity experience to their analysis of the Las Olas Site and to the expert reports of Mr Kevin Erwin. In doing so, they identified numerous deficiencies in Mr Erwin's analysis, which was a product of a poor methodology resulting in unreliable results. Specifically, as Dr Calvo testified,

Mr Erwin failed to use a systematic approach in attempting to determine the existence of alleged wetlands. Such an approach should have consisted of a quantitative analysis to determine whether there is a preponderance of wetland plants, to obtain information regarding hydrology, and to determine whether there is a presence of hydric soils. That approach should have expanded outward until the upland wetland boundary could be determined. As Dr Calvo stated, there is nothing in Mr Erwin's reports describing any type of similar systematic approach to determining the characteristics and/or the boundaries of the alleged wetlands.

76. Dr Langstroth further elaborated upon the findings as stated in Appendix A of the Second KECE Report. As described by Dr Langstroth, the evidence of wetland species presented in the Second KECE Report is far from conclusive, and in fact does not present any sort of a preponderance or dominance of documented, obligate wetland species. In fact, in some cases the range of strict wetland species was from 0 to 14% coverage in certain delineated areas, and the percentage of upland species is often higher than the percentage of wetland species in these areas. Of course, the KECE Reports are highly dubious on their face given that they are *post-hoc* assessments made years after the fact, but the methodology and data presented in the reports as described in Dr Calvo and Langstroth's testimony constitute further reasons to cast serious doubt over the conclusions of Mr Erwin.

Mr Kevin Erwin of KECE

77. Mr Erwin's reports and his testimony amount to a *post-hoc* attempt to draw conclusions as to the conditions of the Las Olas site from 2007 to 2011, based on observations that took place in 2016. Indeed, Mr Erwin cannot credibly state that, because a wetland or a forest allegedly exists on the Property today (they do not), the same condition must have existed nearly a decade ago. This fundamental flaw in his analysis severely diminishes the credibility of his findings. Moreover, even if the *post-hoc* and inherently unreliable nature of his

reports is completely ignored, his analysis of the current site conditions is nevertheless deeply flawed, as revealed during his testimony at the Hearing.

78. During cross-examination, Mr Erwin conceded Dr Langstroth's point as stated above, that only about 13% of the species that he observed on the Las Olas site were in fact purely wetlands species. It follows from this concession that approximately 87% of the species that Mr Erwin observed in alleged Wetlands 1 to 8 are not necessarily indicative of wetlands at all. This is a clear indicator that Mr Erwin's conclusions are not supported by his own data. In addition, his testimony further revealed the imprecise nature of his methodology. Specifically, Mr Erwin relied on an ambiguous "*wetland/upland*" classification, rather than subdividing the classifications more precisely between "*facultative wet*" and "*facultative dry*." Mr Erwin also made important concessions pertaining to the alleged forests on the Las Olas Project Site, and admitted that his forestry findings were not based on, and in fact had nothing to do with, the Costa Rican definition of a forest.
79. It should also be noted that during the time of Mr Erwin's second site visit to Las Olas, the Municipality was conducting works to unblock a drainage culvert under the public road bordering the southeast section of the Las Olas Site. The works were clearly visible to Mr Erwin and he admitted that he witnessed the works. When asked why he neglected to make any mention of the works in the Second KECE Report, he acknowledged that he "*could have*," but he did not, on the basis that it is common for municipalities to conduct this type of maintenance. Whether or not that is the case, the current activities on the Site, and how those activities may have affected the Site, are highly relevant to an analysis of the conditions of the Site before the activities took place.

Dr Ian Baillie

80. Dr Baillie's authoritative testimony focused on the application of his soils expertise to the characteristics of the Las Olas Site. His academic pedigree is superior to that of the Green Roots team, something that was all too clear

during their oral testimonies. Dr Baillie began with a useful explanation of the distinctions between hydric soils and hydromorphic soils, then clarified that, based on his review, there was no evidence of current hydric soils on the Las Olas site. Dr Baillie then further explained the crucial role of INTA in regard to the classification of soils in Costa Rica. As explained in his testimony, INTA is the only Costa Rican government agency that has the requisite expertise to identify and apply the Costa Rican Land Use Classification Methodology, and in doing so, unequivocally identify hydric soils. It is therefore critical for SINAC to consult with INTA in order to fully assess whether a property contains wetlands. As explained in further detail below, it is clear that the Respondent failed to give proper weight to INTA's findings in the case of the Claimants.

Drs Perret and Singh of Green Roots

81. The testimony of Drs Perret and Singh of Green Roots revealed that they made erroneous presumptions regarding the application of the USDA Keys to Soil Taxonomy's definition of "*fluvaquentic endoaquept*" soils, which led to a mischaracterization of the soils on the Project Site. Critically, the USDA definition provides that the soil can only have a total thickness of less than 50 centimeters of human transported material. However, Drs Perret and Singh disregarded the top one-meter layer of soil before taking into account the 50 centimeters referenced in the USDA definition, on the basis that the top one-meter layer is a "*transported material*." This is despite the fact that Green Roots agrees that fluvaquentic endoaquept soils are soils that have been deposited by rivers, with sediment depositing at different rates with different materials. This was a fundamental methodological error for which they could provide no satisfactory explanation.
82. Nonetheless, Drs Perret and Singh insisted upon making the unwarranted assumption not only that the site contained one meter of "*fill*," but also that the one meter was caused by a disturbance by the Claimants, that being the only

way they could hope to maintain a finding of hydric soils being present at the required depth. Dr Baillie's testimony further confirmed that Drs Perret and Singh have no basis for making this overbroad "*fill*" assumption, as Dr Baillie explained by reference to his Observation 14 across the road from the Las Olas site, that natural soil conditions do include horizons of reddish matrix material. As a result, it is inaccurate and an oversimplification to assume that all reddish material must be treated as "*fill*", the available evidence pointing in a different direction.

Ms Priscilla Vargas

83. Ms Vargas cannot be considered a truly independent expert, as even a cursory review of her report reveals that it is merely a continuation of the Respondent's pleadings and arguments, with practically no contemporaneous evidence. During her testimony, she admitted that she did not even state the scope of her instructions from Mr Erwin, and that those instructions are not in evidence. Additionally, Ms Vargas conceded in cross-examination that she failed to contact SETENA to discuss the EVs issued to Las Olas, and she in fact has no knowledge as to how SETENA conducted its technical review process in order to reach its conclusions. Moreover, Ms Vargas's credibility was severely damaged by her blatant refusal to admit that she based part of her analysis on an entirely irrelevant document, as the TecnoControl Report on SETENA's file, which she reviewed, did not pertain to the Las Olas Project at all.
84. Even worse was Ms Vargas's troubling attempt to suggest to the Tribunal that this document, which on its face could be seen to relate to a different project, did in fact relate to Las Olas. This is a document she had reviewed, supposedly with care and in detail, but which she clearly had not realized had nothing to do with Las Olas. When her error was made clear, no matter how embarrassing it would have been to do so, she should have acknowledged and accepted that she had inadvertently based her analysis on the wrong document. Her failure to do so destroyed any credibility she may have had.

III. THE CORRECT INTERPRETATION OF DR-CAFTA ARTICLE 10.5 AND ANNEX 10-B

85. The Claimants commenced this arbitration both on the basis of sub-paragraph (1)(a)(i)(A) of DR-CAFTA Article 10.16, each on his or her own behalf, and also on behalf of the Enterprises each respectively and/or collectively owned and/or controlled, under sub-paragraph 1(b)(i)(A) of DR-CAFTA Article 10.16. The rights to submit arbitral claims, represented in these two sub-paragraphs, exclusively concern allegations that a Party has breached an obligation contained in Section A of Chapter 10. DR-CAFTA Article 10.22(1) further prescribes that the governing law for claims filed under these two provisions is limited to the DR-CAFTA itself and “*applicable rules of international law.*”
86. Given that the claims of investors who pursue arbitration under sub-paragraphs (1)(a)(i)(A) and 1(b)(i)(A) of Article 10.16 are *a fortiori* limited to substantive obligations found in Section A of Chapter 10, the Article 10.22(1) reference to “*governing law*” provides no legitimate avenue for smuggling any additional substantive obligations into the dispute – whether such obligations would support additional claims or potential defences. Thus, in so far as substantive norms are concerned, the Article 10.22(1) reference to “*the Agreement*” must be construed as a reference to Section A of Chapter 10.
85. Of course, the “*governing law*” of a dispute includes more than substantive obligations. It also includes interpretative norms and procedural norms. For example, the Article 10.22(1) reference to “*applicable rules of international law*” includes both the customary rules of treaty interpretation and procedural norms derived from the general international law principle of good faith, such as various forms of estoppel. And the Article 10.22(1) reference to “*the Agreement*” refers both to governing law as procedure (*e.g.*, the contents of Section B and relevant annexes) and governing law as interpretation (*e.g.*, where a procedural fairness obligation contained in one DR-CAFTA chapter

informs an interpreter's construction of the procedural fairness obligations contained in another DR-CAFTA chapter).

86. The Claimants additionally note that the Parties are in agreement that the customary international law rules of treaty interpretation constitute “*applicable rules of international law*” under DR-CAFTA Article 10.22(1), and that such rules are reflected in the Vienna Convention on the Law of Treaties (the “VCLT”).⁴⁷ Sub-paragraph (3)(c) of VCLT Article 31 provides: “*any relevant rules of international law applicable in the relations between the parties*” must be taken into account, together with the context, in interpreting treaty texts. Sub-paragraph (3)(c) of VCLT Article 31 thus provides an additional ground for treaty interpreters, such as the Tribunal, to take into account other provisions of the DR-CAFTA, general principles of law, and custom, in construing the proper meaning of DR-CAFTA provisions, such as Articles 10.5 and 10.7, in context.
87. Because the only relevant substantive norms in the instant dispute are found in Section A (as first articulated by the Claimants in the Notice of Arbitration, and subsequently explicated through their two memorials and hearing submissions), the Respondent has no legal basis for asserting – as a defense to the charge that it has failed to comply with Section A obligations such as Articles 10.5 or 10.7 – that its conduct was either required or authorized under some other international norm.⁴⁸ The logic of how such claiming provisions work in practice was borne out in the three “*corn sweetener*” cases, which were successfully pursued against Mexico under NAFTA Chapter 11. In each case, it was never in doubt that Mexico possessed a right of reprisal, as a matter of international law, which it was entitled to exercise against the United States, but it was similarly beyond doubt that if the measures Mexico adopted to exercise such retaliatory rights breached its NAFTA Chapter 11 obligations in

⁴⁷ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331

⁴⁸ It is, of course, trite law that compliance with any municipal law would not constitute a valid defence to a DR-CAFTA Section A claim either.

respect of an individual investor, it would be required to provide compensation to affected investors pursuant to those obligations as well.⁴⁹

88. Notwithstanding the many opportunities afforded to the Respondent over the course of these proceedings, it has failed to articulate any rational legal basis for insisting that the Claimants' Section A claims can – much less must – be overridden by various of Costa Rica's alleged municipal and international law obligations. Instead, the Respondent claims to exercise an implicit (*i.e.*, unexplained) entitlement to escape the consequences of its non-compliance with Articles 10.5 or 10.7, which can apparently be enjoyed merely by citing a collection of potentially related municipal and international norms.⁵⁰ And because the Respondent's non-existent entitlement also appears to operate as though by fiat, neither must it apparently go to the trouble of actually establishing how any cited environmental norm would actually require Costa Rica to breach its obligations under Articles 10.5 or 10.7.
89. In this regard Costa Rica appears utterly oblivious to its international law obligation to take all available steps to comply with all applicable norms. The Respondent's argumentation thus omits any recognition of how, under the customary international law rules of interpretation, one must strive to construe two potentially conflicting obligations in a manner that reconciles them, thereby permitting compliance with both.⁵¹
90. Indeed, the Respondent has gone so far as to maintain that – before the Claimants' case can even be heard on the merits – the Tribunal must carefully

⁴⁹ *Corn Products International Incorporated v Mexico*, Decision on Responsibility, ICSID Case No. ARB(AF)/04/1, IIC 373 (2008), 15 January 2008, at ¶¶ 146-161; *Cargill, Inc v Mexico*, Award, ICSID Case No ARB(AF)/05/2, IIC 479 (2009), August 13, 2009, despatched 18th September 2009, at ¶¶ 420-430. But see: *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Incorporated v Mexico*, Award, ICSID Case No. ARB(AF)/04/5, IIC 329 (2007), September 26, 2007, at ¶¶ 120-133, which would have permitted the respondent to invoke customary international law of countermeasures as a defence, but found that the defence was not sustained.

⁵⁰ See e.g. Respondent's Counter Memorial section V, A.

⁵¹ See International Law Commission, Report on the Fragmentation of International Law, UN Doc. A/CN.4/L.682 at 25, para. 37ff. The presumption against conflict has recently been recast as the principle of harmonization by The International Law Commission's Study Group on the Fragmentation of International Law. It is founded on the *pacta sunt servanda* rule, which is itself a manifestation of the general international law principle of good faith. It requires that whenever possible, all applicable treaty provisions must be construed so as to permit compatible, practical results.

scrutinise the pre- and post-establishment conduct of their investment Enterprises by means of a thoroughgoing, *post-hoc*, municipal compliance review before the admission of any claim can be considered. Moreover, in addition to this inside-out theory of admissibility, the Respondent claims that the case should be dismissed, in its entirety, because the Claimants allegedly failed to exhaust allegedly applicable “*local remedies*” before submitting their claims to DR-CAFTA arbitration.

91. Moreover, apart from cursory references to VCLT Article 31, the Respondent has never even outlined exactly how its proffered construction for any of the relevant Chapter 10 provisions might be reconciled with the approach prescribed under customary international law. It was also painfully selective when attempting to establish an alternative object and purpose for interpreting Chapter 10 provisions, based on a claimed environmental policy imperative. To do so, the Respondent was careful to cite two preambular phrases concerning environmental protection, while neglecting to note an earlier preambular passage committing the Parties to “[e]nsure a predictable commercial framework for business planning and investment.”⁵² Nor did it address the obviously more germane language of Article 1.2, which actually sets out a catalogue of the Agreement’s objectives (and which mirror those contained in the comparable NAFTA provision):

1. *The objectives of this Agreement, **as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency,** are to:*
 - (a) *encourage expansion and diversification of trade between the Parties;*
 - (b) *eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;*

⁵² See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S.

- (c) *promote conditions of fair competition in the free trade area;*
- (d) *substantially increase investment opportunities in the territories of the Parties;*
- (e) *provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;*
- (f) *create effective procedures for the implementation and application of this Agreement, for its joint administration, and for the resolution of disputes;* and
- (g) *establish a framework for further bilateral, regional, and multilateral cooperation to expand and enhance the benefits of this Agreement. (Emphasis added)*

92. At root, the Respondent's approach to interpretation was never informed by a logic capable of being discerned from the applicable rules of international law (*i.e.*, the customary international rules of interpretation), nor was it reflective of the plain meaning, context or object and purpose of Chapter 10 provisions. The Respondent instead proffered an *ad hoc* and idiosyncratic construction of the relevant DR-CAFTA provisions justified on little more than fiat declaration.

A. Relevance of Municipal Law

93. Municipal law is a crucial component of the factual matrix for any case. It informs how a tribunal construes the character of the protected investments, the nationality of claimants, and their legitimate expectations to treatment consistent with a Party's obligations under Chapter 10. What municipal law can never do, at least in so far as a DR-CAFTA Chapter 10 claim is concerned – is serve as governing law for a dispute brought under sub-paragraphs (1)(a)(i)(A) and 1(b)(i)(A) of Article 10.16. This is because the prospect of municipal law as governing law is categorically excluded under paragraph (1) of Article 10.22, as already noted above.

94. In fact, a separate paragraph in the very same provision does contemplate circumstances in which “*the law of the respondent, including its rules on the*

conflict of laws,” may serve as governing law. However, such circumstances are expressly limited to claims involving an investment agreement or authorisation under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C). As demonstrated in the logic of the *expressio unius est exclusio alterius* rule of interpretation, the fact that the drafters specifically stipulated circumstances in which municipal law could be regarded as governing law constitutes compelling evidence of their intent that it not be permitted to serve as governing law under differently delineated circumstances.

95. As stipulated in note 7 of Article 10.22, “[t]he ‘law of the respondent,’ means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.” It is thus manifest that the laws of Costa Rica cannot possibly serve as applicable/governing law for the Tribunal, because it is not a Costa Rican court or tribunal. Moreover, there are no circumstances in which “the same case” as the instant matter – *i.e.*, determining whether Costa Rica complied with DR-CAFTA Articles 10.5 and 10.7 – because it is not of a kind that a Costa Rican court or tribunal could ever entertain. Note 7 thus provides further context for the common sense proposition that the municipal laws of Costa Rica cannot serve as substantive norms – and could never serve as overriding norms – in a Section A arbitration.

B. Relevance of Previous Arbitral Consideration of Identical Provisions Found in Other Treaties Based on the U.S. Model

96. The Claimants have already provided a complete answer to the Respondent’s attempts to disparage the utility of findings rendered by arbitral tribunals in respect of other U.S. investment treaties containing provisions identical in wording to DR-CAFTA provisions such as Article 10.11.⁵³ From the beginning, the Claimants have taken the position that there are no rules of

⁵³ See, e.g., Reply Memorial, paras. 54- 56, (citing, inter alia, CLA-43, *S.D. Myers v. Canada*, comparing identical wording of NAFTA Article 1112 to DR-CAFTA Article 10.2(1)).

binding *stare decisis* in this forum, but to discount well-reasoned decisions of other tribunals without a demonstrably sound rationale is simply irrational.⁵⁴

97. The Claimants provided unrefuted evidence demonstrating how the U.S. Model BIT served as the foundation for negotiations that resulted in DR-CAFTA Chapter 10.⁵⁵ The Claimants have also cited secondary sources, authored by former U.S. State Department officials, demonstrating what U.S. officials believed to be the proper construction of the provisions at issue in this case. Such views reflect the long-term objectives of the U.S. treaty programme, first adopted in the early 1980s.⁵⁶ Thus, the Claimants have demonstrated how arbitral practice can allow itself to be guided by well-reasoned awards involving interpretations of identical treaty provisions, particularly given their shared negotiating lineage.⁵⁷ The Respondent has rejected these references out of hand, insisting, without evidence, upon the allegedly *sui generis* character of the DR-CAFTA.⁵⁸
98. Unable to reconcile its preferred construction of provisions such as Articles 10.2, 10.5, 10.7, or 10.11 with the applicable rules of interpretation, the Respondent instead adopted the following mantra: environmental protection was such an overriding priority for Costa Rica and other DR-CAFTA Parties during negotiations that, today, Articles 10.5 and 10.7 must be construed more narrowly than identical provisions in other treaties based upon the U.S. Model BIT. The Respondent provided no evidence in support of the factual supposition underlying this theory. Nor did it explain why, if the Parties had really been as overwhelmed by environmental zeal as it now claims, no apparent attempt was made during the negotiations to alter the text of Articles 10.5 or 10.7, much less Article 10.11? Surely if a green policy consensus as ground-breaking as alleged had actually materialized – so much so that it

⁵⁴ See, e.g., Reply Memorial, para. 47 .

⁵⁵ See, e.g., Reply Memorial, paras. 42, 86, 448; see CLA-57 (US Model BIT); CLA-150, Kenneth J. Vandavelde, U.S. International Investment Agreements (Oxford: Oxford University Press, 2009) at 483.

⁵⁶ See CLA-147, Lee M. Caplan & Jeremy K. Sharpe, United States, in: Chester Brown, ed., Commentaries on Selected Model Investment Treaties (Oxford: Oxford University Press, 2013) 775 at 791-792.

⁵⁷ See, e.g., Reply Memorial, paras. 47, 89-92.

⁵⁸ See Rejoinder, paras. 11, 46-47 & 51-52.

portended the permanent subjugation of investment protection standards to the mere prospect that governmental discretion could be exercised for an environmental purpose – the Parties would have insisted upon different language than past treaties in order to memorialize it.

99. For their part, the Claimants argued that the task of identifying the plain meaning of the text of Article 10.11, and ascertaining its proper context, could only be aided by consulting the reasoned decisions of other tribunals called upon to interpret the same provision in past disputes, as well as arbitral and scholarly interpretations of identically-worded provisions found in predecessor instruments of the Agreement.⁵⁹ In contrast, the Respondent failed to admit how it had oftentimes embraced the very proposition it spurned in this case: *viz.* that NAFTA provisions, and previous arbitral constructions of such provisions, can provide useful guidance to DR-CAFTA tribunals seized with similar provisions.⁶⁰
100. The Respondent did not take advantage of the many opportunities it possessed to provide evidence that might have substantiated its revolutionary environmental arguments, much less an explanation as to why the text of the Agreement is inconsistent with them. The credibility of the Respondent's position – that, although NAFTA Article 1114 and DR-CAFTA Article 10.11 share the same text and negotiating lineage, they must not be similarly construed – is belied by the very negotiating history compiled contemporaneously by Costa Rican officials.⁶¹

C. Relevance of Other DR-CAFTA Provisions

101. Both parties sought to rely on provisions located elsewhere in the DR-CAFTA but that is where the similarity ended. Again, only the Claimants identified a cognizable interpretative rationale for their construction of relevant

⁵⁹ See Claimant's Opening Presentation Slides on Law, slide 8.

⁶⁰ See e.g. Respondent's Rejoinder Memorial para. 1041.

⁶¹ See Claimant's Opening PowerPoint Submission on Law, pages 5-8, dated December 6, 2016. The Respondent has referred to, and relied upon, these same materials, which were compiled by Costa Rican officials present during DR-CAFTA negotiating rounds, as records of negotiations. See: Respondent's Post Hearing Submission, *Spence et al v. Costa Rica*, ICSID Case No. UNCT/13/2, May 26, 2015, at 19, notes 103-104.

provisions,⁶² demonstrating how procedural fairness obligations undertaken by Costa Rica towards its DR-CAFTA partners in Chapters 17 and 18 provided useful context for the Tribunal's construction of Articles 10.5 and 10.7. And, of course, the Claimants were careful not to argue that substantive obligations located elsewhere in the Agreement were capable of sustaining either a claim or defense in an arbitration governed under Article 10.22.

102. For its part, the Respondent abandoned such caution and argued for the Tribunal to permit its vast and unwieldy constructions of Articles 17.1 and 17.2, in its desperate attempt to find a defense to the claims brought under Articles 10.5 and 10.7. As the Claimants have already demonstrated, the Respondent has persisted in making such arguments notwithstanding the fact that the Claimants have never impugned any of the environmental measures (*e.g.*, substantive laws, regulations, standards) protected by these Articles 17.1 and 17.2. To be sure, the Claimants have not made any allegations in relation to the Respondent's right or responsibility to adopt environmental measures in any rule-making capacity. It thus made no sense for the Respondent to argue that their claims could be defeated on the basis of its mere assertion of an Article 17.1 right to adopt environmental measures at a level of its choosing, or an Article 17.2 responsibility to enforce such measures in good faith.
103. The Respondent's stunning contention that Chapter 17 provisions must be construed so as to negate the protection promised by DR-CAFTA Parties under Articles 10.5 or 10.7 provided the most grievous example of its interpretative obstinacy. The Respondent's argument could be distilled into four essential components: (i) recall how Chapter 17 generally safeguards the right to regulate in environmental matters; (ii) recall how Article 10.2 provides that, in the event of an inconsistency between Chapter 10 and other chapters, the latter "*shall prevail to the extent of the inconsistency*;" (iii) construe any measure even remotely related to the claims as having been adopted under the authority

⁶² See, *e.g.*, Reply Memorial, para. 370 (referencing DR-CAFTA Article 18.8 obligation to "*maintain appropriate penalties and procedures to enforce the criminal measures that it adopts or maintains [to prevent corruption]*," and to "*maintain appropriate measures to protect persons who, in good faith, report acts of bribery or corruption.*").

of Articles 17.1 and/or 17.2; and (iv) conclude that such measures are accordingly exempted from compliance with Articles 10.5 or 10.7, in order to avoid a finding of inconsistency.

104. In contrast, the Claimants argued that the plain and ordinary meaning of “*inconsistency*” evoked circumstances in which compliance with one obligation necessarily entailed non-compliance with a different obligation of equal force. If it were possible for a Party to comply with both obligations, it was required to do so. The Claimants also referred the Tribunal to relevant arbitral practice concerning the concept of “*inconsistency*” within the context of a provision such as Article 12.2. And, in conformity with the interpretative principle of effectiveness,⁶³ the Claimants also argued that the only way the Respondent could successfully rely upon Article 10.2 would be to demonstrate how it was forced to violate Articles 10.5 and/or 10.7 in order to comply with Articles 17.1 or 17.2. This was obviously something that the Respondent was simply unable to do.
105. Again, the Respondent did not even attempt to produce a plausible doctrinal basis for its position, nor could it point to any supportive arbitral practice. In maintaining its tautological construction of the term “*inconsistency*,” the Respondent baldly assumed that *any* potential constraint on the discretion of its officials, to administer or enforce environmental measures, would necessarily impinge upon its rights and responsibilities as set out in Articles 17.1 and 17.2 of the Agreement. Applying the logic of the Respondent’s argument in context requires one to conclude that, given how Article 10.5 imposes constraints upon decision-makers – such as an obligation to afford due process or to act with due diligence in maintaining a safe legal environment for foreign investment – it impedes a host State’s absolute right to adopt and enforce any environmental measure as it sees fit under Articles 17.1 and 17.2. Such an interpretation would effectively render Article 10.5 inutile, based upon nothing more than a

⁶³ See Claimants’ Reply Memorial para. 78.

host State's *post-hoc* declaration that impugned conduct had been undertaken in relation to "*the environment*."

106. In any event, even if one accepted the Respondent's general theory of DR-CAFTA interpretation (or lack thereof), the Respondent would nevertheless still have needed to demonstrate to the Tribunal that proximate linkages existed between each of the measures identified by the Claimants – as inconsistent with Articles 10.5 and/or 10.7 – and any discrete acts of rule-making that could be related to such conduct. This is because, even under the Respondent's outrageously expansive construction of the Article 10.2 "*inconsistency*" provision, the strategic burden of proof would still require the Respondent to demonstrate how the conduct underlying each and every alleged breach of Articles 10.5 or 10.7 was necessary to comply with a rule justified under the Article 17.1 "*level of protection*" rule. The Respondent has not even come close to discharging its burden in so far as the Claimants' case is concerned, which is understandable when one recalls how the Claimants' case does not concern the adoption of environmental rules in any event, but rather the grave failures committed by many of those responsible for enforcement.

D. Relevance of Other International Norms

107. DR-CAFTA Articles 10.16(1) and 10.21(1) establish a *lex specialis* model of dispute settlement, in which substantive international law norms not contained in Section A of DR-CAFTA Chapter 10 are only relevant to the extent that they can legitimately inform a tribunal's interpretation of a Section A obligation, in context. For example, arbitral practice has contributed to a thriving *jurisprudence constante* in which international law doctrine sourced from custom and general principle informs treaty standards such as DR-CAFTA 10.5, which contains an explicit reference to "*treatment in accordance with international law*."
108. Similarly, well-established norms of procedural fairness, particularly as enunciated by authoritative international tribunals or ensconced in international

human rights instruments, may be consulted as “*relevant rules of international law applicable between the parties*” for the purposes of construing a DR-CAFTA provision that includes a procedural fairness component, such as both Articles 10.5 and 10.7. Outside of *jus cogens* norms, it is only through interpretative means that other international norms can be received into a DR-CAFTA dispute.

109. Notwithstanding the fact that the interpretative approach outlined above is so ingrained as to be trite, the Respondent blithely ignored such limitations, and instead cited a plethora of international environmental conventions, by which it attempted to excuse the conduct that gave rise to the Claimants’ allegations of DR-CAFTA non-compliance.⁶⁴ The Respondent did not even attempt to justify reliance upon these instruments by reference to VCLT Article 31(3)(c), implying instead that its vague and idiosyncratic construction of these instruments governs merely because they have been incorporated into Costa Rican law. Not unlike the manner in which it attempted to misconstrue Articles 17.1 and 17.2 as according *carte blanche* answers to allegations of a breach of Articles 10.5 or 10.7, the Respondent proffered more of the same vague and unsubstantiated arguments, such as its persistent reliance on the precautionary principle, notwithstanding the fact that such principle would only apply to rule-making activities anyway, and the Claimants identified no rule-making activities as a basis for their DR-CAFTA claims.

E. U.S. Submissions on the Interpretation of Article 10.5 and Annex 10-B

112. By way of a letter dated March 8, 2017, the Respondent indicated to the Claimants that it took issue with various elements of a summary document prepared by Dr Weiler during the Hearing on non-disputing party submissions.⁶⁵ The document was prepared following a request made by the Tribunal President’s to a representative of the United States for copies of all other Article 10.20(2) submissions it might have submitted in other DR-

⁶⁴ See, e.g., Counter-Memorial, paras. 54-57; Reply Memorial, paras. 71-75.

⁶⁵ See Respondent’s letter, dated March 8, 2017.

CAFTA Chapter 10 arbitrations. As the President had expressed curiosity about the consistency of such submissions, Dr Weiler prepared a summary document, using colored highlighting to indicate precisely the degree of consistency among U.S. submissions. To ensure a complete record, he also attached all non-disputing party submissions made on either Article 10.5 or 10.7 in other DR-CAFTA proceedings, including two written opinions submitted by Professor Michael Reisman.

113. In its letter, the Respondent purported to withhold its consent for the distribution of Dr Weiler’s summary document to the arbitrators, stating: “*the incorporation of these documents clearly goes beyond the request made by Mr Siqueiros, and can be considered as an extemporaneous attempt by Claimants to introduce new legal authorities into the record that benefit your position, which cannot be accepted from any perspective.*”
114. With all due respect, the Respondent is attempting to exercise a power that it simply does not possess. Far from being prohibited from introducing “*new legal authorities*” into the record, under the *lex arbitri* of the instant proceeding, advocates are actually under an obligation to draw the Tribunal’s attention to all relevant authorities. In any event, certainly as part of the exercise of preparing their respective post-hearing briefs, the Parties can obviously be expected to cite all applicable sources of law, whether they have been previously canvassed in the proceedings or not. A copy of the summary document is accordingly attached to this submission as Annex E.⁶⁶
115. As regards the United States’ Article 10.20(2) submission, veteran NAFTA and DR-CAFTA lawyers would no doubt be unsurprised by it. Each of the two treaties shares the distinctive trait of a cautious and defensive character. And as each is the product of a small group of likeminded, career-government lawyers – whose primary task over the past two decades has been to defend the U.S. Government from NAFTA and DR-CAFTA claims – most United States submissions include the same familiar arguments, notwithstanding the fact that

⁶⁶ See Annex E.

the most restrictive of them have been consistently rejected over the years. Two quintessential examples of this phenomenon are:

- a. Argumentation on how customary international law should be proved, offered as part of an attempt to preclude any expansion of the substantive content of Article 10.5 by making it effectively impossible to identify other protected norms; and
 - b. Rejection of the firmly-rooted *jurisprudence constante* on fair and equitable treatment, for example concerning the prohibition against arbitrariness, the obligation to accord due process, or State responsibility arising from the frustration of legitimate expectations.
116. The nub of the United States representatives' "*customary international law*" argument is that the only way for a claimant-investor to succeed in an Article 10.5 claim is to either establish that a denial of justice has occurred or prove the existence of a different customary international law norm or doctrine, which could be applied to the respondent's conduct. As the Claimants have previously noted, the vast majority of NAFTA and DR-CAFTA tribunals have rejected such an approach outright. As Professor Reisman has observed:

[T]he burden which the Respondent would impose on the Claimant is not the correct one. Under recognized standards of international law the Claimant need not conduct a vast research of pertinent state practice and opinio juris itself, as the Respondent would have it, to confirm the emergence of a new norm of customary international law. Under Article 38(1)(d) of the Statute of the International Court of Justice, it is entitled to rely on the evidence of customary international law norms provided by pertinent decisions of tribunals and the teachings of the most highly qualified publicists.⁶⁷

117. With respect to the United States' fatuous claim that Article 10.5 does not contemplate State responsibility for the frustration of legitimate expectations, as already noted above, in both of its memorials the Respondent admitted the principle that State responsibility for the frustration of legitimate expectations

⁶⁷ *Railroad Development Corporation v. Republic of Guatemala*, ICSID case No ARB/07/23 para. 54.

was covered under Article 10.5.⁶⁸ It was only in its closing arguments at the Hearing that it changed tack and adopted the position reflected in the U.S. submission.⁶⁹

118. Indeed, the Respondent essentially admitted the validity of each of the Claimants’ principal claims, in principle. It merely disputed any allegation that its officials had conducted themselves in a manner that was arbitrary, an abuse of authority, inconsistent with due process norms, or that frustrated legitimate expectations. Before it came to embrace the obstreperous approach on offer from the United States’ representative, the Respondent’s preferred backup to arguing the facts of the case, or misconstruing the applicable test,⁷⁰ was to simply allege that they were not yet ripe for adjudication – first by insisting that the Claimants’ arguments be construed as denial of justice claims, and then arguing that an exhaustion of local remedies rule should be applied.
119. The Respondent’s denial of justice gambit will be addressed further below, but first we must examine the validity of the minimalist approach advocated by the United States and belatedly adopted by the Respondent as its own.
120. The United States’ representatives have founded their attempt to roll back the protections offered under Article 10.5 to an early 20th century level by juxtaposing the “*fair and equitable treatment*” formula used in Article 10.5 against allegedly “*autonomous*” versions of the standard found in other treaties, stating:

States may decide expressly by treaty to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law. Extending such protections through “autonomous” standards in any particular treaty represents a policy decision by a State, rather than an action taken out of a sense of legal obligation. That practice is not relevant to

⁶⁸ See Respondent’s Counter-Memorial at para’s. 481-482 and Respondent’s Rejoinder Memorial para’s. 793-794.

⁶⁹ See, e.g., English Transcript, 2026:2-15; 2033:10-2034:4.

⁷⁰ For example, the Respondent initially chose to bizarrely restate the Claimants’ legitimate expectation argument as a plea for protection of the right to expect the host State would abstain from enforcing its environmental laws.

ascertaining the content of Article 10.5, which expressly ties “fair and equitable treatment” and “full protection and security” to the customary international law minimum standard of treatment.³⁰ Thus, arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.³¹ Likewise, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.⁷¹

121. As already noted, and explained by Professor Reisman, the same arguments about how to construe the content of Article 10.5 have been made before, and rejected by most NAFTA and DR-CAFTA tribunals, starting with the *Mondev* tribunal (which included both Crawford and Schwebel as members) and continuing more recently with the *Railroad Development* tribunal (which included Rigo Sureda and Crawford as members).⁷² More interesting is the inconsistency inherent in the United States’ representatives’ position on so-called “autonomous” versions of the “fair and equitable treatment” standard.
122. Each of the handful of United States Article 10.20(2) submissions issued thus far represents that Article 10.5 recalls the customary international law minimum standard of treatment. Each also treats NAFTA Article 1105 as an analogous expression of the same standard. The United States has also argued, for example in a 2001 submission to the *Methanex* Tribunal, that all of its “fair

⁷¹ Submission of United States of America, dated April 17 2015, para. 20.

⁷² *Mondev Int’l Ltd. v. U.S.A.*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, at ¶¶ 110-125; *Railroad Development Corporation v Guatemala*, Award, ICSID Case No. ARB/07/23, IIC 553 (2012), 29 June 2012, at ¶¶ 212-216.

and equitable treatment” treaty provisions allude to the very same customary international law minimum standard.⁷³

123. The United States has also been making the same “*autonomous vs. customary*” arguments since at least 2007. The thrust of this argument has remained constant throughout: *viz.* that a tribunal interpreting a “*customary fair and equitable treatment*” provision should never rely upon the reasoning of a tribunal that interpreted an “*autonomous fair and equitable treatment*” provision instead.⁷⁴ Nevertheless, in this same memorial the United States also relied on an UNCTAD study, whose authors had observed how the U.S. had actually employed different types of “*fair and equitable treatment*” clauses in its treaties.⁷⁵
124. Moreover, the United States admitted – by logical implication – that it *had* actually concluded treaties containing an “*autonomous fair and equitable treatment*” provision.⁷⁶ It did so when criticizing a claimant for having relied on awards, which it claimed were based on an autonomous version of the fair and equitable treatment standard, notwithstanding the fact that many of the tribunals issuing them were interpreting the provisions of U.S. treaties, such as the *Azurix* Tribunal, established under the U.S.-Argentina Bilateral Investment Treaty, which wrote:

In their ordinary meaning, the terms “fair” and “equitable” used in Article 3(1) of the BIT mean “just”, “even-handed”, “unbiased”, “legitimate.” As regards the purpose and object of greater cooperation with respect to investment, recognize that “agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the

⁷³ *Methanex v. USA*, Response of Respondent United States of America to Methanex’s Submission Concerning the North American Free Trade Commission’s July 31, 2001 Interpretation, October 26, 2001, at 10-11; <http://www.naftaclaims.com/disputes/usa/Methanex/MethanexUSfirstSubRe1105.pdf>

⁷⁴ *Glamis Gold v. USA*, Rejoinder Memorial, March 15, 2007, at 147, <http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-USA-Rejoinder.pdf>

⁷⁵ *Ibid.* at ¶¶ 148-149.

⁷⁶ *Ibid.*, at ¶ 149, citing: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶ 363 (July 14, 2006), and at ¶ 150, note 598, citing: *Glamis Gold v. USA*, Claimant’s Reply Memorial, December 15, 2006, at ¶¶ 206-207 & 213, wherein *Glamis* cited a number of U.S. bilateral investment treaties containing autonomous “*fair and equitable treatment*” clauses. See, also: *Glamis*’ discussion of the *Azurix* and other cases concerning the proper construction of a “*fair and equitable treatment*” standard, at ¶¶ 229-233.

economic development of the Parties”, and agree that “fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources.” It follows from the ordinary meaning of the terms fair and equitable and the purpose and object of the BIT that fair and equitable should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. The text of the BIT reflects a positive attitude towards investment with words such as “promote” and “stimulate”. Furthermore, the parties to the BIT recognize the role that fair and equitable treatment plays in maintaining “a stable framework for investment and maximum effective use of economic resources.”

Turning now to Article II.2(a), this paragraph provides: “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.” The paragraph consists of three full statements, each listing in sequence a standard of treatment to be accorded to investments: fair and equitable, full protection and security, not less than required by international law. Fair and equitable treatment is listed separately. The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment will be no less than required by international law. The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law. While this conclusion results from the textual analysis of this provision, the Tribunal does not consider that it is of material significance for its application of the standard of fair and equitable treatment to the facts of the case. As it will be explained below, the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.⁷⁷

⁷⁷ *Azurix Corporation v Argentina*, Award, ICSID Case No. ARB/01/12, IIC 24 (2006), June 23, 2006, at ¶¶ 360-361.

125. That the United States’ position on the interpretation of a provision such as Article 10.5 – taking into account the entire scope of the submissions it has been making since first being named as a respondent in a NAFTA arbitration twenty years ago – can seem both settled and yet equivocal, or at least conflicted, is to be expected. As Thomas Wälde once observed, some healthy scepticism is desirable when examining the contents of non-disputing party submissions and memorials for evidence of state practice, as they will necessarily have been “*influenced by considerations of defensive advocacy.*”⁷⁸ One should not be surprised, accordingly, that the very narrow and limited construction of Article 10.5 reflected in the U.S. submission has not supplanted more the balanced views of publicists such as Professor Reisman or the President of the *Railroad Development* tribunal, Andrea Rigo Sureda.

IV. THE TRIBUNAL HAS JURISDICTION TO HEAR THE CLAIMANTS’ CLAIMS

A. Investment

126. The Claimants first delineated their investments, for the purposes of demonstrating *jurisdiction ratione materiae*, at paragraphs 17-20 of the Notice of Arbitration. In particular, they cited sub-paragraphs (e) and (h) of the definition of investment found in Article 10.28 of the DR-CAFTA, which includes “*turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts,*” and “*other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.*” They also made reference to sub-paragraph (g) at paragraph 262 of the Memorial, which includes “*licenses, authorizations, permits, and similar rights conferred pursuant to domestic law,*” as well as the text of the *chapeau* of the investment definition, which provides:

⁷⁸ *Glamis Gold v. USA*, Rejoinder Memorial, March 15, 2007, at note 608, citing the Expert Report of Thomas Wälde, <http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-USA-Rejoinder.pdf>

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. Forms that an investment may take include...

127. The Claimants were also careful to specify, in their Notice of Arbitration, that they were pursuing both claims on their own collective behalf, *qua* investors, as well as claims on behalf of the collection of incorporated Enterprises they had established, under Costa Rican law, to develop the Las Olas Project. Thus, the Claimants also indicated, at paragraphs 17-20 of the Notice of Arbitration, that their investments also included Enterprises, and explained how they collectively exercised ownership and control over the two most important Enterprises for the Project: Inversiones Cotsco C&T, S.A., in which responsibility for development of the villa component had been placed, and La Canícula S.A., in which responsibility for development of the Concession area, including hotel, had been placed.
128. For the avoidance of any doubt, the purpose of making numerous and varied references to the investments owned and controlled by the investors, which satisfied no fewer than five sub-paragraphs of the Article 10.28 definition of investment, was to firmly establish jurisdiction. The Respondent has consistently attempted to make mischief of the Claimants' embarrassment of jurisdictional riches, by seeking to isolate one category of investment at a time and suggesting that it is insufficient. For example, the Respondent has, at various times, attacked the Claimants' case by arguing that they no longer hold title in all of the lots located in their development (as though it was unusual for an operational real estate development business to engage in land sales), and argued that permits issued in respect of the Project Site were not assets capable of being taken.
129. In so doing, the Respondent was deliberately missing the point: *viz.* that it is inappropriate, for the purposes of establishing liability or quantifying damages, to attempt to reduce an investment Enterprise – here: the Las Olas Project – to

the sum of its parts. This notion is encapsulated in the “*unity of investment*” principle, as expressed by the tribunals in *Inmaris v. Ukraine* and *CSOB v. Slovakia*, respectively:

*[T]he Tribunal can step back to consider their claimed investments as component parts of a larger, integrated investment undertaking. It is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy the definitional requirements of the BIT and the ICSID Convention. For purposes of this Tribunal’s jurisdiction, it is sufficient that the transaction as a whole meets those requirements.*⁷⁹

*An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.*⁸⁰

130. Regardless of whether the Tribunal engages in an analysis of the Respondent’s breaches of Article 10.5 or 10.7, or the damages flowing therefrom, the “*investment*” at issue should always be regarded as the entirety of the Claimants’ investment in the Las Olas Project, not discrete elements thereof. Unless the Respondent can demonstrate that the harm suffered as a result of conduct visited upon the Las Olas Project was somehow restricted to a discrete segment, it would be artificial to treat the Las Olas Project as anything less than the integrated investment undertaking that it was.

⁷⁹ *Inmaris Perestroika Sailing Maritime Services GmbH et al v. Ukraine*, ICSID Case No. ARB/08/8, IIC 431 (2010), Decision on Jurisdiction March 2, 2010 at ¶ 92. Although “*unity of investment*” cases originated in ICSID practice arising from investment agreement cases, in which perhaps only one of a number of related contracts contributing to a single investment enterprise contained an ICSID dispute settlement clause, the principle is also useful in demonstrating the distinction that should be made between the potentially many instruments through which jurisdiction may be established in respect of a defined investment, and an appraisal of the total sum, or entirety, of any given investment enterprise, when one considers the impact of impugned measures upon its overall operation.

⁸⁰ *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No ARB/97/4, (1999) 14 ICSID Rev-FILJ 251, IIC 49 (1999), (2002) 5 ICSID Rep 330, May 24, 1999, at ¶ 72. See, also: *Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania*, Award, ICSID Case No ARB/11/24, IIC 682 (2015), 30 March 2015, at ¶ 288; and *Duke Energy International Peru Investments No 1 Limited v Peru*, Decision on Jurisdiction, ICSID Case No. ARB/03/28, IIC 30 (2006), 1 February 2006, at ¶¶ 119-134.

131. In this context, it becomes plain that, in particular, the Respondent's focus on the sale of areas of land in the Las Olas project site – and the accusation that the Tribunal does not have jurisdiction over any parcels of land which have been sold – is meaningless. Up to May 2011, the sale of lots on the project site was part and parcel of the Claimants' investment undertaking, but was not the whole of that undertaking. The Claimants' investment still included, as one of its parts, the individual lots of land that had been sold, since these lots still formed part of the Las Olas Project and were still to be further monetised by the Claimants by virtue of the other aspects of the Project (house building, financing, rentals, management, the beach club, etc) even though the land itself had been sold (it should also be remembered that the individual lots were only accessible over roads built on land still owned by the Claimants). It is therefore nonsensical to speak of the lots sold as somehow having “*dropped out*” of the Tribunal's jurisdiction.
132. Once the Respondent had imposed the shutdown of the Project in May 2011, subsequent sales of lots were made at a fraction of their value (absent the shutdown), solely in an effort to mitigate the Claimants' losses. By this stage, the Project had been destroyed by the Respondent's actions and the Claimants therefore had no hope of continuing (the Tribunal will note that the vast majority of these sales were agreed in the period February to April 2013 – see slides 28 and 29 of Dr Abdala's presentation at the December Hearing). These sales cannot, therefore, affect the Tribunal's jurisdiction, since its jurisdiction, as set out above, extends over the integrated investment undertaking – the Las Olas Project – as a whole and as it stood in May 2011.
133. Accordingly, the ownership position of the land itself as at the date of the Notice of Arbitration (which is addressed further in Section X below) is not relevant to the Tribunal's determination of the Claimants' claims.

B. Article 47 of the ZMT Law

134. The Respondent's initial jurisdictional objection based on Article 47 of the ZMT Law was that there had been a gap of approximately thirty days, during

which the La Canícula Concession was 100% owned by a foreigner, rather than 51% owned by a national of Costa Rica. That issue was resolved by a showing of evidence, and a correction by Mr Aven of his Witness Statements.⁸¹ The Respondent next pursued an alternative theory of non-compliance with Article 47 of the ZMT law on the ground that, since the Claimants actually exercised control over the Concession, its 51% ownership by a Costa Rican national was a sham transaction intended to subvert the object of the ZMT Law. This is further discussed in Section VIII.D (1) below.

135. The first time the Respondent raised this particular jurisdictional objection, was in its closing arguments during the Hearing. And it only did so following *sua sponte* expressions of curiosity, by the Tribunal President during witness examinations, concerning the operation of this particular provision in practice. Article 23(2) of the 2010 UNCITRAL Arbitration Rules provides: “*A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence.*” It would be manifestly unfair, and constitute a grave prejudice to the Claimants, if the Respondent were permitted to raise such objection so very late in the proceedings – particularly since it would be after the point at which the Claimants could submit all relevant evidence to rebut it.
136. In any event, as underscored by question no. 9 in the Tribunal’s Closing Questions, the Respondent never commenced any proceedings to annul either the La Canícula Concession, or the sale of the shares by Mr. Monge in the Enterprise which possessed rights in the Concession. As explained further below, this has been a consistent theme for the Respondent as regards its accusations of the Claimants’ alleged non-compliance with municipal law: *i.e.*, they were all *post-hoc*. There is no evidence on the record that the Claimants’ interest in the Concession was invalid, or that the Respondent even considered the possibility that it might be invalid at the relevant time, *viz.* when the DR-CAFTA breaches occurred.

⁸¹ See English Transcript, 801:16-803:16. This was also reflected in the Claimants’ opening. See English Transcript, 148:7-149:16; see Exhibit C-8, compare with Exhibit C-237.

137. The Claimants made out their *prima facie* claims in respect of the La Canícula Concession, demonstrating that they possessed control over the Enterprise that held all rights granted by the Municipality for its use. The only available evidence on the record indicates that Municipal officials were well aware that U.S. investors exercised control over the Concession at all relevant times. When one considers the stridency with which opponents of the Las Olas Project, including their official interlocutors, attempted to derail it, it is apparent that the reason the Respondent never pursued an attack based upon Article 47 of the ZMT Law is that it was never viewed as a likely avenue for successful challenge.⁸²

V. ADMISSIBILITY

A. The Respondent's "Illegality" Arguments

138. The Respondent initially characterized its illegality objection as jurisdictional in nature, basing it on a handful of awards in which the applicable treaties included "*compliance with local law*" clauses, unlike the DR-CAFTA.⁸³ The Respondent reformulated its objection for the Rejoinder, recasting it as an issue of admissibility. The thrust of the Respondent's reformulated objection was that the Claimants should not be permitted to pursue their Chapter 10 rights if – at any time during the life of the investment – they became noncompliant with local law.⁸⁴

139. The Respondent's reformulated objection is premised, however, upon examples in which respondents alleged serious criminality or fraud had materially contributed to establishment of the investment.⁸⁵ As the *Quiborax*

⁸² See Section VIII.D.1.

⁸³ See Memorial, para. 270 ("*Claimants' illegal and bad faith conduct bars them from claiming under the Treaty. In the following paragraphs we set out with greater specificity the nature of this illegal conduct. In the section thereafter, Respondent sets out the basis for this jurisdictional objection under international law.*")

⁸⁴ See Reply Memorial, para. 525 ("*But Respondent has never stated in its Counter Memorial that it was challenging the jurisdiction of the Tribunal based on the illegality of the investment. Rather, it asked the Tribunal to consider Claimants' claim as inadmissible based, on the seriousness of their misconduct in the operation of the investment.*")

⁸⁵ See, e.g.: RLA-118, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, Award, ICSID Case No. ARB/03/25, August 16, 2007, at ¶ 346; RLA-119, *Anderson v. Costa Rica*, Award, ICSID

tribunal observed, even in cases where a treaty's compliance with municipal law clause is construed as a legality requirement, it is understood that "*the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance.*"⁸⁶ And as the *Yukos* tribunal observed, even in cases where a tribunal might be prepared to "*read in*" to a treaty a legality requirement without a clause prescribing compliance with the laws of the host State, it could only logically adopt a standard applicable to the establishment phase of an investment.⁸⁷ The reason for such limitation is elementary, as articulated by the *Copper Mesa Mining* tribunal:

As regards violations of Ecuadorian law, in the Tribunal's view, the wording of the Treaty is confined, at most, to a jurisdictional bar applying to the time when the Claimant first made its investment. That was in 2004. The wording of Article 1(g) of the Treaty is clear: the phrase "in accordance with the latter's laws" qualifies the earlier concept of the investment's ownership and control when made; and it does not extend to the subsequent operation, management or conduct of an investment.

Not only is any such wording significantly absent from Article 1(g), but it would take clear wording to produce such an important jurisdictional bar. It would effectively deprive an investor from exercising any arbitral remedy under the Treaty if the investor (or its agents or employees) ever committed a breach of the host State's laws during the life of its investment. That would be a stark and potentially harsh result, severely limiting the legal autonomy of the arbitration agreement between an investor and a host State resulting from Article XIII(4) of the Treaty. ...

*On all these matters, the Respondent bore the legal burden of proving its positive allegations...*⁸⁸

ARB(AF)/07/3, May 19, 2010, at ¶ 55; RLA-121, *Inmaris Perestroika Sailing Maritime Services GmbH et al v. Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB/08/8, 8 March 2010, at ¶ 140.

⁸⁶ *Quiborax SA and ors v Bolivia*, Decision on Jurisdiction, ICSID Case No ARB/06/2, IIC 563 (2012), September 27, 2012, at 266.

⁸⁷ *Yukos Universal Limited v Russian Federation*, Final Award, PCA Case No AA 227, IIC 652 (2014), ICGJ 481 (PCA 2014), July 18, 2014, at ¶¶ 1352-1354.

⁸⁸ *Copper Mesa Mining Corporation v Ecuador*, Award, PCA Case No 2012-2, IIC 841 (2016), March 15, 2016, at ¶¶ 5.54-5.55 & 5.59. See, also: *Oxus Gold plc v Uzbekistan*, Final Award, IIC 779 (2015), Ad Hoc, UNCITRAL Arbitration Rules, December 17, 2015, at ¶¶ 706-707, citing: *Gustav F W Hamester GmbH & Co KG v Ghana*,

140. The Respondent has instead attempted to bolster its objection by fusing it with another version of its environmental trump approach. Rather than repeating the claim that Chapter 10 obligations must be varied (if not defenestrated) on the basis of an untenable interpretation of Articles 17.1 and 17.2 (which grants absolute discretion to officials whenever measures can be construed as environmental), this version of the Respondent's environmental trump approach is merely intended to leverage an *a priori* analysis of the Claimants' alleged non-compliance with municipal rules, prior to having their substantive claims heard on the merits.
141. In a nutshell, the Respondent's argument is that environmental principles are so important, both as a matter of Costa Rican law and under the DR-CAFTA, that the conventional burden of proof, prescribed under customary international law, must be reversed. Thus, the Respondent glibly suggests, whenever a host State claims that its measures are founded upon the so-called principles of either precaution or prevention, the Claimant should only be permitted to pursue substantive investment claims after it has overcome the presumption that such recourse to these principles was unjustified.
142. In short, the Respondent's illegality objection, whether characterized as a matter of jurisdiction or of admissibility, and whether or not combined with its preposterous proposal to reverse the onus of proof whenever a host State's claimed rationale for adopting a measure is environmental, simply strains credulity. More to the point, given how the Respondent has not even made the allegation that the Claimants failed to comply with municipal law in establishing their investment, much less having procured it by fraud, its objection – no matter how formulated, must fail.

Award, ICSID Case No. ARB/07/24, IIC 456 (2010), June 10, 2010, at ¶ 127; and: *Inceysa Vallisoletane, SL v El Salvador*, Award, ICSID Case No ARB/03/26, IIC 134 (2006), August 2, 2006, at ¶ 239.

B. The Respondent's Exhaustion of Local Remedies Argument

143. The Respondent also maintains that the Claimants' case should be dismissed for want of ripeness, despite having struggled to identify any relevant legal authority for the proposition. The bottom line is that the DR-CAFTA does not contemplate exhaustion of local remedies. It cannot because what it does contemplate, in Article 10.16(3)(a), is recourse to the ICSID Arbitration Rules for investment disputes under Chapter 10. Article 26 of the ICSID Convention prohibits its Member States from interposing exhaustion rules on claimant-investors, unless the Member State has taken an explicit reservation as regards its consent to arbitration, in advance. Given how the DR-CAFTA contains no provision that could authorise a Party to take a reservation that would condition its consent under Article 10.16, and it does contemplate the submission of investment disputes to ICSID arbitration, it is simply impossible for the Agreement to be construed in such a manner as to accommodate the Respondent's desire to interpose an exhaustion requirement upon the Claimants.
144. More to the point, there is no provision of Chapter 10 that could permit the Respondent to unilaterally impose an exhaustion requirement. Instead, as the Claimants have previously argued, the relevant Chapter 10 provisions provide additional confirmatory context for the proposition that exhaustion rules are prohibited as an impermissible constraint upon the exercise of Chapter 10 rights within the Free Trade Area. For example, Article 10.18(3) permits an investor-claimant to "*initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages*" simultaneously with the pursuit of a damages claim under Article 10.16. If the Parties had actually intended for investor-claimants to exhaust local remedies before pursuing claims under Article 10.16, they would have provided for such a process. Instead, they provided investor-claimants with the right to pursue both an arbitration and a local remedy simultaneously, which negates the very premise of the Respondent's argument.

145. The same logic was applied in the *Quiborax* case, where the respondent’s complaint – that the claimants had not undertaken any reasonable efforts to obtain a revocation of the impugned measure locally – was quickly dispatched by reference to the treaty’s fork-in-the-road provision.⁸⁹ Of more interest for this case, however, was another unsuccessful Bolivian argument: “*that the alleged expropriatory measure, Decree 27589, was not a ‘definitive decision of the State.’*”⁹⁰ Importantly, in evaluating and rejecting the argument, the *Quiborax* tribunal did not delve into an analysis of the municipal legal order. Rather, it evaluated the measure on a *prima facie* basis, taking into account the relative rank of the official who issued it, the clarity of its text, and whether it appeared to operate so as to deprive foreign investors of their rights. The same approach should be followed in this case, rather than allowing the Respondent to draw the Claimants or the Tribunal into the *minutiae* of Costa Rican administrative law and practice.
146. Moreover, as the *Mytilineos Holdings* tribunal explained, even in the absence of an explicit clause negating the possibility of requiring exhaustion of local remedies, the very form and function of investment treaties necessarily negates the possibility of parties to such treaties unilaterally imposing such a requirement in the event of a new dispute. It reasoned:

To assume that the BIT had not tacitly dispensed with the requirement to exhaust local remedies would imply that an investor, before making his or her choice between domestic courts and international arbitration, would have to exhaust domestic remedies. This would in effect render the “domestic courts” alternative of the fork-in-the-road clause meaningless and thus such an assumption cannot be made. On the contrary, a fork-in-the-road clause obliges an investor to choose whether to pursue remedies before domestic or international fora. Once the choice is made in favor of

⁸⁹ *Quiborax SA and Non Metallic Minerals SA v Bolivia*, Award, ICSID Case No. ARB/06/2, IIC 739 (2015), September 16, 2015, ¶¶ 156-158. The Tribunal reasoned that, had the claimant undertaken any such efforts, presumably by petitioning a municipal court or tribunal, the clause would have operated to preclude it from seeking relief from an international tribunal. See, also: *Arif v Moldova*, Award, ICSID Case No. ARB/11/23, IIC 585 (2013), April 8, 2013, at ¶ 333.

⁹⁰ *Ibid*, at ¶ 159.

domestic remedies, international arbitration is no longer available. Thus, one cannot require the exhaustion of local remedies as a precondition for access to international arbitration. Instead, the initiation of local proceedings forfeits access to international arbitration.

The result that BITs granting private investors direct access to international arbitration do not require local remedies to be exhausted is also confirmed by underlying policy reasons. A requirement for the exhaustion of local remedies as a general precondition to mixed investment arbitration would seriously undermine the effectiveness of this form of dispute settlement.⁹¹

147. Nor is there any merit to the Respondent's claim that it ought to be entitled to interpose an exhaustion of local remedies rule in this case because it involves allegations concerning the conduct of a prosecutor, as well as the administrative decisions the court in which Mr Aven was prosecuted. For example, the claimant in *Arif v. Moldova* founded his allegations of treaty breach on an uncompensated expropriation. The fact that the expropriation dispute had proceeded as far as the host State's courts of first instance did not mean that the claimant was expected to exhaust all available appeals before proceeding with his BIT claim. This is because – again just as in the instant matter – the claimant did not allege that he had suffered a denial of justice. In reaching its conclusion, the tribunal observed:

The ICSID system is not intended to be a subsidiary system of dispute settlement in case the host State's legal system fails, but rather it is set up as an alternative to the host State's remedies in case of an investment dispute. As already mentioned above, there is no general requirement to exhaust local remedies for a treaty claim to exist, unless such a claim is for denial of justice. In a claim for denial of justice, the conduct of the whole judicial system is relevant, while in a

⁹¹ *Mytilineos Holdings SA v Serbia and Montenegro and Serbia*, Partial Award on Jurisdiction, IIC 345 (2006), September 8, 2006, Ad Hoc Arbitration (Chisinau), at ¶¶ 221-222. In the case of a DR-CAFTA dispute, the same reasoning applies notwithstanding its exception for the pursuit of injunctive relief because the waiver provisions do impose a partial fork-in-the-road – forcing the investor-claimant to elect between seeking compensation locally or before a Chapter 10 tribunal.

*claim for expropriation, it is the individual action of an organ of the State that is decisive.*⁹²

148. In a similar vein, the tribunal in *EDF v. Argentina* dismissed a respondent's plea to require exhaustion on the basis of non-compliance with a court order for the claimant to exhaust administrative procedures. In rejecting the argument, the tribunal explained: "*This fact is irrelevant, however, to the issue of jurisdiction in this proceeding. Local rules of procedure, as varied and complicated as they may be, are not binding on this Tribunal.*"⁹³ And in *Helnan v. Egypt*, the Annulment Panel explained why it would be inappropriate to insist upon exhaustion of administrative remedies in most cases, given the deleterious impact that such practice might have on investor-State dispute settlement generally:

The problem with the Tribunal's reasoning is that this is to do by the back door that which the Convention expressly excludes by the front door. Many national legal systems possess highly developed remedies of judicial review. Yet it would empty the development of investment arbitration of much of its force and effect, if, despite a clear intention of States parties not to require the pursuit of local remedies as a pre-condition to arbitration, such a requirement were to be read back in as part of the substantive cause of action.

...

*... To be sure, the Treaty standard of fair and equitable treatment is concerned with consideration of the overall process of the State's decision-making. A single aberrant decision of a low-level official is unlikely to breach the standard unless the investor can demonstrate that it was part of a pattern of state conduct applicable to the case or that the investor took steps within the administration to achieve redress and was rebuffed in a way which compounded, rather than cured, the unfair treatment.*⁹⁴

149. The scenario envisaged immediately above is obviously reminiscent of the facts of this case. Notwithstanding the Claimants' numerous attempts to

⁹² *Arif v Moldova*, Award, ICSID Case No. ARB/11/23, IIC 585 (2013), April 8, 2013, at ¶ 345.

⁹³ *EDF International SA et al v Argentina*, Final Award, ICSID Case No. ARB/03/23, IIC 556 (2012), June 11, 2012, at ¶ 1129.

⁹⁴ *Helnan International Hotels AS v Egypt*, Annulment Decision, ICSID Case No. ARB/05/19, IIC 440 (2010), May 29, 2010, at ¶¶ 47 & 50.

cooperate with officials and comply with their increasingly arbitrary and onerous demands, particularly as demonstrated in Mr Aven's attempts to reach out to Prosecutor Martínez, before it became clear that Mr Martínez had no intention of pursuing a reasonable course of conduct, the more they tried, however, the worse the cumulative treatment from all sources became.⁹⁵

150. Returning to the bottom line on the Respondent's ripeness objection, however, the simple facts are that, in this case, the Claimants are pursuing damages for breaches of Articles 10.5 and 10.7, the latter of which pertains exclusively to the Respondent's failure to provide them with prompt, adequate and effective compensation for so substantially interfering with the operation of the Las Olas Project as to effectively deprive them of any meaningful enjoyment of it.⁹⁶ As additionally demonstrated in the reasons for decision in both *Saipem SpA v Bangladesh* and *Lemire v Ukraine*, claims for expropriation are in no case capable of derailment on the grounds of any alleged failure to exhaust local remedies.⁹⁷

VI. THE RESPONDENT'S BREACHES OF ARTICLE 10.5.

A. The Respondent has breached Article 10.5 of the DR-CAFTA by frustrating the Claimants' legitimate expectation that the Respondent would apply its laws in good faith

151. The Respondent has breached the rights afforded to the Claimants as investors under Article 10.5 of the DR-CAFTA. Specifically, as discussed above, the Respondent has breached the duty of good faith in the enforcement of its laws, which is an indispensable element of the Claimants' legitimate, investment-backed expectations under the Fair and Equitable Treatment (FET) standard

⁹⁵ See FirstWitness Statement of David Aven para. 186.

⁹⁶ See Claimants' Memorial para. 337.

⁹⁷ *Saipem SpA v Bangladesh*, Decision on Jurisdiction, ICSID Case No. ARB/05/7, IIC 280 (2007), 21 March 2007; and *Lemire v Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, IIC 424 (2010), January 14, 2010.

and minimum standard of treatment of aliens under Article 10.5.⁹⁸ As next discussed, the Respondent breached Article 10.5 and Annex 10-B of the DR-CAFTA by, *inter alia*, failing to honor the Claimants' legitimate expectation that they could rely on the property rights, certifications, and permits granted by the State, and that the Respondent's authorities would exercise the governmental authority delegated to them in good faith and in accordance with the express laws of the State.

1. The Respondent has failed to respect the Claimants' construction and Environmental Viability permits, which grant rights to their holder and may only be vitiated through final administrative action

152. The Respondent has engaged in a comprehensive effort to undermine specific official decisions of its own agencies when those decisions did not serve its case. These decisions include, but are not limited to, the decisions of SETENA and the Municipality in granting EVs and construction permits. Despite the Respondent's efforts to undermine its own agencies and the legal effects of their actions, the Claimants were entitled to rely (and did rely) on the EVs and construction permits issued by SETENA and the Municipality of Parrita because those permits granted lasting rights and had lasting effects under Costa Rican law. Moreover, these EVs and construction permits may only be vitiated through a final administrative action - which the Respondent indisputably has failed to commence.

⁹⁸ See *supra*, para. 95 (Municipal law informs how a tribunal construes the Claimants' legitimate expectations); see para. 117 (Respondent has admitted that the DR-CAFTA's Fair and Equitable Treatment provisions covers a protection against the frustration of the Claimants' legitimate, investment-backed expectations); see para. 124 (*Azurix* tribunal holding that "*fair and equitable treatment*" standard encompasses maintaining "*a stable framework for investment and maximum effective use of economic resources*").

See also Memorial para. 249 (citing the "*general international law principle of good faith*" used to interpret the "*fair and equitable treatment*" standard); Memorial para. 282 ("*From the general international law principle of good faith flow [an] injunction against host State behavior that results in [...] frustration of the foreign investor's legitimate, investment-backed expectations*"); see generally Memorial, para. 283- 308.

a. **It is settled law in Costa Rica that Environmental Viability Permits (EVs) and construction permits grant rights to their holders**

153. The Respondent does not dispute that the Claimants acquired both EVs and construction permits for the Concession and the Condominium Sections, nor does the Respondent dispute that the Municipality of Parrita granted construction permits to the Claimants for the Easements. A list of construction permits and EVs obtained by the Claimants is below.

Section	Name of the project	Permits required	Exhibit	Permit No.	Date issued	Area
Concession	Hotel Colinas del Mar	EVs	C-36	Decision No. 543-2006	March 17, 2006	EV for the Concession Section of the Project
		Construction	C-40	165-08	August 29, 2008	Esterillos Oeste frente al supersol. Construction of hotel, cabins and swimming pool 1.500 m ²
	Hotel Cabinas del Mar	EV	C-138	Decision No. 2030-2011	August 23, 2011	EV for the Concession that reflected a change in units
	Concession permit		C-40	154-07	August 13, 2007	La Canícula Construction of cabin and hotel, 36 m ² .
Condominium	Condominium Horizontal Residencial Las Olas	Exhibits relevant to EVs	C-40	Decision No. 1597-2008	June 2, 2008	EV for the Condominium Section.
			C-122	Decision No. 839-2011	April 13, 2011	Revoked EV granted by means of Decision 1597-2008
			C-144	Decision No. 2850-2011	November 15, 2011	Reconfirmed the validity of the EV for the Condominium Section

		Construction	C-14; C-85	Permit No. 130-10	September 7, 2010	Entrance to Esterillos Oeste, Diagona Super Sol, Infrastructure works, 3.573 m ²
	Villas La Canícula (file closed because the project was never developed)	Construction	N/A			
		EVs	R-12	Decision No. 375- 2007	February 27, 2007	1 year extension to “Villas La Canícula” EV (Initially granted by decision No. 2164-2004)
R-9	Decision No. 2164- 2004		November 23, 2004	EV for Villas la Canícula (includes some of the Easements Section of the Project)		
Section	Permit	Exhibit No.	Permit No.	Date issued	Area	
Easements	Construction permits	C-40	142 ⁹⁹	September, 2007	--	
		C-14; C71	090-10	July 16, 2010	Esterillos Oeste, de la costanera 1km al sureste, 324 m ² .	
		C-14; C71	091-10	July 16, 2010	Esterillos Oeste, de la costanera 1km al sureste, 390 m ² .	
		C-14; C71	092-10	July 16, 2010	Esterillos Oeste, de la costanera 1km al sureste, 69 m ¹ .	
		C-14; C71	093-10	July 16, 2010	Esterillos Oeste, de la costanera 1km al sureste, 435 m ² .	
		C-14; C71	094-10	July 16, 2010	Esterillos Oeste, de la costanera 1km al sureste, 402 m ² .	
		C-14; C71	095-10	July 16, 2010	Esterillos Oeste, de la costanera 1km al sureste, 402 m ² .	
		C-14; C71	096-10	July 16, 2010	Esterillos Oeste, de la costanera 1km al sureste, 420 m ² .	

154. An important issue in this arbitration is the classification and legal effect of EVs and construction permits. While the Claimants and the Respondent agree that construction permits are “*final acts*” that have inherent effects on third parties and grant lasting rights and obligations, the Parties disagree as to the

⁹⁹ Mussio Madrigal testified that that the Municipality “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” (See English Transcript, 440:1-4.). Additionally, the Claimants submitted a letter issued by the Municipality on November 29, 2016 whereby it affirmed that “With respect to construction permit dossier No. 154-2007 issued on behalf of La Canícula S.A., the latter is not contained in our physical records because it was issued in 2007 and as a result of the flooding caused by Hurricane Alma in 2008 the dossier was declared lost due to the water and mud damage that affected the archives” See Exhibit C-295. It stands to reason that official copies of other construction permits acquired by the Claimants cannot be recovered from the Municipality’s files.

legal effect of EVs. As a matter of Costa Rican law, both the Claimants and the Respondent accept that construction permits are “*final acts*” that have direct and immediate legal effects on third parties, either conferring rights or establishing obligations.¹⁰⁰ As indicated in the table above, the Claimants obtained construction permits for the Concession,¹⁰¹ Easements,¹⁰² and Condominium¹⁰³ Sections.

155. However, the Respondent contends that the EVs granted by SETENA to the Claimants for the Concession and Condominium Sections do not grant rights or have inherent effects on third parties. As next discussed, the Respondent’s attempts to distinguish the legal effects of EVs from construction permits under Costa Rican law are, in this case, a distinction without a difference. The Respondent’s feeble attempt to minimize the Claimants’ rights granted by the EVs is specious for two reasons:

- a. the Respondent’s alternative theory that EVs do not grant lasting effects fails to account for the construction permits issued for the Concession, Easements, and Condominium Sections. Even under the Respondent’s case theory, these construction permits are the “*final acts*” for the EVs, and have indisputably been obtained by the Claimants;¹⁰⁴ and
- b. the Respondent relies on an alternative theory of Costa Rican law regarding the effects of EVs rejected by the Constitutional Chamber,

¹⁰⁰ See Luis Ortiz Expert Report, para. 67 (“*the final administrative act will always have direct and immediate legal effect on third parties, either conferring rights or establishing obligations.*”); Julio Jurado Second Witness Statement, para. 17 (“*the final act resulting in the realization of their project [is] the municipal permit for construction.*”); and Julio Jurado Second Witness Statement, para. 11 (as corrected in Julio Jurado direct examination English Transcript, 1418:19-1419:17) (“*final act, which, for instance, is materialized with the construction permit.*”).

¹⁰¹ See Exhibit C-138.

¹⁰² See Exhibits C-14 and C-71.

¹⁰³ See Exhibits C-14 and C-85.

¹⁰⁴ See Luis Ortiz Expert Report, para. 72 (“*the discussion in this particular case is a big innocuous, as the Project does have the construction permits validly granted on the basis*”).

whose decisions are *erga omnes* and binding on all public agencies as a matter of Costa Rican law.¹⁰⁵

156. Because the Claimants' EVs and construction permits have inherent effects and granted the Claimants rights, Costa Rican law contains mandatory administrative procedures meant to safeguard the rights of EV and construction permit holders against arbitrary revocation or annulment by the government. In this case, the Respondent has failed to apply these procedures and has illegally enjoined the Las Olas project indefinitely.

b. Construction Permits are Final Acts that create rights for, and have inherent legal effects on, third parties

157. Both the Claimants and the Respondent agree that construction permits are final acts that create rights and have inherent legal effects.

158. The Claimants' expert Mr Luis Ortiz, and the Respondent's witness Attorney General Julio Jurado agree that final acts establish rights and obligations. Dr Jurado explains in his Second Witness Statement that "*the result of a final act is the creation of a relationship between the Administration and the individual, establishing rights and obligations for the parties, as well as the possibility to modify or terminate previous legal situations.*"¹⁰⁶ Mr Ortiz agrees, and adds that "*the final administrative act will always have direct and immediate legal effects on third parties, either conferring rights or establishing obligations.*"¹⁰⁷

159. Dr Jurado explained in his First Witness Statement that "*one may concluded [sic] [...] that the environmental viability granted by SETENA is a mere preparatory act or procedure, subordinate to a final act, this being the construction permit that the Municipality would have to grant. The full legal effects would be produced until [sic] that time.*" Dr Jurado's Second Witness

¹⁰⁵ See Luis Ortiz Expert Report, para. 65; English Transcript, 1281:9.

¹⁰⁶ See Julio Jurado Second Witness Statement, para. 7.

¹⁰⁷ See Luis Ortiz Expert Report, para. 67.

Statement merely confirms the Respondent's position,¹⁰⁸ and the Claimants do not dispute that construction permits are understood as "*final acts*" under Costa Rican administrative law.

160. Because construction permits are considered "*final acts*" and the Parrita Municipality granted construction permits for the Concession, Condominium, and Easements Sections of Las Olas,¹⁰⁹ it cannot be disputed that the Claimants held construction permits that created inherent rights upon which the Claimants could rely. Likewise, these construction permits create legal obligations to which the Respondent, its agencies and public administrative bodies and private parties are bound. Thus, the fact that the Municipality of Parrita issued construction permits, granting tangible and inherent effects and rights to their holders is key to this Tribunal's determination of whether the Respondent breached its obligations under DR-CAFTA Article 10.5.

c. EVs have inherent legal effects on third parties, and governmental agencies are bound by SETENA's determinations

161. Despite conceding that construction permits are final acts that create inherent rights under Costa Rican law, the Respondent nevertheless disputes that EVs create any inherent effects for third parties, or grant any rights to their holders.
162. With respect to SETENA, Dr Jurado argued in both of his Witness Statements that EVs are "*preparatory acts*" that do not have any inherent effects on third parties.¹¹⁰ Mr Ortiz disagrees, citing Constitutional Chamber opinions and Dr Jurado's own Attorney General Opinions indicating that EVs do grant rights and have inherent effects. Mr Ortiz notes, however, that disagreement between himself and Dr Jurado is more theoretical than real in this case, because it is

¹⁰⁸ See Julio Jurado Second Witness Statement, para. 11 ("*a final act [...] materialized with the construction permit provided by the pertinent Municipality.*").

¹⁰⁹ See table above.

¹¹⁰ See Julio Jurado First Witness Statement, paras. 104-114; and Julio Jurado Second Witness Statement, paras. 6-34.

not disputed that the Municipality of Parrita granted construction permits to the Claimants:

Anyhow, in this case the discussion on the EV having been a preparatory or final act in my opinion does not have the importance it has had in other cases, as in this particular case not only was the EV granted, but also the corresponding construction permits. Even more not only were the EVs suspended, but also the construction permits are still paralyzed, even though that SETENA lifted the injunction. Therefore, the discussion in this particular case is a bit innocuous, as the Project does have the construction permits validly granted on the basis of the corresponding EV's. Therefore, there should be no doubt whatsoever that a subjective right was indeed granted, and that the only way to declare it null and void is by declaring its absolute, evident and manifest invalidity thru an ordinary administrative proceeding prior opinion of the Attorney General's Office, or else file a judicial review before the Administrative Court, but not by way of a criminal process, nor by injunctions with no term and no principal procedure to which they must be instrumental.¹¹¹

163. Because the Municipality of Parrita granted the final act of a construction permit to the Claimants, there is no practical significance in this case regarding Dr Jurado's purported distinction that EVs are mere "*preparatory acts*" and this is merely an irrelevant distraction which should not entertain the Tribunal for long.
164. Nonetheless, it is integral to clarify that Costa Rican law provides that EVs do create inherent effects, and that Dr Jurado's continued effort to represent otherwise to the Tribunal is wrong, and undermines his credibility as an independent expert on Costa Rican law. In that regard, by virtue of his role at the time of his first witness statement in these proceedings and his current role as Attorney General of Costa Rica, Dr Jurado cannot be characterized as a truly independent expert. The Claimants do not intend this as a criticism of Dr Jurado, it is simply a fact that as Attorney General of the Republic, Dr Jurado cannot be independent of the State and his evidence must be seen in that light.
165. Both the Claimants and the Respondent accept that the law clearly provides that all private and public institutions must comply with SETENA's resolutions

¹¹¹ See Luis Ortiz Expert Report, para. 72.

in relation to EVs and Environmental Impact Assessments. This was confirmed by Dr Jurado in his First Witness Statement, where he agrees that “*the law clearly provides that both private and public institutions must comply with SETENA’s resolution in relation to the environmental impact assessments.*”¹¹² Dr Jurado also agreed that EVs issued by SETENA are binding on all public employees – including all judges and prosecutors – and are also binding on all agencies of the public administration.¹¹³

166. Dr Jurado also agreed with Mr Ortiz, as he must, that opinions of the Constitutional Chamber are *erga omnes* and binding under Costa Rican law.¹¹⁴ Dr Jurado testified in cross-examination that “*the jurisprudence of the Constitutional Chamber is binding upon judges*” and that, in the environmental field, all must “*abide by the Constitutional Chamber*” which is “*the last word in that field.*” Dr Jurado is acutely aware that the Constitutional Chamber, in its Ruling Number 2010-17237, confirmed that EVs grant rights to and create inherent effects for their holders.¹¹⁵ This is evidenced by his signature on an opinion issued by the Attorney General’s Office in 2013 confirming that an EV cannot be revoked or annulled unless there is a declaration in a final administrative proceeding that the EV has an “*absolute, evident, and manifest defect.*”¹¹⁶ In cross-examination by the Claimants’ counsel at the Hearing, Dr Jurado confirmed that the Constitutional Chamber of Costa Rica has held that an EV is a “*preparatory act with inherent effects*” (as opposed to a preparatory act with no effects) and that the Attorney General’s office has issued several opinions that confirm that an EV is “*a license for the benefit of the individual*” and that the EV has “*its own inherent effects.*”¹¹⁷
167. Despite this, Dr Jurado gave an alternative reading of the law asserting that no rights or effects result from SETENA’s granting of an EV. In his Second

¹¹² See Julio Jurado First Witness Statement, para. 11.

¹¹³ English Transcript, 1467:1-1468:9.

¹¹⁴ See Luis Ortiz Expert Report, para. 65 (Constitutional Chamber precedents “*are binding erga omnes.*”); and English Transcript, 1479:17-1480:14.

¹¹⁵ See Luis Ortiz Expert Report, para. 69.

¹¹⁶ See Attorney General Opinion C-293-2013 (Exhibit to Ortiz Expert Report).

¹¹⁷ English Transcript, 1479:15-1480:3.

Witness Statement, Dr Jurado testified that “*the administrative-contentious case law characterizes the environmental viability as a preparatory act without inherent effects.*”¹¹⁸ This alternative interpretation, by Dr Jurado’s own admission, is contrary to the opinions of the Constitutional Chamber whose decisions are *erga omnes* and binding under Costa Rican law,¹¹⁹ as can be observed from the following exchange at the Hearing:

5 Q. Could you please go to Paragraph 13 of the
6 Second Report?
7 A. Yes.
8 Q. Would you please read it?
9 A. "In other words, obtaining the Environmental
10 Viability alone does not generate any legal effects
11 since this creates no rights in favor of the
12 individual, but it is part of the authorizing process,
13 and therefore, it can be catalogued as a proprietary
14 act without inherent effect."
15 Q. Could you please go now to 134 of your Second
16 Report. Could you please read it.
17 A. "In lieu of a declared subjective right, by
18 definition, the principle of *actos propios* could be
19 invoked, since we would not be before an act with
20 inherent effects."
21 Q. Would you agree with me that this paragraph is
22 contrary to what the Constitutional Chamber decided

1 based on your decision?
2 A. Yes, I stated this in my statement.
3 Q. It doesn't agree with the thesis of the
4 Constitutional Chamber when that body analyzed the
5 environment--EVs for the purpose of annulling
6 administrative acts.
7 A That's correct.

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¹¹⁸ See Julio Jurado Second Witness Statement, para. 21.

¹¹⁹ English Transcript, 1480:11-14

¹²⁰ English Transcript, 1477: 5-22 and 1478: 1-7.

168. In the circumstances, this Tribunal should reject Dr Jurado's views because they do not represent the prevailing precedent under Costa Rican law. Perhaps more importantly, however, Dr Jurado's views as to whether an EV is a preparatory or final act are not relevant to the issues to be decided in this arbitration, because, as discussed above, the Respondent does not dispute that: (i) construction permits *are* final acts which grant lasting rights to, and have lasting effects for, the Claimants; and (ii) the Municipality of Parrita granted numerous construction permits covering the Concession, Condominium, and Easements Sections of the Project.
169. As admitted by Dr Jurado himself in his Second Witness Statement and at the Hearing, the Constitutional Chamber of Costa Rica has binding precedent which makes it compulsory to carry out a final administrative proceeding to annul an EV¹²¹ – a procedure only necessary for those preparatory acts that have inherent effects, because to vitiate administrative actions that grant rights to their holders without initiating a formal proceeding to determine whether the alleged nullity is “*absolute and manifest*” violates due process under Costa Rican law. Dr Jurado and the Respondent's arguments to the contrary are specious and only seek to confuse the relevant issues before the Tribunal.
- d. All work has been indefinitely suspended on the project without the Respondent initiating a principal proceeding to nullify the construction permits or EVs**
170. The Claimants have demonstrated that, in order to nullify the rights granted by the EVs and construction permits, the Respondent was obliged under DR-CAFTA Article 10.5 to apply its law in good faith by initiating a final administrative action, including initiating a full hearing, to revoke the EVs and construction permits. As discussed further below, this is the *only* legal way under Costa Rican law vitiate the rights granted by EVs and construction

¹²¹ See Julio Jurado Second Witness Statement, para. 35.

permits at Las Olas, which cannot be paralyzed indefinitely by injunctions that are to last only for a limited time.

171. Both Parties' Costa Rican law experts agree that under Article 173 of the LGAP (as interpreted and confirmed by the Constitutional Chamber of Costa Rica), EVs may only be annulled *ex officio* by the corresponding administrative body where it declares that the EV's nullity is "*absolute, evident, and manifest.*"¹²² The same procedure applies to the annulment of construction permits issued by the Municipality.¹²³
172. Although the criteria and procedure for annulment of EVs and construction permits are not in dispute, Dr Jurado and Mr Ortiz differ slightly in the interpretation of the applicable rule of *when* a final administrative action must be initiated and/or completed after a precautionary measure is issued. Mr Ortiz has testified that a principal proceeding must follow no more than fifteen days after an injunction, whereas Dr Jurado has testified that a principal proceeding must follow "*after a reasonable term.*"
173. Again, the Parties' experts' disagreement over the time period in which a principal proceeding must be brought, however, is not material in this case. This is because under either expert's reading of the law, the Respondent has utterly failed both tests – the Respondent has sustained injunctions (themselves temporary measures) since 2011 (for nearly six years), a period of time that is far more than "*fifteen days*" and cannot ever be considered a "*reasonable term.*" By abusing these interim relief injunctions, the Respondent has completely failed to exercise its governmental authority in good faith and in accordance with the express laws of the State, and has therefore breached Article 10.5 of the DR-CAFTA.

¹²² See Attorney General Opinion C-293-2013 (December 10, 2013) by Julio Jurado; and Luis Ortiz Expert Report, para. 69.

¹²³ English Transcript, 1534:15-22.

e. **Mr Ortiz’s view is that a principal proceeeding must be initiated within fifteen days of an injunction**

174. Mr Ortiz, citing the jurisprudence of the Constitutional Chamber, has testified that: (i) all bodies of the public administration have the competence to issue an interim relief injunction, but such injunctions may last only fifteen days before a full administrative procedure is initiated; and (ii) if the competent authority does not comply with this procedure, the injunction must be reversed.¹²⁴ Mr Ortiz quotes Constitutional Chamber Resolution 2004-09232, which provides that:

*[...] the urgent nature of interim relief injunctions determines the exceptional possibility that government bodies have to order them even before an administrative proceeding has been initiated (ante causam). Nonetheless, the exercise of this power is conditioned – in light of its instrumentality – to the initiation of the principal proceeding within a relatively short period of time. Otherwise, the interim relief injunction becomes, inevitably, ineffective, based on the assumption that the beneficiary of the injunction has no interest and the need to avoid causing damages to the affected party.*¹²⁵

175. Mr Ortiz explained further that Constitutional Chamber Resolution 2004-09232 has since been expanded upon by the Constitutional Chamber in binding jurisprudence, defining the “*relatively short period of time*” as fifteen days:

*In this sense, it must be considered that, from the relation of articles 229, 2nd paragraph, of the General Public Administration Act, 26 of the Administrative Procedural Code and 243 of the Civil Procedural Code, the period of time that government bodies have to initiate the administrative proceeding once an interim relief injunction has been ordered is fifteen days.*¹²⁶

176. In Mr Ortiz’s view, it does not matter whether the substance of the injunction is child protection, telecommunications, competition, consumer law, or environmental law, as Constitutional Chamber opinions are binding on all

¹²⁴ See Luis Ortiz Expert Report, para. 155-56.

¹²⁵ See Luis Ortiz Expert Report, para. 31, quoting Constitutional Chamber Resolution 2004-09232.

¹²⁶ See Luis Ortiz Expert Report, para. 32, citing Constitutional Chamber Resolution 2009-03315; and Res. 20100-15094; 2010-015424; 2014-019433.

bodies of the public administration, regardless of the substantive law at issue.¹²⁷

f. Dr Jurado’s view is that an injunction cannot be indefinite, and a principal proceeding must be initiated within a reasonable term after the injunction

177. Like Mr Ortiz, Dr Jurado agrees that under the precautionary principle, bodies of the public administration may issue interim relief injunctions in appropriate circumstances. However, Dr Jurado takes the view that the fifteen-day period to commence a final action does not apply strictly to for cases involving environmental protection.¹²⁸ Indeed, it is both Dr Jurado’s testimony and the Respondent’s case that, because the Constitutional Chamber resolutions cited by Mr Ortiz are not “*environmental cases*,” the Constitutional Chamber jurisprudence regarding the fifteen-day rule does not apply.¹²⁹
178. The Claimants reject Dr Jurado and the Respondent’s baseless attempt to distinguish environmental cases from other types of interim relief injunctions. Neither Dr Jurado nor the Respondent has identified any specific precedent of the Constitutional Chamber to justify a different treatment of environmental injunctions from the general law of public administration or otherwise. In contrast, Dr Jurado has admitted that environmental agencies such as SETENA, the TAA, and SINAC are subject to the same rules and laws as other administrative bodies:

¹²⁷ English Transcript, 1321:11-21, and Luis Ortiz Expert Report, paras. 31-33, citing Constitutional Chamber Resolutions 2004-09232.

¹²⁸ English Transcript, 1446:17-1447:4; 1448:1-3.

¹²⁹ English Transcript, 1318:1-18.

10	Obviously, since we're speaking of Public	
11	Administration, it practices its competence granted by	
12	these laws under the general law of Public	
13	Administration. Like any other sector of Public	
14	Administration, all is subject to the principle of	
15	legality established by Article 11 in the Constitution	
16	which states that a State and Public Administration	
17	cannot go beyond what is allowed expressly by law.	130

179. Importantly, Dr Jurado agrees with Mr Ortiz that, regardless of whether a principal proceeding must be initiated within the fifteen-day strict rule set forth by the Constitutional Chamber, or within some other “*reasonable time*,”¹³¹ an interim relief injunction (even pertaining to environmental matters) *may not* be sustained indefinitely¹³² and *must* be “*limited in time*”:¹³³

19	This is a provisional measure. It is	
20	instrumental. It is not in and of itself a proceeding	
21	or--it's instrumental.	
22	And it is limited in time. I see here a	

¹³⁰ English Transcript, 1424:10-17.

¹³¹ English Transcript, 1408:13-1409:3; 1484:1-1488:8.

¹³² English Transcript, 1447: 17-20.

¹³³ English Transcript, 1445:19-22.

1 debate, and I see that there's some--well, there's no
2 established period with regard to administrative
3 Precautionary Measures. The Constitutional Court has
4 talked about the same period for Precautionary Measures
5 ante causam, which are placed upon the Claimant before
6 they file--well, then, this 15-day period is ante
7 causam and afterward.

8 So, the Precautionary Measure is temporary,
9 but it is to stop imminent harm to the environment,
10 because in Environmental Law, it would not--make no
11 sense to see if harm is already inflicted, because then
12 it would be--damage would already have been done by the
13 time this measure would be issued.

14 So, to be speedy, the administration issues
15 Precautionary Measures, and it has a certain period of
16 time to then launch the main proceeding. This is the
17 proceeding which may lead to the nullification of the
18 permits issued by the administration. It's not that
19 the administration has two different ways to go--or it
20 imposes the Precautionary Measures or nullifies the
21 permits; it doesn't have two ways to go.

22 To avoid the harm, it must act swiftly. And

1 to do this, it issues Precautionary Measures, then it
2 has a period of time, which we can debate whether it's
3 15 days or more to adopt this main proceeding, which
4 can nullify the permit or not. Then it has this
5 period.

6 What I want to say is that the 15-day
7 period--the constitutional case law has made an
8 exception for the environment, and it doesn't strictly
9 apply the 15-day period.

10 In other cases in which the TAA, based on my
11 experience as a prosecutor--because I've had to defend,

[..]

16 Constitutional Court has given longer periods of time.
17 And that's in its case law.
18 Why? Because sometimes the adoption of this
19 main proceeding requires study by the administration
20 with regard to the environment, which requires more
21 time and to know what it needs to do.
22 Now, the Court has been more flexible in this

1 regard. More flexible; it has not created a situation
2 where it's "sine die," no deadline. It's more
3 flexible, though.

4 And that's why my point here--and I
5 want--this--Mr. Ortiz mentioned this, that this is not
6 strictly applied. The Constitutional Court has not
7 applied the 15-day period strictly.

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180. Therefore, unsolicited and in direct examination, Dr Jurado agreed that a precautionary measure cannot be used *in lieu of* a principal proceeding, but that an agency “*has a certain period of time to then launch the main proceeding.*” Dr Jurado also admitted that there is a “*debate whether it’s 15 days or more to adopt this main proceeding,*” and that the Constitutional Court has “*not created a situation where it’s ‘sin a dia,’ no deadline.*” Dr Jurado, then admitted, in cross-examination, that a principal proceeding must be commenced within a reasonable term:

12 Q. Thank you. In your presentation earlier, you
13 also explained a thesis that is presented and you also
14 pointed out that you agreed that it is a--that
15 Mr. Ortiz mentioned that if there is a precautionary
16 measure, there is a constitutional duty to initiate a
17 process within 15 days, and that's a general thesis is
18 Costa Rican legislation; is this correct?

19 A. Correct, that is the jurisprudence of the
20 Constitutional Chamber.

21 Q. And because it is the former thinking of the
22 Constitutional Chamber, it has to be applied within the

¹³⁴ English Transcript, 1445:19-1447:11, and 1447:16- 1448:7.

1 Costa Rican legal system; is that correct?
2 A. Yes, that one as well as the thesis of that
3 chamber, about--not operating the 15 days.
4 Q. And that thesis is the 15 days do not--is not
5 applicable. What it--what it does determine is it has
6 to be a reasonable term; is that correct?
7 A. Yes, correct.
8 Q. And a reasonable term, you'll agree, needs to
9 have objective parameters in order to be established
10 and to respect the proportionality and reasonability
11 which is the guiding principle of Costa Rican
12 legislation; is that correct?
13 A. Yes, correct.

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181. Accordingly, the Respondent's own expert agrees that this "*reasonable term*" must have objective parameters. In other words, it is not up to the individual agency to determine whether it would be reasonable to sustain an injunction for more than six years – as multiple agencies of the Respondent have done in this case. Thus, it is again specious for the Respondent to argue (as it does in its Rejoinder) that governmental bodies such as the TAA are entitled to apply their injunctions indefinitely under its own law because "*an injunction can only be changed when the circumstances that originated it have changed.*"¹³⁶ This absurd result violates DR-CAFTA Article 10.5's minimum standard of treatment, even if permissible under Costa Rican law (which is denied, *see above*), because it creates a condition in which an injunction issued without a hearing can be sustained in perpetuity.

g. Under both Dr Jurado and Mr Ortiz's view, the Respondent's injunctions and refusal to start a principal proceeding cannot be based on a good faith application of its law

182. Despite the Respondent's continued efforts to hide the ball when it comes to these principles of Costa Rican law, it is clear that Dr Jurado is in substantial

¹³⁵ English Transcript, 1481:12-1482:13.

¹³⁶ *See* Respondent's Rejoinder, para. 651.

agreement with Mr Ortiz's testimony provided in his Expert Report. Both agree that Costa Rican law requires that a principal proceeding be initiated within a reasonable time after an injunction is issued.

183. In addition – and this is crucially important – Dr Jurado and Mr Ortiz are in agreement that this principal proceeding must be concluded within 30 days (for an action under the TAA) or two months (under LGAP), although this deadline may be extended in “*exceptional cases*”:¹³⁷

3 Q. And so, would you agree with me that
4 promptness is established here with regard to the
5 administrative environmental tribunal?
6 A. Correct.
7 Q. Now, the norms that you said were the main
8 instruments for the environment refer to the general
9 law on public administration; do you agree?
10 A. Yes.
11 Q. And there is a deadline of two months
12 established to resolve any proceeding.
13 So, all the laws, all environmental laws that
14 you mentioned as the principle ones, refer to a
15 procedural law that establishes a period of two months
16 to resolve disputes in an administrative proceeding; is
17 that correct?
18 A. Yes.
19 Q. Now, the law that regulates the TAA reduces
20 that to 30 days; is that correct?
21 A. Yes.
22 Q. Correct?

¹³⁷ English Transcript, 1487:3-1488:11.

1 A. Yes, yes. It's referring to the procedure.

2 Q. What you just read in Article 110 said in

3 exceptional cases it could be extended.

4 So, we have the environmental norms establish

5 the necessary--the fact that there must be--this must

6 be swift, this must be prompt, that it must be of the

7 Court's own--the Tribunal's own motion, it must be

8 within a certain period of time, and this refers to a

9 maximum period of two months.

10 Do you agree with me?

11 A. Yes, sir.

184. Thus, whether the time period is 30 days or two months, both Mr Ortiz and Dr Jurado agree that the principal proceeding must be concluded within a fixed time:

- a. As a matter of TAA procedure, the TAA is obliged to initiate a principal administrative proceeding after investigating and gathering evidence, where the Parties will be summoned to an oral hearing. This is subject to the ordinary administrative procedure of the LGAP under Article 11 of Decree 34136.¹³⁸ After the conclusion of the oral hearing, the TAA has **thirty days** to issue a final ruling under Article 110 of the Organic Law of the Environment, though in special cases, an extension of thirty more days may be ordered.¹³⁹
- b. For all other administrative procedures, Article 261 of the LGAP requires public bodies to finalize ordinary administrative procedures no more than two months after the complaint was filed.

185. In this case, no ordinary procedure was filed – if one had been filed, it would have been subject to the above strict time limits and procedures. The Respondent’s refusal to initiate a principal proceeding, which has strict time limits for completion, coupled with the Respondent’s imposition of injunctions

¹³⁸ See Executive Decree No. 34136 (Exhibit to Luis Ortiz Expert Report).

¹³⁹ See Luis Ortiz Expert Report, para. 127, citing Article 110 of the Organic Law on the Environment.

lasting in perpetuity cannot be a good faith application of Costa Rican law vis-à-vis the Claimants and violates Article 10.5 of the DR-CAFTA.¹⁴⁰

2. The Respondent's Illegal and Indefinite Injunctions Violate Article 10.5's Minimum Standard of Treatment

186. As next discussed, it is not in dispute that the Respondent has suspended indefinitely all work on the Las Olas Project, which includes paralyzing the construction permits and the EVs without initiating *any* final administrative action to nullify the permits.
187. To summarize, these interim actions having the effect of enjoining the Project include:
- a. the SINAC Notification¹⁴¹ issued on February 4, 2011, stating that the developers could not continue with any activity related to the development of the project, on the basis of the precautionary principle and the Allegedly Forged Document. This notification continues in effect to this day;
 - b. the Parrita Municipal Council Accord No. AC-03-2362-2011 issued on March 8, 2011, agreeing with the instruction to halt any development on the Las Olas Condominium project, based on the complaints discussed at a meeting between Marvin Mora Chinchilla, Nelson Masis Campos, and Steve Allen Bucelato;¹⁴²
 - c. the SETENA resolution dated April 13, 2011,¹⁴³ received by the Municipality on April 26, 2011,¹⁴⁴ requesting the Municipality to enjoin the Las Olas Project on the basis of the Allegedly Forged Document put

¹⁴⁰ Alternatively, this absurd application of the law clearly violates Article 10.5's minimum standard of treatment, even if somehow permissible under Costa Rican law.

¹⁴¹ See Exhibit C-112.

¹⁴² See Exhibit R-75 and Exhibit C-284 – DAMP-159-2012, letter from Jorge Briceño Vega.

¹⁴³ See Exhibit C-122.

¹⁴⁴ See Exhibit R-85.

on the file by Mr Bucelato.¹⁴⁵ This SETENA Resolution ordered that any work or activity initiated on the Las Olas Project be stopped and that no construction permits be issued until the injunction is lifted. By a further resolution, SETENA lifted its injunction on November 15, 2011, upon determination that: (i) there was no evidence that the Claimants submitted the Allegedly Forged Document; (ii) SETENA had not in any event relied on the Allegedly Forged Document in issuing the EV for the Condominium Section; and (iii) SETENA could rely on other supporting documentation filed to reconfirm the Condominium EV;¹⁴⁶

- d. the TAA Injunction,¹⁴⁷ which states in its precatory paragraph that it was issued on April 13, 2011, but which the Respondent's Rejoinder states was effective on July 17, 2012.¹⁴⁸ (Importantly, the TAA injunction states explicitly that it is not effective until served on the Claimants.) The TAA injunction relied upon, *inter alia*, the recycled criminal complaint filed by Mr Bucelato and the precautionary principle. The Claimants' Memorial explained that the Claimants never received this notification.¹⁴⁹ This injunction continues to this day.

- e. the Municipality's Shutdown Notice of May 11, 2011,¹⁵⁰ instructing the Claimants to discontinue all work on the site based on the SETENA Resolution of April 13, 2011. The Municipal Council received a request from Mr Aven to lift the Shutdown Notice on December 1, 2011 (via INVU) (considering the SETENA Resolution suspending works had been lifted on November 15, 2011).¹⁵¹ Based on Mr Aven's request, on November 6, 2012 the Municipal Council requested that this Shutdown

¹⁴⁵ See Claimants' Memorial, para. 151-53.

¹⁴⁶ See Exhibit C-144.

¹⁴⁷ See Exhibit C-121.

¹⁴⁸ See Respondent's Rejoinder, para. 653.

¹⁴⁹ See Claimants' Memorial, para. 155.

¹⁵⁰ See Exhibit C-125.

¹⁵¹ See Exhibit R-129.

Notice be revoked.¹⁵² Nevertheless, the Municipality failed to act on this request and continued to enforce injunctions against the Las Olas Project;

- f. the Criminal Court Order issued on January 26, 2012 requiring the Municipality not to issue construction permits for plots P6-79209-F-000 and P6-79496-F-000. The Criminal Order does not explicitly specify the grounds upon which it is issued. The Municipality did not receive this order until November 22, 2012.¹⁵³ It appears that this order remains effective to this day, based on recommendations of the Municipal Council to continue the indefinite suspension of work at Las Olas on June 12, 2013 and October 1, 2013 based on the criminal injunctions.¹⁵⁴

188. It is important to mention that none of these acts enjoining work on the Project reference whether the act nullifies or suspends the construction permits or EVs – rather, they only specify that all work on the Las Olas Project shall stop – which may apply generally to both the construction permits and EVs issued to the Claimants.

189. Just as in *Tecmed v Mexico*, where the Tribunal held that the Mexico’s failure to maintain or renew a permit necessary for the Claimants’ operation of its landfill frustrated the claimants’ legitimate expectation to operate the landfill,¹⁵⁵ so too here should the Tribunal conclude that the Respondent’s

¹⁵² See Exhibit R-129.

¹⁵³ See Exhibit R-134. The Respondent asserts that on September 26, 2013, “the criminal court of Quepos ordered that its injunction remain in effect until the issue is resolved by a final ruling of a court of law,” but the exhibit offered does not support this position. See Respondent’s Rejoinder, para. 654.

¹⁵⁴ See Exhibit R-390, Interdisciplinary Commission recommendations to continue suspension until criminal injunction revoked, June 12, 2013 (including Ingrid Jimenez Diaz); and Exhibit R-391, letter from ZMT legal department attorney Ingrid Jimenez Diaz, October 1, 2013 (same).

¹⁵⁵ See CLA-54, *TECMED S.A. v. United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (May 29, 2003), ¶¶ 88, 122, 171-174, 254 (“INE unilaterally transformed a previous administrative act, which, as such, was presumed to be legitimate, had immediate effects and could only be interpreted in good faith as having accepted Cytrar’s petition to be the transferee of the existing permits for the operation of the Landfill [...] it cannot be ignored, in light of the good faith principle (Articles 18 and 26 of the Vienna Convention), that the conduct of the Respondent between the date of execution of the Agreement (in view of the Respondent’s determination to ratify it subsequently) and the effective date thereof, is incompatible with the imperative rules deriving from Article 4(1) of the Agreement as to fair and equitable treatment.

[...]

agencies frustrated the Claimants' legitimate expectations in disregarding already issued EVs and construction permits from SETENA and the Parrita Municipality – instead paralyzing the project through the above-described illegal interim injunctions for nearly six years.

190. Likewise, just as Venezuela's declaration of the "absolute nullity" of a construction permit in *Gold Reserve* (under the pretext of environmental protection) was contradicted by earlier agency determinations that no illegal mining had taken place – violating the customary international law minimum standard of treatment,¹⁵⁶ so too does the Respondent's illegal enjoining of the project in contradiction with duly issued Claimants EVs, construction permits, and prior agency determinations breach of the DR-CAFTA Article 10.5's fair and equitable treatment provision.

INE's described behavior frustrated Cytrar's fair expectations upon which Cytrar's actions were based and upon the basis of which the Claimant's investment was made, or negatively affected the generation of clear guidelines that would allow the Claimant or Cytrar to direct its actions or behavior to prevent the non-renewal of the Permit, or weakened its position to enforce rights or explore ways to maintain the Permit. [...] Despite Cytrar's good faith expectation that the Permit's total or partial renewal would be granted to maintain Cytrar's operation of the Landfill effective until the relocation to a new site had been completed, INE did not consider Cytrar's proposals in that regard and not only did it deny the renewal of the Permit although the relocation had not yet taken place, but it also did so in the understanding that this would lead Cytrar to relocate. [...] The Respondent's behavior...amounts, in itself, to a violation of the duty to accord fair and equitable treatment to the Claimant's investment.") (emphases added).

¹⁵⁶ See CLA-115, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶¶ 592-601 ("MinAmb declared the 'absolute nullity' of the Construction Permit issued on 27 March 2007 and as a result revoked the same 'for reasons of public order.' The Revocation Order refers initially to the 'fundamental duty of the Venezuelan State to guarantee the protection of the environment...' [...] The reference in the Revocation Order to "uncontrolled mining activities" being conducted in the area by a large number of miners is contradicted by the Inspection Report issued by MIBAM one month before the date of the Revocation Order. [...] **The Tribunal finds that Respondent's conduct did not accord with the obligations required by the FET standard in the BIT.** Respondent issued the Revocation Order without allowing Claimant an opportunity to be heard [...] The absence of any recourse by Claimant against the Revocation Order that may have been available under Venezuelan law, as alleged by Respondent, does not change this conclusion. **The fact that Claimant chose to pursue the present arbitration, rather than any alternative domestic remedies does not exculpate Respondent's conduct.**") (emphases added)

a. The Respondent’s own civil servant, Jorge Antonio Briceño Vega, confirmed that the injunctions were not based on a good-faith application of Costa Rican law

191. As previously stated, the Respondent has engaged in a comprehensive effort to undermine specific official decisions of its own agencies where those decisions do not serve its case. This maxim could not be more true than in the case of the testimony offered Mr Briceño, the Respondent’s own civil servant.
192. Mr Briceño was the Internal Auditor of the Municipality of Parrita at the time of the Respondent’s unlawful actions *vis-à-vis* the Claimants’ investment. At the hearing Mr Briceño was shown to be a careful and knowledgeable official, who took his professional role as auditor and the responsibilities of his public office very seriously. And it is obvious that he simply does not have, nor has he ever had, a horse in this race.
193. In his witness statement, Mr Briceño explained that the Municipal Council appointed him to perform the general functions of the General Comptrollership of the Republic.¹⁵⁷ As part of his official role as internal auditor, Mr Briceño carried out an investigation in 2012 as to whether the Municipality’s stoppage of the Las Olas Project had been carried out in conformance with Costa Rican law.¹⁵⁸
194. After reviewing the Municipality file, Mr Briceño had deep-rooted, legitimate concerns regarding the legality of the Municipality’s shutdown of the Las Olas Project. Mr Briceño wrote in DAMP-159-2012 that “*the only grounds justifying Municipal Council Accord No. AC-03-2362-2011 was a correspondence*” consisting of a single letter (DZMT-026-2011) dated March 7, 2011, based upon which the Municipality decided to shut down all work at the Las Olas Project.¹⁵⁹

¹⁵⁷ See Jorge Briceño Witness Statement paras. 2-16.

¹⁵⁸ See Jorge Briceño Witness Statement para. 20.

¹⁵⁹ See Jorge Briceño Witness Statement para. 32 (a).

195. Mr Briceño explains that the March 7, 2011 letter memorialized a meeting involving Mr Bucelato, Mr Nelson Masis Campos (the Municipal Councillor at the time), Mr Marvin Mora Chinchilla (of the Maritime Terrestrial Zone), Mr Alfonso Jiménez (a lawyer), and Mr Franklin Carmiol (an environmental consultant and neighbor of Las Olas). The substance of the March 7, 2011 letter (written by Mr Marvin Mora Chinchilla) consisted of only two paragraphs, providing:

On this day, at 10:30 a.m., in the meeting room, together with Mr Nelson Masis Campos, we hosted Mr Steve Bucelato, Mr Alfonso Jimenez and Mr Franklin Carmiol, who explained a series of situations concerning the Las Olas Development Project, which is located in the Esterillos Oeste sector. The conversation dealt with different aspects, all of them to the effect that said project should not be continued and that the Municipality should cancel all the permits granted to this date and cease to issue any more authorisations of this type.

During the conversation a series of documents was produced, which were provided to us during that act, and I am releasing those acts so that they may become known by the Municipal Council, as was indicated to me by Mr Masis Campos.

196. Mr Briceño, in his official role as internal auditor, was alarmed at the irregular nature of the injunction made as a result of this meeting.¹⁶⁰ Upon interrogating further the Municipal Council Accord No. AC-03-2362-2011 and the Municipality's subsequent actions, Mr Briceño became doubly concerned about the Municipality's utter lack of basis to suspend the Project. These concerns included *inter alia* that: (1) the Municipality had failed to establish an environmental violation through the proper procedure; (2) the Municipality had failed to determine the authenticity of photographs which formed the basis of its Accord; (3) the selective nature of the Municipality's decisions to ignore certain resolutions of other agencies, but to give effect to others (*e.g.*, the failure to give effect to the SETENA Resolution No. 2850-2011, dated November 15, 2011, which ordered the annulment of the precautionary measures); (4) the failure of the Municipality to give the Claimants the

¹⁶⁰ Mr Briceño was alarmed at this irregularity even without knowing Mr Bucelato's concerted campaign against the Las Olas project in other agencies of the Respondent.

opportunity to be heard regarding the shutdown decision, or to preserve the Claimants' basic due process rights.¹⁶¹

197. As a result of Mr Briceño's review of the Municipality's actions, Mr Briceño made three recommendations: (1) to consider the annulment of Municipal Council Accord AC-03-2362-2011, which shut down the Las Olas Project, "since it was not made with the due legal basis"; (2) to make known and apply the SETENA Resolution No. 2850-2011, dated November 15, 2011; and (3) to create an interdisciplinary group to study the issue.¹⁶² Only the third recommendation was adopted, and no further action was taken to address Mr Briceño's assessments.
198. Mr Briceño also had legitimate concerns regarding Ms Vargas's filing with the Administrative Environmental Court (TAA) (File No. 343-10-01-TAA). Mr Briceño was concerned that Ms Vargas's complaint had not been instigated by the Municipality itself, and Mr Briceño feared that the Municipality might be found to be economically and criminally liable for damages under LGAP Article 190. Accordingly, Mr Briceño warned the Municipal Council regarding the risks of Ms Vargas's filing.¹⁶³
199. Mr Briceño's findings were the *contemporaneous* finding of an *independent* government-appointed auditor. Mr Briceño found that the Respondent failed to apply its laws in good faith by closing down Las Olas on the basis of little more than supposition, and without regard to the Claimants' due process rights. Unlike the Respondent's entire defense, Mr Briceño's conclusions are not the *post-hoc* evidence of the official whose conduct he rightfully impugned, or of a senior official such as the country's sitting Attorney General, provided exclusively for the purposes of defeating a DR-CAFTA claim. Mr Briceño's statement was presented to the Tribunal because it provides the rarest and most

¹⁶¹ See Jorge Briceño Witness Statement para. 32 (f).

¹⁶² See Jorge Briceño Witness Statement para. 33, and Exhibit C-284

¹⁶³ LGAP Article 190 provides that the public administration can be economically liable for damages due to its legitimate or illegitimate operation, and Jorge Briceño Witness Statement para. 30 (a).

prized form of evidence: that of an objective and professionally knowledgeable observer of contemporaneous events.

200. Unsurprisingly, the Respondent has nevertheless engaged in a futile (and unsavoury) attempt to undermine Mr Briceño's character or to deem his findings irrelevant. As demonstrated by Mr Briceño's testimony at the Hearing, these personal and professional attacks are of no use to the Respondent's case.

b. The Respondent's personal attacks against Mr Briceño are baseless

201. The unsuccessful personal attacks of the Respondent against Mr Briceño's character include: (1) erroneously claiming that Mr Briceño resigned from the Municipality because he received a pension whilst employed as internal auditor; and (2) accusing Mr Briceño of involvement in politics whilst employed as internal auditor. Both accusations are blatant mischaracterizations of the law and the facts, and merely serve as evidence of the Respondent's grasping at straws.

202. First, Mr Briceño explained at the Hearing that, at the time he became internal auditor, there was no prohibition against him receiving a pension. However, a change of jurisprudence from the Constitutional Chamber created a prohibition in 2011. Mr Briceño continued to receive his pension erroneously under the 2010 law in good faith. Once the error was realised, Mr Briceño and the National Commission of Pensions reached an agreement for Mr Briceño to reimburse the State as a result of the error.

20	Q. How do you respond to the allegations that you
21	received a pension contrary to provisions of law?
22	A. Well, with regard to that, I should say--I

7 Rather, I started working at the municipality
8 until the Administrative Tribunal of Costa Rica ruled
9 in September 2010--or, excuse me, July. And then in
10 October it notified the fact that my appointment was
11 going through.

12 In September in 2010, the Constitutional Court
13 of Costa Rica, through 1528, declared that the
14 articles on the pensions were unconstitutional. So, I
15 did not have to renounce my pension in order to be the
16 internal auditor. It is not directly under the
17 central government; rather, it's a municipality. So,
18 I did not waive my pension.

19 Then in 2011, in August, the Tribunal--and I
20 think it was 1530--issued another opinion referring to
21 the prior opinion, and it invalidated it. It was then
22 some 12 months later. So, when I went into my job and

1 started working for the municipality, I received these
2 two remunerations, but in good faith, but in keeping
3 with the first decision of the Constitutional Court.

[...]

16 Subsequently, in February 2014--I think it was
17 ten or 12 months later--the Commission on
18 Pensions--the National Commission on Pensions informed
19 me that there had been a complaint with regard to the
20 fact that I had two remunerations and that we had to
21 come to some kind of settlement or agreement.

22 And it's what I told you, that in keeping with

1 | the Constitutional Court's ruling, I had acted in good
2 | faith. And, so--but I said we could come to an
3 | agreement on this.
4 | On 26 February of that year, 2014, we drew up
5 | a document, which is called a compensation act or
6 | document, and it included all the calculations of what
7 | I received from the Pension Commission. And this was
8 | the debt that I owed them, and so I am still paying
9 | them now.

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203. In a similar fashion, the Respondent's accusation that Mr Briceño engaged in "*political*" activity that might compromise his testimony regarding the Respondent's misconduct to this Tribunal is both inaccurate and irrelevant. First, as a general matter, the Respondent's accusation makes no sense – as Mr Briceño himself explained, he was never accused of impartiality whilst serving as Parrita's internal auditor. On the contrary, he received high praise and accolades:

22 | Q. And, finally, Mr. Briceño, at the time you

1 | served as auditor, how did the municipality view your
2 | work?

3 | A. In that regard, I always got along with all
4 | the employees because my job--although it's a job of
5 | oversight and is under the internal control law of our
6 | country, and you have to do oversight over assets, the
7 | universe of activities also of the municipality, in
8 | order to ensure taxpayers that their tax dollars are
9 | being used correctly.

[...]

¹⁶⁴English Transcript, 2056:20-2059:9.

15 | And so, you're not the police. But you need
16 | to be very independent and be very sure of what you're
17 | doing.

18 | By 2012, during the time I was there, I only
19 | received one evaluation because there was a new mayor
20 | that came in in February 2011. And, so, he evaluated
21 | me in July 2012.

22 | And in that evaluation of the nine

1 | points--well, each point could be 1 to 5. So, the
2 | maximum score could be 45, and I have 44.48. And
3 | my--I was--got an excellent assessment. And, so, all
4 | circumstances are explained with regard to me. They
5 | never spoke badly about me. The attorneys can look at
6 | that.

7 | Well, there are only good things. And
8 | sometimes you don't expect so much from people. But I
9 | have to say that the score from the mayor, who was the
10 | mayor then and is now the mayor, said that I did
11 | excellent work.

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204. Second, the Respondent's claim that "*Mr Briceño's performance as an auditor was sandwiched by his involvement in politics*"¹⁶⁶ is hyperbolic and grossly mischaracterizes facts. The Respondent admits that Mr Briceño was only "*nominated*" as a candidate for deputy prosecutor in October 2012 (which was never accepted),¹⁶⁷ yet nevertheless devotes twelve lengthy paragraphs attempting to besmirch Mr Briceño's independence as auditor. Mr Briceño explained at the Hearing that there is absolutely nothing to the Respondent's *ad hominem* attacks:

¹⁶⁵ English Transcript, 2061:22-2063:11.

¹⁶⁶ See Respondent's Additional Submission January 17, 2017, at para. 24.

¹⁶⁷ See Respondent's Additional Submission January 17, 2017, at para. 27.

12 Q. Thank you.

13 And what do you say about the suggestions that
14 you were not independent or the basis of your
15 involvement in local politics?

16 A. Well, with regard to local political life, if
17 this is referring to before 2010, I participated in
18 political parties--well, they have to name
19 representatives for what is called the electoral
20 cantonal committee. And that it depends on the
21 Supreme Electoral Tribunal, which controls the voting
22 and electoral process.

1 And that electoral cantonal council has
2 meetings, and there are representatives from all
3 political parties. And they come to agreements.

4 And we call these packages, packets, or tulas
5 (in Spanish), and these are the votes or the ballot
6 papers that Costa Ricans are going to use, and then
7 they need to also be distributed to the different
8 balloting places, and that is under the Supreme
9 Electoral Tribunal.

10 Then that council, once elections have taken
11 place, then they, again, go to the different balloting
12 places, and they collect the ballot papers, and a
13 truck goes and picks them up.

14 So, I participated in several elections for
15 different parties, even though I wasn't a member of
16 the party or a follower of the party.

17 I'm not sure of the date, but in 2012 another
18 party asked me to participate on a district committee.
19 These district committees--well, they organize parties
20 in Costa Rica. Political parties have district
21 elections. Then there are cantonal elections, and
22 then there are provincial elections, and then there is

1 a national assembly to choose their representatives
2 and candidates for the presidency.
3 And on that opportunity, they invited me. And
4 since in my job/my profession I'm an auditor, and I
5 carry out oversight in my job, they asked me to do
6 this oversight.
7 I told them I couldn't participate because I
8 was an auditor. They said, "Well, you can be an
9 alternate prosecutor."
10 And so, I said, "Well, I'll find out whether I
11 can be an alternate prosecutor."
12 And so, they did do their research. And,
13 finally, the Tribunal, because of the structure of the
14 party, did not accept my appointment as an alternate
15 prosecutor because this post didn't exist.
16 They invited me into another meeting, but I
17 didn't actively participate, nor was I spreading
18 propaganda or involved in voting for them.
19 So, that's--well, if that's the accusation
20 with regard to why I'm not independent--well, this is
21 my explanation, and you can assess my response.

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c. The Respondent's attempts to minimize Mr Briceño's evidence are either wrong or miss the point

205. The Respondent argues that Mr Briceño's findings have no bearing on Costa Rica's liability under the DR-CAFTA because he is allegedly just a low-ranking employee whose recommendations are not binding and have no bearing on the rights of third parties.¹⁶⁹ This assertion is wrong. Mr Briceño's recommendations do have legal effects under Costa Rican law, and Mr Briceño's testimony shows the contemporaneous observations of one of the Respondent's own employees, demonstrating its maladministration.

206. Regarding Mr Briceño's recommendations, Article 39 of the Internal Control Act establishes administrative liabilities for Municipality employees who unjustifiably decide against implementing an internal auditor's

¹⁶⁸ English Transcript, 2059:13-2061:21.

¹⁶⁹ See Respondent's Additional Submission January 17, 2017, at paras. 83-99.

recommendations. Thus, Mr Briceño was entitled to make recommendations to protect the Municipality from civil and criminal liability, and to ensure that Municipal decisions were taken in accordance with the law.¹⁷⁰ The Claimants do not allege that the Respondent has breached Article 39 of the Internal Control Act – nor do the Claimants submit that a breach of Article 39 is tantamount to a breach of the DR-CAFTA. Rather, Mr Briceño’s evidence demonstrates that t one of the Respondent’s own agents had raised the issue of the Respondent’s illegal conduct and deprivation of the Claimants’ rights *at the time the events occurred*, within the scope of his official duties.

207. The Respondent’s response to Mr Briceño’s evidence also demonstrates the extent to which the Respondent has painted a false narrative in this arbitration – seeking to deflect its own breaches of the DR-CAFTA by attempting to paint both foreign investors and its own government agents as scoundrels. Moreover, contrary to the Respondent’s false narrative, Mr Briceño’s testimony fills the gaping hole in the evidentiary record of missing fact witnesses from Costa Rican municipal or government agencies left open by the Respondent, including officials from the Municipality, SINAC, INTA, and SETENA.

B. The Prosecutor’s Office Failed the Claimants

208. The conduct of Environmental Prosecutor Luis Gerardo Martínez Zúñiga in regard to the criminal investigation, prosecution, and trial of Mr Aven epitomizes arbitrary and discriminatory treatment in every respect. This has been consistently borne out through the Claimants’ submissions and the documentary evidence, and it became even clearer from Mr Martínez’s own statements during Day 4 of the Hearing. Indeed, Mr Martínez’s conduct in regard to Mr Aven goes far beyond incompetence, and demonstrates such a level of disregard for the evidence, the law, and professional standards, that the

¹⁷⁰ Despite these clear duties, the Respondent argues that Mr Briceño overstepped his bounds to become a *de facto* co-administrator. There is absolutely no evidence in the record that indicates that his actions *replaced* the actions of an administrative body such as the Municipal Council – which is how the Respondent itself defines “*co-administration*.” See the Respondent’s Additional Submission January 2017, at paras. 18-19.

only conclusion that can be drawn is that Mr Martínez intentionally targeted Mr Aven due to reasons that had nothing to do with actual criminal culpability. As discussed in further detail below, Mr Martínez's arbitrary and discriminatory misconduct in the criminal proceedings against Mr Aven includes, but is not limited, to the following:

- a. Failing to request highly relevant documentary records concerning the Las Olas project in his Order of Seizure, which documents made it impossible for Mr Martínez to carry his burden of proving criminal intent;
- b. Ignoring highly relevant environmental agency findings and permits that unequivocally demonstrated that Mr Aven did not act with the requisite criminal intent;
- c. Premising his investigation and decision to file charges on the unsupported allegations of a biased and hostile individual who had repeatedly filed civil actions against the Las Olas Project, each of which were rejected prior to the filing of Mr Martínez's criminal indictment against Mr Aven;
- d. Failing to investigate the Alleged Forged Document, and ignoring the highly suspicious submission of the document by Mr Bucelato – the very individual who filed a criminal complaint (and numerous rejected civil complaints) against Mr Aven;
- e. Ignoring the works of the Municipality of Parrita on the Las Olas site, despite documentary evidence indicating that such works were intended to dry the supposed existing wetland;
- f. Commissioning a soils report from INTA that found no evidence of wetlands soils on the Las Olas site, then arbitrarily deciding to ignore the report's findings, which were detrimental to his criminal case;

- g. Violating the Guidelines for the Prosecutorial Investigation of Environmental Crimes by ignoring evidence that made it impossible to prove the requisite three elements comprising the definition of a wetland;
 - h. Improperly charging Mr Aven under a more serious criminal statute based on alleged actions that took place prior to the statute's enactment, which led to the arbitrary and unnecessary imposition of an INTERPOL Red Notice based on allegations that Mr Aven committed a crime likely to result in a fine, even under the more serious statute that Mr Martínez improperly invoked.
209. Based on the foregoing, it is abundantly clear that Mr Martínez's investigation and decision to file criminal charges were utterly devoid of all objectivity, and demonstrated a serious disregard for the law and the facts. His conduct unquestionably rises to the level of arbitrary and discriminatory treatment under the DR-CAFTA. As an Environmental Prosecutor he is required to act in a manner consistent with the protections afforded by the DR-CAFTA, as expressly indicated in the prosecutorial guidelines.¹⁷¹ He is also required to comply with the principle of objectivity pursuant to Sections 63 and 180 of the Costa Rican Criminal Procedure. Prosecutor Martínez's failure to comply with the principles of objectivity is strong evidence of the Respondent's violation of Article 10.5's prohibition against arbitrariness and breach of the minimum standard of treatment.
210. Like in *Metalclad*, where a NAFTA tribunal determined that Mexico breached the minimum standard of treatment when a regional governor issued an arbitrary decree declaring (without basis) that the claimant's investment was located in a cactus preserve and arbitrarily denied Metalclad's application for a construction permit,¹⁷² Prosecutor Martínez breached the Article 10.5 fair and

¹⁷¹ See Exhibit C-297.

¹⁷² See CLA-42, *Metalclad Corporation v Mexico*, Award, ICSID Case No. ARB(AF)/97/1, (2001), at paras. 59, 96 (“On September 23, 1997, three days before the expiry of his term, the Governor issued an Ecological Decree declaring a Natural Area for the protection of rare cactus. The Natural Area encompasses the area of the landfill”); para. 90 (“On December 5, 1995, thirteen months after the submission of Metalclad's application – during which

equitable treatment standard's prohibition against arbitrariness in making a *manifestly arbitrary decision* to pursue a criminal prosecution of Mr Aven, in contravention of applicable law and his prosecutorial guidelines for the alleged "*draining and filling of a wetland*." Just as the respondent in *Metalclad* lacked any basis to deny the construction permit under Mexican law, so too did Prosecutor Martinez lack any basis to prosecute a crime premised on the assumption that a wetland at Las Olas existed (let alone that it had been drained and filled), where the administrative agency actually competent to make a wetlands determination (SINAC) had *never* made any final determination regarding wetlands.

211. As further discussed below, Prosecutor Martinez's actions fell drastically short of upholding these standards, and resulted in serious harm to Mr Aven on a financial and reputational level, for which compensation is required.

1. **The Criminal Investigation**

a. **Criminal Complaints**

212. Mr Martínez's arbitrary behavior can be seen as early as the filing of the original criminal complaint by Mr Bucelato. As stated in Mr Martínez's First Witness Statement, "*in criminal matters, the reasons or identity of the complainant are not relevant to the investigation.*"¹⁷³ It is clear that Mr Martínez acted consistently with this flawed premise by commencing a criminal investigation based on Mr Bucelato's complaint.¹⁷⁴ Indeed, had he considered the fact that Mr Bucelato had already filed multiple administrative complaints alleging the existence of wetlands on the property,¹⁷⁵ which were

time Metalclad continued its open and obvious investment activity – the Municipality denied Metalclad's application for a construction permit. The denial was issued well after construction was virtually complete and immediately following the announcement of the Convenio providing for the operation of the landfill."); para. 101 ("The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.")

¹⁷³ See Luis Martínez First Witness Statement, para. 16.

¹⁷⁴ See Exhibit C-110.

¹⁷⁵ See Exhibit C-75, and C-119.

then rejected, Mr Martínez would have justifiably viewed Mr Bucelato's complaint with the high degree of skepticism it deserved.

213. Nonetheless, he chose to proceed in launching his investigation in light of his opinion that the reasons for Mr Bucelato's complaint were apparently irrelevant. When pressed on this issue at the Hearing Mr Martínez made one of many concessions relating to inaccurate assertions in his witness statement, as seen in the following exchange:¹⁷⁶

5 Q. So, that would mean that if it were a personal
6 vendetta, if you thought there were a personal
7 vendetta underlying the complaint, that you might
8 treat the complaint differently; is that right?
9 A. Yes. If it is apparent that it is a question
10 of personal vendetta, we would have to act much more
11 cautiously in order to try to determine if those facts
12 are true or not.

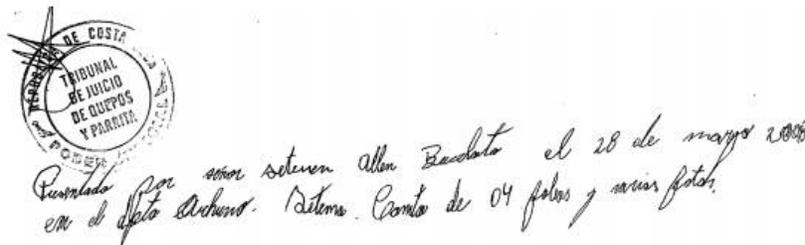
214. If Mr Martínez had made any effort to look into the history concerning Mr Bucelato's repeated and harassing requests, he would have recognized that Mr Bucelato had a personal vendetta against both the Project and Mr Aven individually, which should have cast serious doubt on the criminal investigation at the outset. Moreover, even assuming Mr Bucelato's motivations were sincere – which is wholly unsupported by the record – the fact remains that Mr Bucelato's previous administrative complaint was *rejected* in SETENA Report ASA-1216 dated August 19, 2010¹⁷⁷ – roughly six months before Mr Bucelato filed the criminal complaint.
215. In other words, before commencing his investigation, Mr Martínez knew that SETENA's opinion was that the existence of wetlands on the Property could

¹⁷⁶English Transcript, 1022:5-12.

¹⁷⁷See Exhibit C-79.

not be proven in an administrative proceeding. He also knew that, as a criminal prosecutor, he would be subject to the higher burden of proof of beyond a reasonable doubt. As discussed further below, the doubt in the criminal case against Mr Aven was overwhelming.

216. In addition to Mr Bucelato's allegations regarding violations of wetlands and forestry laws, his complaint made reference to SINAC Report 67389RNVS-2008¹⁷⁸ – the Allegedly Forged Document. According to Mr Martínez, he was required to investigate the forgery allegation given that forgery is a crime of public action. And while he now concedes that his investigation revealed no evidence that Mr Aven had anything to do with the alleged forgery,¹⁷⁹ the investigation should have also revealed that Mr Bucelato's entire criminal complaint lacked credibility and should have been wholly disregarded.
217. At the Hearing, Mr Martínez was presented with a copy of the Allegedly Forged Document as it was submitted to SETENA, including page 9 of the document, which is a handwritten note, possibly from Mr Bucelato himself, dated March 28, 2008 – one day after the document was apparently issued, as shown below:



TRIBUNAL DE JUICIO DE QUEPOS Y PARRITA
COSTA RICA

Presentado por señor setenera Allan Bucelato el 28 de marzo 2008 en el Seto Archivos. Sistema. Conto de 04 folios y varias fotos.

218. In other words, page 9 shows that it was Mr Bucelato that submitted the document to SETENA the day after it was created. This clearly raises a multitude of questions and suspicions, not least of which is how Mr Bucelato could have come across this document one day after it was created and why he would have submitted it to SETENA. Mr Martínez's answer to these questions,

¹⁷⁸ See Exhibit C-110.

¹⁷⁹ See Luis Martínez First Witness Statement, para. 38.

as stated in his testimony, was that “*Mr Bucelato had no interest in using a falsified document*” because the Alleged Forged Document was used “*to obtain a benefit*” for the Las Olas Project.¹⁸⁰ Mr Martínez’s logic appears to be that Mr Bucelato would never seek to obtain a benefit for the Las Olas Project given that he was filing complaints against it.

219. The most generous interpretation of Mr Martínez’s evidence is that it did not occur to him that someone might create a document and put it on a public agency’s file as part of a plan of attack; that seems a difficult proposition to maintain in respect of a prosecutor, since it involves a degree of naivety that someone in that position cannot credibly have. The alternative interpretation is that Mr Martínez knew or did not care that someone else had put the document on the SETENA file, since the document gave him an opportunity to attack the Claimants. Either way, it is clear that Mr Martínez grossly failed in his duties to conduct investigations and prosecutions with a degree of care and professionalism as to the evidence on which such investigations and prosecutions are based. He ultimately had to abandon the forgery charges, admitting there was insufficient evidence to maintain them, but it is clear from the record that there was no reasonable or legitimate basis on which to bring the charges in the first place.
220. Mr Martínez’s wilfully simplistic view of Mr Bucelato’s personal interests in regard to the Las Olas Project was apparently enough for Mr Martínez to not only discount the possibility that Mr Bucelato had anything to do with the Allegedly Forged Document, but also to decline to investigate the source and the circumstances behind the handwritten note. At the very least, the suspicious circumstances of the note should have cast a cloud over the credibility of any allegations in Mr Bucelato’s criminal complaint, and the Claimants submit that, when considered in the context of Mr Bucelato’s history with Mr Aven and the Las Olas Project, the handwritten note should have invalidated the criminal complaint in its entirety.

¹⁸⁰ English Transcript, 1106:19-22.

221. In addition to Mr Bucelato's complaint, Mr Martínez received a criminal complaint from Luis Picado Cubillo on February 8, 2011.¹⁸¹ The Picado complaint is yet another early indication of Mr Martínez's failure to request and consider relevant evidence. The Picado complaint accuses Mr Aven of committing wetlands-related crimes, but it also specifically refers to drainage works being conducted by the Municipality in the southern portion of the Las Olas site that were intended to dry out an existing wetland.¹⁸²
222. When asked about this, Mr Martínez claimed that he consulted with the Municipality and was told that their works were being conducted on public roads rather than on the Las Olas Site.¹⁸³ However, this statement lacks any credibility given a letter from the Municipality to Inversiones Cotsco dated April 10, 2008,¹⁸⁴ in which the Municipality sought the collaboration of Inversiones Cotsco in the construction of a canal in the southwestern portion of the property – the same location of the alleged wetland referenced in the Picado complaint.
223. Mr Martínez conceded during the hearing that he had never seen the letter, and there is no indication – beyond his own vague, unsupported reference to certain consultations – that he gave any serious consideration to the Municipality's role in the works affecting the alleged wetlands, which is evidenced by numerous documents that were available to Mr Martínez throughout his investigation.¹⁸⁵ Mr Martínez had the obligation to request all documents pertaining to the Las Olas project pursuant to the principle of objectivity. It is abundantly clear from the nature of his investigation as well as his admissions during his testimony at the Hearing that he failed to uphold this standard.

¹⁸¹ See Exhibit R-66.

¹⁸² See Exhibit R-66.

¹⁸³ English Transcript, 1028:21-1029:2.

¹⁸⁴ See Exhibit C-296.

¹⁸⁵ See, for example, Exhibit C-112, the February 14, 2011 injunction issued by SINAC, which cites the filling of a potential wetland in connection with work carried out by the Municipality; see also Exhibit C-116, SINAC Inspection Report, March 16, 2011; Exhibit C-117, SINAC Inspection Report, March 18, 2011.

b. Order of Seizure

224. As stated in Mr Martínez's First Witness Statement, after receiving the criminal complaints against Mr Aven, "*one of the first measures [he] took was to request seizure of SETENA's records to see what documentation was there from SINAC-MINAE.*"¹⁸⁶ The Order of Seizure provided with his witness statement indicates that Mr Martínez requested documents in administrative file number D1-1362-2007-SETENA,¹⁸⁷ which pertains to the Condominium Section of the Project Site. Mr Martínez and the Respondent provided no evidence whatsoever that he requested files pertaining to other portions of the site, including file number 110-2005 for the Concession, and Mr Martínez in fact confirmed that he did not review documents pertaining to the Concession because they are located in the Terrestrial Maritime Zone.¹⁸⁸
225. Nonetheless, the fact remains that the Concession is part of the same Project, and part of the same Project Site, as the Condominium Section. It is obvious that, in determining whether a developer had the intent to harm the property to be developed, the developer's compliance with environmental regulations in regard to the entire Project, and the entire property, is highly relevant. Mr Martínez therefore started with an incomplete picture of the facts. This is true not only in light of his disregard for the Concession, but also given the fact that he did not request records for the previous administrative file number pertaining to the Condominium Section. Indeed, the Condominium Section previously had the administrative file number of 551-2002-SETENA, and was in fact granted an environmental viability under that number.¹⁸⁹ Mr Martínez did not request or review these records.¹⁹⁰

¹⁸⁶ See Luis Martínez First Witness Statement, para. 19.

¹⁸⁷ See Exhibit R-69.

¹⁸⁸ English Transcript, 1053:19-22.

¹⁸⁹ See Exhibit R-9.

¹⁹⁰ English Transcript, 1046:5-16.

c. Evidence Available During the Investigation

226. The Tribunal is encouraged to carefully review and consider the documentary record when assessing the nature of Mr Martínez's misconduct, as the documents demonstrate a clear pattern of arbitrary and discriminatory behavior. The Claimants will not endeavor to describe in detail each document available to Mr Martínez during his investigation, that he either failed to review or failed to consider or request, but instead will provide a summary in the following list, with corresponding references to his witness testimony:

- i. On November 23, 2004, SETENA granted an environmental viability permit to Villas La Canícula, the title previously given to the Condominium Section of the Project.¹⁹¹ The EV confirmed that Villas la Canícula was not located in a Wildlife Protected Area. Mr Martínez did not request or review this document as part of his investigation, as confirmed by the following exchange:¹⁹²

22 | My point to you is that this has a different |

1 | number, different file number. 551-2002-SETENA. |

2 | Did you review this material--or material from |
3 | that file number--for the purposes of your |
4 | investigation? |

5 | A. No. We did not review this file because our |
6 | interests were focused on the moment when the |
7 | viability--or the Environmental Viability was granted. |

- j. On March 17, 2006, SETENA issued an EV for Hotel Colinas del Mar, administrative file number 110-2005-SETENA,¹⁹³ confirming that the Concession was not in a Wildlife Protected Area. Mr Martínez did not

¹⁹¹ See Exhibit R-9.

¹⁹² English Transcript, 1045:22-1046-7.

¹⁹³ See Exhibit C-36.

review this document as part of his investigation, as confirmed by the following exchange.¹⁹⁴

11	Just to be clear, the answer to my question
12	"Did you review this documentation for the purposes of
13	your investigation?" is no. That's correct, isn't it?
14	A. No, sir. For the reasons that I pointed out
15	to the Tribunal a moment ago.

- k. On April 2, 2008, Mussio Madrigal received confirmation from SINAC that the Condominium Section of the Las Olas Site was not within any Wildlife Protected Area.¹⁹⁵ Mr Martínez confirmed that he did review this document,¹⁹⁶ but appears to have disregarded its evidentiary relevance as to the issue of whether Mr Aven could have intended to harm a forest and/or wetland on the Project Site;
- l. On October 1, 2008, SINAC issued ACOPAC Visit Report SD-087-08, a three-page report drafted by Carlos Vinicio Cordero Valverde, who is not a part of the wetlands department of SINAC.¹⁹⁷ The report cited the “*possible*” existence of wetlands on the Las Olas site. Mr Martínez confirmed that he reviewed this document during his investigation, and also acknowledged that the site visit that it was based on did not include a soil study and did not result in a definitive conclusion as to the existence of wetlands.¹⁹⁸
- m. At the Hearing, Mr Martínez was then shown the SINAC-MINAE report issued by Rolando Manfredi and Christian Bogantes on July 8, 2010,¹⁹⁹ which superseded the October 1 Report by determining that there were no

¹⁹⁴ English Transcript, 1054:11-15.

¹⁹⁵ See Exhibit C-48.

¹⁹⁶ English Transcript, 1058:6-15.

¹⁹⁷ See Exhibit R-20.

¹⁹⁸ English Transcript, 11077:12-1079:2.

¹⁹⁹ See Exhibit C-72.

wetlands on the Las Olas property according to inspections carried out in January, February and July. Mr Martínez conceded this in his testimony in the following exchange, yet refused to concede that this document, or any of the other numerous agency findings already discussed, made it impossible for him to prove that Mr Aven intended to harm a wetland or a forest.²⁰⁰

14 | Now, this report--this three-page report
15 | indicating the possibility of wetlands but seeking
16 | more information was, of course, superseded, wasn't
17 | it, by the SINAC report that appears at Exhibit C-72,
18 | Tab 13 in your files?

19 | If you would just go to page 6 of that
20 | document. It actually says "page 3" at the top, but
21 | it's the sixth page in the document. If you go down
22 | to the last paragraph, you will see that there is the

1 | conclusion that there were no wetlands on the
2 | property. Do you see that?

3 | The conclusion is on that paragraph--the
4 | bottom of the sixth page of that document, there is
5 | recorded the conclusion that there are no wetlands.
6 | Do you see that?

7 | A. Correct. That is what this paragraph states.

- n. On September 1, 2010, SETENA issued Resolution 2086-2010-SETENA,²⁰¹ which confirmed the dismissal of an administrative complaint filed by Mr Bucelato in which Mr Bucelato claimed that there were wetlands on the Project Site. Mr Martínez confirmed that he reviewed this document during his investigation. He further confirmed that he was aware of the fact that Mr Aven had filed a defamation lawsuit against Mr Bucelato in connection with Mr Bucelato's repeated

²⁰⁰ English Transcript, 1079:14-1080:7.

²⁰¹ See Exhibit C-83.

complaints. There is therefore no question that Mr Martínez was aware of the contentious relationship between Mr Aven and Mr Bucelato which, despite his assertions in his witness statement, Mr Martínez conceded is a relevant fact to the assessment of Mr Bucelato’s criminal complaint.²⁰²

- o. On January 3, 2011, SINAC issued Report ACOPAC-CP-003-11,²⁰³ which concluded that the Project Site contained bodies of water “*apparently*” classified as wetlands. Again, Mr Martínez accepted that, contrary to the numerous agency findings of no wetlands, this document did not contain a definitive conclusion.²⁰⁴

17 | Can you just go to page 3 of the report. You
18 | see there at the very first conclusion there is
19 | that--there is a statement that there are bodies of
20 | water on sites that are apparently classified as
21 | wetlands. Do you see that?
22 | A. Correct.

1 | Q. So, you--as a prosecutor or as a lawyer of any
2 | sort, you would understand that that is not going to
3 | be a conclusive position. You need to do much more in
4 | order to establish, as one of the various elements of
5 | the offenses in question, that there was a wetland;
6 | right?
7 | Right?
8 | A. Correct.

- 227. Despite the substantial amount of evidence shown to Mr Martínez above – which made it impossible for him to meet his burden of proof – he still asserted in his First Witness Statement that the October 1, 2008 Report (which was superseded by subsequent and definitive contrary findings), “*in itself was sufficient motive to continue the investigation in order to guarantee the application of legislation on environmental protection.*”²⁰⁵ Mr Martínez grossly

²⁰² English Transcript, 1022:5-9.

²⁰³ See Exhibit C-101.

²⁰⁴ English Transcript, 1086:17-1087:8.

²⁰⁵ See Luis Martínez First Witness Statement, at para. 20.

misapplied that legislation, which will be discussed in further detail below, but in any event, the documents shown to Mr Martínez prove the opposite point – there was no acceptable course of action other than to conclude that there was no evidence that Mr Aven intended to commit a crime.

228. At this point, it should have been clear to Mr Martínez that multiple environmental agencies disagreed as to the *existence* of a wetland on the Project Site and based on that granted rights to construct, which is obviously a critical finding in order to establish that Mr Aven actually intended to *cause harm* to the supposed wetland. It had also been established that Mr Aven applied for, and received, numerous regulatory permits indicating that Las Olas was not within a Wildlife Protected Area, which is compelling evidence that he fully intended to comply – and in fact did comply – with Costa Rican environmental regulations. Under these circumstances, there is quite simply no basis whatsoever to continue with a criminal investigation.
229. Nonetheless, Mr Martínez was not convinced by the record before him (in part because it was grossly deficient due to his own failure to review relevant documents, as revealed by his testimony), and therefore decided to commission a series of additional reports to gain further information regarding the conditions of the Project Site. As discussed below, those reports only reinforced the fact that it would be impossible for him to meet his burden of proof in Mr Aven’s criminal case.

d. Reports Commissioned by Mr Martínez

230. In connection with his criminal investigation, Mr Martínez commissioned: (1) a soils report from the Institute for Agricultural Innovation and Technology Transfer (INTA), which was issued on May 5, 2011; and (2) a SINAC-MINAE report addressing whether wetlands were present on the Project Site, which was issued on March 18, 2011 (and was supplemented on May 18, 2011).²⁰⁶ Before addressing the findings of these reports, the Tribunal should bear in

²⁰⁶ See Exhibit C-124, C-116 and C-117.

mind the previously discussed Guidelines for the Prosecutorial Investigation of Environmental Crimes, which expressly state at paragraph 3.3 [*Lakes, non-artificial lagoons, and other wetlands*] that in order to demonstrate the existence of a wetland, three criteria must be established: (1) soil permeability; (2) the presence of hydrophytic vegetation; and (3) a slope below or equal to five percent.²⁰⁷

231. Mr Martínez himself conceded the mandatory nature of these criteria in his Hearing testimony, as follows:²⁰⁸

5 So, you're aware, and were aware in 2011,
6 weren't you, that it was mandatory for you, as a
7 prosecutor, to ensure that you could prove the three
8 specific elements that make up a wetland; that's
9 correct, isn't it, Mr. Martínez?
10 A. Correct. Yes. At that date, they were in
11 force, and they're still in force; and yes, it was
12 considered that we had to actually prove those three
13 criteria, and so, a technical report was requested in
14 that regard.
15 Q. So, if any of those three--if just one of
16 those three criteria could not be satisfied, there
17 couldn't be an investigation, a prosecution, in
18 respect to wetlands; that's right, isn't it?
19 A. That is correct.

232. As stated by Mr Martínez in the exchange above, he commissioned technical reports specifically for the purpose of establishing the three mandatory criteria under Section 3.3 of the guidelines. This included commissioning the INTA report in order to analyze whether the requisite soil quality was present, as Mr Martínez admitted below:²⁰⁹

²⁰⁷ See Exhibit C-297, para. 3.3.

²⁰⁸ English Transcript, 1037:5-19.

²⁰⁹ English Transcript, 1113:18-1114:2.

18 | Turning back to Exhibit C-124, the INTA
 19 | report, you went to them because you knew, didn't you,
 20 | that in order to establish whether or not there was a
 21 | wetland; one of the mandatory elements was that there
 22 | was the requisite quality of soil in the areas on the
 1 | site; that's right?
 2 | A. Correct.

233. It should therefore follow, based on Mr Martínez’s testimony and the prosecutorial guidelines, that if the reports that he commissioned failed to establish the mandatory criteria for the existence of wetlands, and there was no other documentary evidence establishing those criteria either, then Mr Martínez was expressly prohibited by them from filing criminal charges – he simply had no case to bring. It is against this backdrop that the findings of the INTA report and the SINAC-MINAE report should be assessed by the Tribunal in addressing the arbitrary nature of Mr Martínez’s investigation and decision to file charges.
234. The INTA Report in and of itself should have brought Mr Martínez’s investigation to a close, as it confirmed that the soil samples taken from the Las Olas Site did “*not support cataloguing the soil at this site as typical of wetlands systems.*”²¹⁰ When asked why he disregarded INTA’s findings, Mr Martínez claimed that it is necessary to “*bear in mind the historical moment when the inspection is done by INTA,*” and “*at that specific point, the site had been filled substantially.*”²¹¹ In other words, Mr Martínez commissioned a report from a soils agency – clearly because he believed the agency’s findings would be relevant to Mr Aven’s case – and decided to ignore the report on the basis that the inspection was done after the alleged offense occurred. This raises the obvious questions of why Mr Martínez commissioned the report in the first place, and why he disregarded other reports issued years before the

²¹⁰ See Exhibit C-124, page 8.

²¹¹ English Transcript, 1115:8-12.

INTA report that made similar findings regarding the non-existence of wetlands.

235. In another attempt to explain away the findings of the INTA report, Mr Martínez stated that it was just “*one more document that the Prosecutor’s office had to analyze as part of the investigation.*”²¹² He then referred to the findings of Jorge Gamboa of the National Wetlands Program in the SINAC-MINAE Report of March 18, 2011,²¹³ which cited a photo of supposed hydromorphic soils on the Project Site. However, Mr Martínez neglected to mention at this point – and he later conceded in response to questions from Mr Baker – that the findings of the SINAC-MINAE Report of March 18, 2011 did not include any analysis of actual soil samples.²¹⁴ Instead, as stated by Mr Martínez below, Mr Gamboa was merely present while Diogenes Cubero of INTA took soil samples – Dr Cubero then conducted the analysis of those samples that led to the conclusion that they were *not* characteristic of wetlands soils.²¹⁵

6 ARBITRATOR BAKER: And what technical
7 apparatus did Mr. Gamboa bring with him at the site
8 investigation to collect samples of the soils to make
9 those decisions?

03:00:4510 THE WITNESS: At that time when he did the
11 inspection, Mr. Diogenes Cubero from INTA went along.
12 And during that specific visit, the first visit we
13 did, no samples were taken.

14 But after that Mr. Diogenes went to the site
03:01:0315 with Mr. Gamboa, and he did the sampling in the
16 presence of Mr. Gamboa. So, Mr. Jorge was present
17 when the samples were taken for the decision that INTA
18 took.

236. Mr Martínez’s idea of “*weighing*” the evidence therefore consisted of a decision to rely on a photograph of soil rather than actual soil sample analysis conducted by a soils agency in a soils report that Mr Martínez himself

²¹² English Transcript, 1114:15-17.

²¹³ See Exhibit C-116.

²¹⁴ English Transcript, 1159: 6-18.

²¹⁵ English Transcript, 1159:6-18.

commissioned. The INTA report speaks for itself – Mr Martínez simply could not establish the soil criteria required for a determination of wetlands, therefore making it utterly impossible to prove that Mr Aven intended to harm a wetland, and should therefore be convicted of a criminal offense. Maintaining the prosecution served no legitimate purpose; rather, its only effect, and objective, was to attack and harass Mr Aven and the Claimants' investment.

237. The reality of what was happening behind the scenes was indicated by documents like MINAE's internal memorandum of January 3, 2011, a document to which the Respondent referred in its opening submissions in the Hearing. In this internal memorandum, various recommendations are set out in terms of actions to take against Las Olas (the issuance of an injunction, commissioning a soils study from INTA, the initiation of a criminal complaint and so on). Nothing was said to the Claimants or to Mr Damjanac at this stage about the preparation of such attacks; indeed, with construction permits having been issued as recently as July and September 2010 and with SETENA (the authoritative body) having given the Project a clean bill of health as regards environmental issues on September 1, 2010, the Claimants were blissfully ignorant of the attacks that were soon to be launched against the Project, including by Mr Martínez. The fact that, as the January 3, 2011 memorandum reveals, such attacks were being prepared without SETENA even being notified, and in violation of the legally binding resolutions SETENA had issued, demonstrates the bad faith with which certain officials proceeded at this point in the story. And other than obtaining the studies anticipated in the memorandum, the action plan set out in the memorandum was indeed put into effect in the few months following.

2. **The Criminal Charge**

238. Despite the overwhelming evidence that should have led any reasonable prosecutor to decline to pursue criminal charges against Mr Aven, Mr Martínez filed an indictment on October 21, 2012, in which he accused Mr Aven of

(1) ordering the draining and drying of wetlands in violation of Article 98 of the Wildlife Conservation Act; and (2) invading a conservation area in violation of Article 58 of the Costa Rican Forestry Law.²¹⁶

239. As discussed during the Hearing, the Wildlife Conservation Act was amended in by the passage of Article 1 of Law 8689 on December 4, 2008. Although passed in December of 2008, this law did not actually come into effect until June 24, 2009, and it did not have retroactive effect, in accordance with Section 34 of the Costa Rican Constitution²¹⁷ and Section 11 of the Costa Rican Criminal Code. Accordingly, as conceded by Mr Martínez in his testimony, any alleged offenses predating June 24, 2009 would be irrelevant to the application of Article 1 of Law 8689, and would have to be assessed under the pre-existing law.²¹⁸ The reason this is important is that Article 1 of Law 8689 has critical distinctions from the pre-existing law. Specifically, the crime of draining and filling a wetland carried with it the possibility of a three-year prison sentence rather than just an economic sanction of less than US\$500.

240. Additionally, under the previous law, Mr Aven's extradition could not be sought through an INTERPOL Red Notice if the crime was punishable only by an economic sanction. At the Hearing, Mr Martínez claimed that he had nothing to do with the decision to report Mr Aven to INTERPOL, but he conceded that, had he charged Mr Aven with the original offense, INTERPOL never would have been implicated in the first place.²¹⁹ Given the significance of the change in the law in December of 2008 that came into effect in June 2009, it was therefore crucial for Mr Martínez to consider the timeline of the alleged offenses when determining the criminal law that was applicable to Mr Aven, and to apply that law in good faith.

241. Mr Martínez failed to make this consideration, as the documents on which he based the criminal charges against Mr Aven, including SINAC Report

²¹⁶ See Exhibit C-142.

²¹⁷ Spanish Transcript, 1114:3-7.

²¹⁸ See Exhibit C-307, Section 103.

²¹⁹ English Transcript, 1122:2-9.

ACOPAC-CP-003-11 of January 3, 2011, state that the alleged draining and filling of wetlands in fact took place in or around early 2009.²²⁰ As a result, even if the allegations were true (which is unsupported by the record) it is obvious that at least some of those alleged actions could not be punished with imprisonment. In response to this, Mr Martínez and the Respondent's counsel have suggested that the activities "increased" after June of 2009.²²¹ However, the evidence does not in any way support this beyond the blanket assertion in the criminal charge,²²² and in any event, there is no indication that Mr Martínez even considered the timeline of the alleged acts at all. If he had done so, the principle of *tempus regit actum* (non-applicability of a new legal provision to past conducts) would favor assessing the alleged acts under the pre-existing law. Section 12 of the Costa Rican Criminal Code further confirms that when punishment of a crime is increased between commission and conviction, the lesser penalty should be applied to the defendant.

242. It should also be noted that, until September of 2009, under Article 7 of the Wildlife Conservation Act, wetlands were required to be created and delimited by executive decree.²²³ A series of criminal court cases is particularly relevant as to this point. The only four cases addressing wetlands before the resolution 14288-2009 of Constitutional Chamber of September 9, 2009,²²⁴ were decided by the criminal courts in 2005, 2006 and 2008, and three out of these four criminal court rulings concluded as follows:

Legislator defined the special characteristics and conditions to be taken into account in order for a particular wilderness area to qualify and be declared (and delimited) as a wetland, for which adequate technical and professional assistance may also be appropriate. It also established that this declaration and delimitation must be made by means of an Executive Decree, which presupposes that in the case of a private property, the

²²⁰ See Exhibit C-101.

²²¹ English Transcript, 1125:21-1126:2.

²²² In fact, the evidence supports the opposite assertion, as the complaints alleging wetlands violations were based on actions that allegedly took place prior to April 2009. See Exhibits R-23; and R-26.

²²³ See Exhibit C-307.

²²⁴ See Exhibit C-308.

*process of expropriation or previous compensation (in cases of simple affectation).*²²⁵

243. As a result, prior to September 2009, in the absence of an executive decree, a wetland did not exist for the purposes of the Wildlife Conservation Act. It goes without saying that a criminal prosecutor should not take it upon himself to create a new wetland and then charge a layperson with having the specific intent to harm that undeclared wetland. Yet, this is exactly what Mr Martínez decided to do in Mr Aven's case, as to this day, there is no portion of the Las Olas site that has ever been delimited as a wetland pursuant to an executive decree.
244. If nothing else, the above-mentioned provisions of Costa Rican law demonstrate that the timeline of the alleged acts was highly relevant to Mr Aven's case, as the question of whether Mr Aven could possibly have been subjected to a prison sentence and/or an INTERPOL Red Notice (for acts that, as discussed, he did not commit) turned on the precise timeline of events. Accordingly, Mr Martínez should have had concrete evidence of actual draining and filling activities after the effective date of Article 1 of Law 8689 in order to proceed under the more serious charge. The record demonstrates that he did not have such evidence, as the photographs relied upon for the so-called draining and filling activities refer almost exclusively to alleged activities taking place in early 2009,²²⁶ which was before the effective date of Article 1 of Law 8689 and before the change in the law pertaining to executive decrees.

²²⁵ See Exhibit R-236 Resolution 2008-178, explains how this thesis is consistent with judicial precedents 2005-461 and 1123-2006 from different Criminal Tribunals of Cassation and why the Criminal Court did not agree with Resolution 1209 of November 15, 2005. Resolution 1209 of 2009 considered that wetlands were protected independently if they have been declared as wildlife conservation area, changing the criteria issued by that Tribunal in resolution 2005-461. However, in the next years, the same Tribunal changed the criteria in resolutions 1123-2006 and 2008-178, considering again that wetlands have to be created by Executive Decree.

²²⁶ See Exhibit C-101.

3. **The Criminal Trial**

245. The Claimants have already discussed Mr Aven’s criminal trial in detail in their pleadings, and rather than repeat each of the contradictory and detrimental statements made by the prosecution and the prosecution’s witnesses, the Claimants refer to the Tribunal to paragraphs 188 to 201 of the Claimants’ Memorial, paragraphs 330 to 334 of the Claimants’ Reply, the First and Second Witness Statements of David Aven and Nestor Morera Viquez, and the Criminal Trial Transcript produced with the Claimants’ Reply.

4. **Prosecutor Martínez’s unreasonable refusal to agree to postpone Mr Aven’s trial until the presiding judge returned from his planned medical leave.**

246. The Claimants have already discussed in detail in their pleadings the deficiencies in the prosecution’s criminal case against Mr Aven, and the disastrous testimony that plagued the prosecution throughout the trial.²²⁷ It is therefore unsurprising that, by the end of the criminal trial, Mr Martínez was in search of some sort of strategy that could enable him to undo the damage inflicted upon his case by his own witnesses. The means by which he chose to do this was by exploiting the so-called “*ten-day rule*” after Judge Solis stated that he would be absent from the trial due to a medical emergency. Given that the absence would extend the interruption in trial to more than ten days, under Costa Rican law it was possible to discontinue the trial and to start the process over again, disregarding the previous trial in its entirety.²²⁸

247. Of course, it must be noted that it was “*possible*” to discontinue the trial, but it certainly was not necessary. The parties were entitled to agree to waive the ten-day rule and to wait until Judge Solis was prepared to return so that the trial could resume.²²⁹ Indeed, Mr Aven’s attorney offered to enter into such an arrangement with Mr Martínez, but Mr Martínez refused. In doing so, he relied

²²⁷ See Claimants’ Memorial paras. 188-201; Claimants’ Reply Memorial paras. 330-34; and Criminal Trial Transcript produced with the Claimants’ Reply.

²²⁸ See Exhibit C-13, Section 336, Costa Rican Criminal Code.

²²⁹ See Nestor Morera First Witness Statement, para. 37.

on outdated and misconstrued case law and attempted to call into question the enforceability of such an agreement.²³⁰ This was a less-than-transparent tactical decision to continue on his unwavering path to single out Mr Aven in the face of overwhelming evidence demonstrating that no crime had been committed. The purpose of the ten-day rule is to protect criminal defendants – it should not be used by a prosecutor as a tool for correcting mistakes by obtaining a new trial or for prolonging a prosecution of someone against whom there is insufficient evidence.

5. **Pursuing extradition, and inclusion on INTERPOL’s Red Notice list, for what should have been trial for a non-extraditable offense.**

248. As explained in Section XI, B, on October 21, 2011, Mr Martínez charged Mr Aven with violating Article 98 of the Wildlife Conservation Act by draining and filling a wetland.²³¹ The Wildlife Conservation Act was amended on December 4, 2008 with the passage of Article 1 of Law 8689, which became effective on June 24, 2009. The amendment did not apply retroactively. The effect of the amendment was that the crime with which Mr Aven was charged was punishable by a possible prison sentence of up to three years, as opposed to the previous offense that could only result in a fine.

249. The Claimants have already demonstrated that neither Mr Martínez nor the Respondent can prove that a wetland even existed on the Las Olas property during the period in question, much less that Mr Aven intended to harm a wetland. However, even if both of these impossible propositions are accepted, the fact remains that the alleged “*draining and filling*” activities (which the Claimants deny) that were relied upon by Mr Martínez took place prior to the effective date of Article 1 of Law 8689.

²³⁰ See Nestor Morera First Witness Statement, para. 37-43.

²³¹ See Exhibit C-142, Criminal charges filed against David Aven and Jovan Damjanac, October 21, 2011.

250. Indeed, the photographs relied upon by Mr Martínez of the alleged “*harm*” being visited upon the alleged wetlands are from March 2009,²³² and although the Respondent alleges that such activities continued into 2010 and 2011, the evidence of this alleged “*continuation*” is deficient and does not support charging Mr Aven with an offense carrying with it the possibility of a prison sentence and an INTERPOL Red Notice. Indeed, as acknowledged by Mr Martínez at the Hearing,²³³ if he had charged Mr Aven with the lesser offense as he should have, INTERPOL never would have become involved in Mr Aven’s case, as the offense was very clearly a non-extraditable offense. As the Tribunal is aware, INTERPOL later removed the Red Notice on the basis that the offense of which Mr Aven was accused was insufficiently serious to meet INTERPOL’s criteria. However, this decision was simply too little, too late, as Mr Aven had already suffered both emotional and reputational harm as a result of being wrongfully and publicly portrayed as some sort of international fugitive.

VII. THE RESPONDENT’S NONCOMPLIANCE WITH THE FULL PROTECTION AND SECURITY STANDARD

251. In their Memorial, the Claimants explained how both the full protection and security standard and the fair and equitable treatment standard are recognized as binding under both customary international law and actionable through Articles 10.5 and 10.16 of the DR-CAFTA.²³⁴ They also noted the traditional role of the protection and security standard as the customary international law minimum standard of treatment of aliens, in respect of how the traditional doctrine on denials of justice did not limit findings of State responsibility to decisions of courts, nor did it require the aggrieved alien to appeal a determinative decision issued by the Executive or Legislative branches of State

²³² See Exhibit C-101, SINAC Inspection Report, January 3, 2011.

²³³ English Transcript, p. 1122:1-9.

²³⁴ See: Claimants’ Memorial, at paras. 268-270 and note 278.

to the Judicial branch of State before raising it to the international plane for resolution.²³⁵

252. In their Reply Memorial, the Claimants noted how the Respondent had not challenged their argument that a host State's failure to "*properly to investigate, or punish, credible complaints by a foreign investor about corruption*" would constitute a failure to honour the due diligence obligation to provide "*protection and security*" under customary international law. They added that Prosecutor Martinez's decision to flout minimum standards, by refusing to perform a good faith investigation of credible corruption charges levelled against Mr Bogantes, was an example of failing to honor this minimum standard of protection.²³⁶

A. The Respondent's seeming unawareness of its protection and security obligations under customary international law

253. The Respondent was thus certainly on notice of its customary international law obligation to at all times accord full protection and security to the Claimants, and yet further examples of its seeming unawareness or incomprehension of what the standard means for its conduct nevertheless materialized during the Hearing. Indeed, the Respondent made oral arguments that – while they need not evince a breach of the Article 10.5 standard of protection and security, *per se* – cannot possibly be reconciled with the obligation, and therefore cannot serve the purposes for which they were apparently uttered.

254. For example, at the Hearing, the Respondent's counsel wondered aloud about why Mr. Aven could not have just hired his own security guards for a return visit to the country to face a second criminal trial – a trial which Prosecutor Martinez had manipulated the system to arrange, including charging Mr Aven

²³⁵ See Claimants' Memorial at paras. 315-317 & 342-343, and note 337, citing Todd Weiler, *The Interpretation of International Investment Law* (OUP: 2013) at 257-259. In this regard the exhaustion of local remedies rule was treated as potential procedural bar to espousal of the aggrieved alien's claim, not an element of the substantive delict from which State responsibility flowed.

²³⁶ See Claimants' Reply Memorial at paras. 370-371.

under the wrong statute so as to ensure the potential for his incarceration if convicted.²³⁷

255. The very fact that the Respondent had refused the reasonable request of Mr Aven's Costa Rican counsel to provide him with protection was plainly inconsistent with its protection and security obligations in the circumstances, but the Tribunal does not need to find a breach.²³⁸ It should simply recognize that the Respondent cannot rely on the credulous defence that – had only Mr. Aven returned to the country to face a second trial – the Claimants' investment could have miraculously been allowed to continue. Such defense is premised on the proposition that the Respondent owed no obligation, under customary international law, to vouchsafe the protection and security of Mr. Aven, particularly given the circumstances of its utter failure to investigate other crimes committed against him within its territory, as described immediately below.

B. The Respondent's refusal to cooperate with Mr Aven, so as to enable him to return to the country for a new trial

256. After the criminal trial, Mr Aven received a series of anonymous phone calls and emails in which he was threatened and told to leave Costa Rica. These threats are well-documented and have been submitted with the Claimants' evidence. It should come as no surprise that Mr Aven genuinely feared for his safety when he received threats such as the following email from "*Ruben Jimenez*," stating as follows: "*Senior David Aven i here your debate didn't go well for you. Don't think the next one will be better. Some good advice is to go bac home were you come from while you still can. Bad things happen to greedy gringos who caus problemas all time here. go home now.*"²³⁹

²³⁷ English Transcript 751:7.

²³⁸ English Transcript, 883:18-887:20.

²³⁹ See Exhibit C-159, Threatening Email from Ruben Jimenez to David Aven, February 2, 2013.

257. Mr Aven's fears for his safety proved to be entirely justified given the events of April 15, 2013. Mr Shiolen and Mr Aven were *en route* from the courthouse in Quepos to San José when a motorcyclist accelerated alongside Mr Aven's car, fired five gunshots into the car, and then sped away.²⁴⁰ The gunshots shattered multiple windows and left the car riddled with bullet holes, but miraculously, neither Mr Aven nor Mr Shiolen sustained serious physical injuries. That said, they were highly disturbed by the incident, which validated and compounded their safety concerns in Costa Rica, made them fear for their lives. In light of the repeated threats, the declarations to leave Costa Rica, and the attempted murder, the only option available to Mr Aven to protect his physical well-being was to return to the United States.
258. However, before doing so, he filed a police report in San José in connection with the shooting, which includes a sworn statement and a detailed description of the events.²⁴¹ The Respondent claims that it investigated the shooting incident, although the actual police file obtained by Mr Ventura would suggest otherwise.²⁴²
259. Mr Aven left Costa Rica in May 2013, as any reasonable person would do. At this time, his second criminal trial was still pending, and despite the fact that he would be putting his life at risk by returning to Costa Rica, Mr Aven was willing to appear for his trial as long as the proper security measures were in place. As indicated in Mr Aven's testimony, the Respondent failed to engage with him on this point in any way, nor did the Respondent give any consideration to a serious medical condition that prevented Mr Aven from leaving the U.S. for his second trial.²⁴³ Instead, the Respondent proceeded to notify INTERPOL of Mr Aven's absence, which, as discussed above, led to the entirely inappropriate imposition of a Red Notice.

²⁴⁰ See David Aven First Witness Statement, paras. 232-33.

²⁴¹ See Exhibit C-162, Police report of shooting, April 15, 2013.

²⁴² See Exhibit C-162, Police report of shooting, April 15, 2013.

²⁴³ See English Transcript p. 884:3-886:9.

VIII. THE RESPONDENT’S HOPELESS DEFENSE STRATEGY

A. The Respondent’s Unfounded Allegations regarding Mr David Aven’s Nationality are not credible.

260. As the Claimants have already clarified in their submissions, Mr Aven is a U.S. citizen, born in the United States – and the Respondent’s allegation that Mr Aven is not an “*investor of a Party*” within the meaning of Chapter 10.1 and 10.28 of the DR-CAFTA has no merit. As discussed in the Claimants’ memorials and elsewhere in this Post-Hearing Brief, as a matter of DR-CAFTA interpretation and under customary international law, the “*dominant and effective nationality*” test is not applicable here because Mr Aven is not a national of the Host State.²⁴⁴

261. Even if this Tribunal were to apply the dominant and effective nationality test, as discussed below, Mr Aven easily passes this test because Mr Aven’s dominant and effective nationality is the United States.

262. As Mr Aven testified in response to questions from the Tribunal, although he is a dual national with Italy in name only, he has no attachments, business, property, or bank accounts in Italy. Mr Aven has never lived in Italy. Mr Aven has visited Italy only a handful of times his entire life, and has lived in the United States except for the time period he lived in Costa Rica:

20	I do have dual nationality. But I don't
21	have any attachments to Italy. My dominant residence
22	has always been the United States. I don't do any

²⁴⁴ See Claimants’ Reply Memorial, Section II. A. 1.

1 business in Italy. I don't have any bank accounts,
2 own property. I don't vote there. I don't have
3 anybody I correspond with over there.
4 I haven't been there in ten years. I mean,
5 been totally to Italy probably five times in my life.
6 So--so my dominant residence is, no question, United
7 States.
8 I was born in New Castle, Pennsylvania,
9 graduated high school there. Graduated college from
10 Baylor University in 1964. So--and been living and
11 working in the United States all of my life except
12 for the time period I was living in Costa Rica.

245

263. Nevertheless, the Respondent has made unfounded assertions regarding Mr Aven and his dual nationality. The Respondent has contested the Tribunal's jurisdiction *ratione personae* by, *inter alia*, erroneously asserting in its Rejoinder that Mr Aven was born in Italy:

*Thus, accepting Mr Aven's claims as a U.S. national would have the effect of giving him protection "for free" since Italy (his place of birth to which he has a "genuine link") does not have to offer the same standards of protection to other investors in Costa Rica.*²⁴⁶

264. The false assertion that Mr Aven was born in Italy is archetypal of the Respondent's disregard of the facts of this case in *ad hominem* attacks against the Claimants in defense. Confronted with this falsehood, the Respondent was forced to abandon its claim that Mr Aven was born in Italy at the hearing:

²⁴⁵ English Transcript, 890:20-891:12.

²⁴⁶ See Respondent's Rejoinder, para. 153.

17 | he's a dual national. We would like to correct the
18 | record. We misspoke when we suggested that Mr. Aven
19 | was born in Italy. We will concede the point that he
20 | was born in the United States. That was an error on
21 | our part.

247

265. Despite the Respondent's errors, it nonetheless has pressed on in its feckless assertion that Mr Aven cannot be an "*investor of a Party*" entitled to DR-CAFTA protection, relying on a handful of documents where Mr Aven elected to use his Italian nationality in Costa Rica. Unfortunately for the Respondent, a few examples of documents listing Mr Aven as an Italian national cannot make out its jurisdictional objection.

266. Apart from the fact that Mr Aven has no attachments, business, property, or bank accounts in Italy, has never lived in Italy, has visited Italy only a handful of times his entire life, and has lived in the United States except for the time period he lived in Costa Rica, Mr Aven also has acted before Costa Rican authorities as a U.S. Citizen on multiple occasions,²⁴⁸ including in his role as representative of La Canícula. Mr Aven emphasized this point at the Hearing in response to questions from the Tribunal:

10 | ARBITRATOR BAKER: Allegations have been
11 | made that you represented yourself in your business
12 | dealings in Costa Rica as an Italian citizen. Would
13 | you comment on that, please.
14 | THE WITNESS: Well, if you look, there's
15 | a--I think many times that I was--represented myself
16 | as a U.S. citizen. In fact, if you look at the first
17 | documents that we initiated the purchase agreements
18 | in 2002, it clearly says--identifies me as a U.S.
19 | citizen.

[...]

²⁴⁷ English Transcript, 187:17-21.

²⁴⁸ See Exhibits C-3, C-278, C-256, and C-246.

13		ARBITRATOR BAKER: So, as you sit here	
14		today, do you remember ever representing yourself in	
15		any of the transactions in Costa Rica as an Italian	
16		citizen?	
17		THE WITNESS: Yes, I do. And I--I did it as	
18		a--you know, just as an option. You know, I just had	
19		the Italian passport. And I, you know--on a number	
20		of occasions I did. But, I mean, I think for the	
21		Project, it was mostly--I was--I was held--I held	
22		myself out as a U.S. citizen.	249

267. Further, a review of the 2004 EV for the Villas La Canícula project, shows that the Respondent’s agency, SETENA, was aware that “*the developers were collecting the monetary amount in question [for the Environmental Security Deposit] in the United States.*”²⁵⁰ Because Mr Aven and the other Claimants have affirmatively established that they are “*investor[s] of a Party*” within the meaning of the DR-CAFTA under any test, the Respondent’s objection must be dismissed.

B. The Respondent’s *post-hoc* allegations of illegalities rely on misinterpretations of CR law and fact

268. As discussed above, the Respondent’s supercharged theory regarding admissibility – that a burden must be placed upon the Claimants to disprove all of the Respondent’s claims of non-compliance because the Respondent’s claims concern environmental policy prerogatives – has absolutely no basis in the DR-CAFTA or customary international law.

269. Turning first to the text of the DR-CAFTA itself, Article 10.22 of the DR-CAFTA provides that this dispute is governed by the DR-CAFTA’s express terms and “*applicable rules of international law.*” It is not disputed that the DR-CAFTA lacks any “*unclean hands*” provisions. Therefore, the Respondent fashions this novel “*post-hoc compliance*” requirement that it implies from

²⁴⁹ English Transcript, 891:12-22.

²⁵⁰ See Exhibit R-9.

DR-CAFTA Chapter 17 and four inapposite authorities.²⁵¹ This is *the only basis* provided by the Respondent in arguing that a customary international law principle exists requiring investors to affirmatively disprove any allegation by a host State – *years* after the events in question.

270. None of the authorities cited by the Respondent lend support to this reading. Accordingly, the Respondent has failed to demonstrate there is any customary international law basis upon which to assert the defense that it asserts here.

271. Even though the Respondent’s “*trail of illegalities*” theory has no place in this arbitration, for the sake of completeness, the Claimants will engage with the Respondent’s baseless allegations. But for the avoidance of doubt, the fact that Claimant addresses these groundless points below should not be taken as any concession regarding the validity of the Respondent’s legal arguments – these allegations do not have *any* bearing on this treaty dispute. For the sake of protecting the Claimants’ (and their witnesses’) reputation from unfounded assault and to clarify the record, as next shown, the Respondent’s “*trail of illegalities*” defense fails both on its facts, and as a matter of Costa Rican law and international law.

1. **The 51% ownership rule**

272. The Respondent has attempted to defend its own breaches of the DR-CAFTA by, *inter alia*, accusing the Claimants of violating the “**51% Rule.**” This *post-hoc* allegation of non-compliance with the 51% Rule, some fifteen years later, cannot be decided in international arbitration – let alone serve as a defense or as a bar to a DR-CAFTA claim.

273. Before addressing the substance of the Respondent’s allegation, it is worth noting that this accusation only relates to a small portion of the Las Olas

²⁵¹ *Inceysa v. El Salvador* (RLA-11), *Plama v. Bulgaria* ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶143. (RLA-12), *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, ¶58 (RLA-13), *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶332 (RLA-14).

Project Site (the Concession). In the circumstances, if it were the case that the Claimants' acquisition of the Concession was unlawful (which is denied), the overall effect on the Claimants' claims would be minimal.

274. Turning now to the substance of the Respondent's arguments, there are three main reasons why this Tribunal should reject the Respondent's belated "*admissibility*" objection of non-compliance with the 51% Rule out of hand: (1) this arbitration is not the proper forum for its *post-hoc* allegation of non-compliance with the 51% Rule; (2) the only way to determine non-compliance with the 51% is to initiate a proceeding in Costa Rica to *annul* the Concession, which the Respondent's agencies have never done; (3) on its facts, a hypothetical local law challenge to the Concession based on an unsubstantiated allegation of non-compliance fifteen years ago would fail.

275. As the Claimants have already addressed the first issue above (that the Respondent's admissibility objection is not properly before this Tribunal), the Claimants next discuss why, even if this Tribunal considers the objection, the Respondent's argument fails.

a. The Respondent has never initiated a proceeding in Costa Rica to cancel the Concession.

276. The Respondent has misinterpreted the 51% Rule in Costa Rican law and practice. The 51% Rule, as part of the law of the Maritime Terrestrial Zone, is subject to laws and procedures which the Respondent only selectively applies.

277. The Claimants agree that Article 53 of the ZMT Law provides that concessions ***may be*** cancelled by the Municipality or the Costa Rican Tourism Authority ("**ICT**") due to a violation of the provisions of the ZMT Law or the law in force when the Concession was granted. However, the Claimants certainly do

not agree with the Respondent's assertion that the Claimants' interest in the Concession is a nullity.²⁵²

278. Like other administrative acts granting rights and having effects on third parties, a private party or government agency seeking the annulment of a concession is required to follow certain procedures. In this case, Section 80 of the ZMT Regulations provides that the cancellation of a concession must be completed only through a formal administrative procedure which follows due process of law and follows the formalities sanctioned by the LGAP.²⁵³ Dr Jurado in his cross-examination explicitly acknowledged this requirement:

13	Last question. If there is going to be any	
14	sort of revocation of a Concession, it would have to be	
15	done through a procedure respecting rights of due	
16	process; is that correct?	
17	A. Yes, sir.	254

279. It is not nearly enough for the Respondent to simply *allege* non-compliance with the 51% Rule, and likewise allege that the Claimants' interest in the Concession is a nullity, without first seeking to cancel the Concession in an official procedure "*respecting rights of due process*" (as Dr Jurado puts it). The Respondent ignores this critical feature of the law in its haste to belatedly raise its jurisdictional objection, as the Claimants discuss in more detail elsewhere in this Post-hearing Brief in response to the Tribunal's Closing Questions.

280. Although there have been previous challenges before the ZMT to cancel the Claimants' Concession that have failed – namely an erroneous challenge in November 2013 by Mr Fernando Morales Azofeifa (at the behest of Mr Bucelato) already dismissed by the Municipality and ZMT²⁵⁵ – the Respondent acknowledges that none of *its* agencies have ever raised any challenge to the

²⁵² See Respondent's Rejoinder, paras. 188-189.

²⁵³ See Section 80 of the ZMT Regulations.

²⁵⁴ English Transcript, 1530:13-17.

²⁵⁵ See Exhibit R-310 (Complaint filed by Mr Fernando Morales Azofeifa's to cancel concession); R-315 (Municipality Resolution (SM-2013-748) upholding the Claimants' Concession, sent to Mr Morales).

Claimants' Concession based on the 51% Rule. Indeed, the Respondent explicitly recognizes in its Rejoinder that "*it is not for [...] the Tribunal to declare the nullity of this transaction but for Respondent's local courts to initiate corresponding proceedings.*"²⁵⁶ This is fatal to the Respondent's unfounded *post-hoc* allegation that the Claimants have violated the 51% Rule, because under Costa Rican law, there has never been a determination that the Claimants have done anything wrong in regards to the Concession.

b. Any hypothetical challenge to the Concession under the 51% Rule in its proper venue in Costa Rica would Fail.

281. Moreover, it is not surprising that the Respondent has not raised any issue regarding the Claimants' alleged non-compliance with the 51% Rule until it was convenient as a defense in this arbitration. The Respondent has likely failed to raise this issue (and has still failed to raise this issue in the local courts) for three main reasons: (1) any hypothetical challenge brought today would likely be dismissed as time-barred; (2) the Claimants have already established in past submissions, any challenge would fail because the Claimants have complied with the 51% Rule; and (3) the record suggests that it is unlikely that Costa Rican authorities would bring an action to enforce the 51% Rule in any case.

c. The Respondent's hypothetical challenge would likely be deemed "time-barred" or "cured" under Costa Rican law.

282. In the Rejoinder, the Respondent bases its allegation of non-compliance on Mr Aven's April 30, 2002 acquisition of shares in La Canícula.²⁵⁷ Therefore, it has been nearly *fifteen* years since the actions that the Respondent alleges to have breached the 51% Rule occurred.

²⁵⁶ See Respondent's Rejoinder, para. 197.

²⁵⁷ See Respondent's Rejoinder, para. 192. The Respondent asserted that this acquisition occurred on April 1, 2002, but Mr Aven subsequently corrected his Witness Statement to clarify that the acquisition occurred on April 30, 2002. See English Transcript, 801:16-803:16. This was also reflected in the Claimants' opening. See English Transcript, 148:7-149:16; see Exhibit C-8, compare with Exhibit C-237.

283. The ZMT Law does not specify a specific statute-of-limitation period for an action seeking the cancellation of a concession, but as noted above, Section 80 of the ZMT Regulations provides that the cancellation of a concession must be completed through a formal administrative procedure that follows the formalities under the LGAP. The general statute of limitations that applies to actions under the LGAP is *four years*, as set forth in Article 198 of the LGAP. In the absence of a specific statute of limitations in the ZMT Law or Regulations, the LGAP statute of limitations is applicable.²⁵⁸
284. Thus, the time to have brought a claim lapsed a long time ago. Even though Dr Jurado did not know offhand what the statute of limitations would be for an action to cancel the ZMT, on cross-examination Dr Jurado admitted that “*there ought to be one.*”²⁵⁹
285. Anticipating the absurd nature of its objection, the Respondent itself has recognized in the Rejoinder that the Claimants may raise the obvious issue that the “*Respondent is estopped from raising this objection because [...] [n]one of its agencies had raised it before; or a local court has not declared the nullity of the illegal transactions whereby Claimants acquired its rights in the Concession.*”²⁶⁰ Although the Respondent does not cite the manifest issue of a statute of limitations, barring this “*hypothetical*” claim, the Respondent nonetheless argues that “*Claimants never informed the Costa Rican authorities of these illegal transactions and there was no possible way that Costa Rican agencies could have known of these transactions without Claimants’ notifying them.*”²⁶¹ This is far beyond the pale, even for the Respondent.
286. Without going too far down the road of a hypothetical proceeding that might have been brought in Costa Rica, this argument should be immediately

²⁵⁸ Even if the four-year statute of limitations did not apply here (which is denied), the longest statute of limitations found *anywhere* in Costa Rican law is *ten years*. See Section 868 of the Civil Code. This time limit has also passed long ago.

²⁵⁹ English Transcript, 1528:2.

²⁶⁰ See Respondent’s Rejoinder, paras. 193-197.

²⁶¹ See Respondent’s Rejoinder, para. 194.

discarded by the Tribunal because (1) there is no basis to support the Respondent's claim that it could not have found out the beneficial interest holding or trust arrangements of La Canícula if the Respondent's agencies had done *basic due diligence or monitoring*; (2) the available documents show that the Municipality of Parrita knew all along that Mr Aven represented La Canícula as its owner; and (3) the Respondent has not shown that any principle exists under Costa Rican law of equitable tolling,²⁶² or any principle that would operate to toll the applicable statute of limitations. In this vein, Dr Jurado's speculation at the Hearing regarding the permissibility of a hypothetical challenge, brought today against the Concession, cannot be accepted. Dr Jurado opined that he thought that an action to annul the Concession for non-compliance with the 51% Rule could be brought today, years later, even if the shareholding was subsequently made compliant with the 51% Rule. However, Jurado admitted that he did not have "*any legal authority to offer*" for that proposition, and that it was only his "*personal opinion*"²⁶³

d. The Claimants complied with the 51% Rule and none of the transactions challenged by the Respondent was "*illegal*."

287. The Respondent's jurisdictional objection in paragraph 192 of the Rejoinder can be summarized as follows: "*Mr Aven acquired 'the totality of shares of La Canícula from its sole shareholder, Mr Monge.' Under Article 47 of the ZMT and constitutional case law, Mr Aven's acquisition of the totality of shares in La Canícula on April 1, 2002 is null and void, and therefore, Claimants have no rights in La Canícula or the Concession.*"

²⁶² This is a principle in equity that has been asserted (but largely rejected) in the United States where a plaintiff, despite use of due diligence, could not have discovered an injury until after the expiration of the applicable statute of limitations. In the United States, this principle cannot apply in any case where the party invoking the principle failed to exercise due diligence in preserving legal rights. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Respondent has offered no evidence to show that this principle (or anything like it) applies under Costa Rican law or international law.

²⁶³ See English Transcript, 1530:7. In addition, Dr Jurado gave no opinion regarding the applicable statute of limitations except that "*there ought to be one*." See English Transcript, 1528:2.

288. Mr Aven corrected his testimony at the hearing to clarify that the SPA between Mr Aven and Mr Monge occurred on April 30, 2002.²⁶⁴ The SPA was executed contemporaneously with the Trust Agreement, also executed on April 30, 2002.²⁶⁵ An error in the Trust Agreement showed that it was executed in “April 2002,” without specifying the date, and Mr Aven erroneously assumed in his Second Witness Statement (and the Claimants in their Reply Memorial) that the SPA was executed on April 1, 2002.
289. It is clear upon further interrogation of both documents that they were executed together, and the agreements refer to each other.²⁶⁶ Notably the SPA specifically references the “Trust Agreement signed on this date.”²⁶⁷ The Claimants’ counsel, Mr Burn, explained this error in the Claimants’ Opening Statement at the Hearing:

15 The Claimants have complied at all times with
16 the Concession Agreement.
17 On--now, there is--to be fair to the
18 Respondent, we realized that there was an error in the
19 dating of one of these documents. So, the sale and
20 purchase agreement actually has--as you can on the
21 left-hand side, it's--the date is not filled in. The
22 trust agreement on the right-hand side has the date

²⁶⁴ English Transcript, 801:16-803:16.

²⁶⁵ See Exhibit C-8 (SPA); and Exhibit C-237 (Trust Agreement).

²⁶⁶ See Exhibit C-8 and C-237. Page 12 of the SPA [C-8] refers to the Trust Agreement of April 30, 2002 [C-237] in the past tense, stating: “*the parties have subscribed a Guarantee Trust...*”

²⁶⁷ See Exhibit C-8, at pp. 13-14. The Fourth Clause of the SPA refers specifically to the “*trust agreement signed on this date by the BUYER, as Trustor, and the BANCO CUSCATLAN DE COSTA RICA S.A. as Trustee, and the SELLERS as Trust Beneficiaries, copy thereof, signed by the parties hereto, forms an integral part of this agreement as annex to the same.*”

1 30th of April completed. And these agreements, when
2 you actually read them, you realize that they
3 are--they've been executed at the same time because of
4 the way in which the provisions in each cross-refer to
5 one another, they depend on each other.

6 And it's obviously some sort of historical
7 oversight that one date was not inserted. Mr. Aven
8 speculated that he thought he--it was--the sale and
9 purchase agreement had been dated the 1st of April.
10 He now realizes that is wrong and it must have been
11 the 30th of April. There was a transaction on the 1st
12 of April, which appears to have confused him, relating
13 to some disposal of separate plots within the site.
14 But there is no mystery, again. Mr. Aven will speak
15 to that when he appears.

16 And page 12 of the sale and purchase agreement
17 refers to the trust Agreement. You can see, we've
18 highlighted the text there. And this is the point you
19 can--it doesn't take much to understand that the two
20 were executed simultaneously.

21 And, again, you can see the cross-reference,
22 according to the trust agreement signed on this date

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290. Mr Aven subsequently explained the error at the Hearing during his testimony:

19 You referred a moment ago to the date,
20 April 1, 2002.

21 A. Uh-huh.

22 Q. You'll see in this paragraph, there are two

²⁶⁸ English Transcript, 147:15-148:22.

1 references to that date.

2 Could you just read the text of that?

3 A. Which paragraph is that again?

4 Q. 27, beginning on Page 6. Read through the
5 whole paragraph.

6 If you're satisfied that that is the point
7 at which you need to insert a corrected date, let us
8 know. If it's not, we'll find the right place for
9 you.

10 A. Yes, we entered into a purchase
11 agreement--purchase and sale agreement with Mr. Monge
12 to purchase all shares of La Canícula from him. On
13 payment for the purchase of the non-Concession
14 property, the title was transferred to--by Pacific
15 Park Condo on April 1st of 2005 to Inversiones
16 Cotsco.

17 Q. So, that's 2002.

18 A. I'm sorry, 2002, yeah.

19 And as a result, the U.S. investors owned
20 the entirety of both La Canícula and Inversiones
21 Cotsco as of April 1st, 2002, including three
22 properties mentioned above.

[..]

8 Q. So, first of all, on the dates--

9 A. I'll change that--yeah, April 30th, 2002.

10 Q. Is that correct, both of those April 1sts
11 should be April 30s?

12 A. Yes.

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291. Why are these dates important? The Respondent claims that this *thirty-day* period (which never existed) between the date Mr Aven purchased the shares of La Canícula and the date of the Trust Agreement (providing that the La Canícula shares would be held in trust by a Costa Rican national) should deprive this Tribunal of jurisdiction over the Claimants' claims regarding the Concession. As described above, there is no factual basis for the Respondent's objection. In fact, during his oral testimony, Mr Aven confirmed that at all

²⁶⁹ English Transcript, 801:19-803:12.

times title to at least 51% of the shares in La Canícula were held by a Costa Rican national (either Mr Aven's former lawyer, Juan Carlos Esquivel, or Mr Aven's long-term personal assistant, Ms Paula Murillo). Nothing in the cross-examination of Mr Aven showed his statement to be incorrect, leaving the Respondent's entire position on this issue without any evidential basis.

292. Even if the Tribunal considers that the SPA was executed on April 1, 2002 (which is denied), the Claimants submit that a thirty-day period of alleged non-compliance with the ZMT Law, raised fifteen years after the events in question, is a *de minimis* violation, and this *post-hoc* allegation of non-compliance (in any case) certainly does not deprive this Tribunal of jurisdiction.
293. The Respondent then speculates about other imagined instances of non-compliance with the ZMT law, all without merit. The Respondent first alleges that “*it is fair to assume that the Trust Agreement terminated on April 30, 2003, one year after its execution.*”²⁷⁰ Then, the Respondent, relying on Article 688 of the Commercial Code, erroneously asserts that under Costa Rican law, the La Canícula shares in trust automatically reverted back to Mr Aven on April 30, 2003.²⁷¹ But Article 688 is not the relevant law regarding the expiry of trusts – as the Respondent admits in its Rejoinder, Article 688 applies to amounts in escrow.
294. As Mr Burn explained at the Hearing,²⁷² Article 659 of the Commercial Code is the correct reference relating to the expiration of trusts, and none of the grounds listed refer to the “*extinction of the Trust Agreement term*”²⁷³ as a ground for automatic reversion.²⁷⁴ In Costa Rica, a reasonable trustee would

²⁷⁰ See Respondent's Rejoinder, para. 180, citing R-394, Article 688 of the Commercial Code.

²⁷¹ See Respondent's Rejoinder, para. 185.

²⁷² English Transcript, 149:1-2.

²⁷³ *Id.*

²⁷⁴ See Exhibit C-299, Article 659 of the Commercial Code.

keep the assets in trust until he, she, or it receives instructions on how to proceed.²⁷⁵ As Mr Ortiz confirmed, no automatic reversion would occur.²⁷⁶

295. Thus, the Respondent's allegation is based on a misunderstanding of Costa Rican law, and is raised (in this case) *fourteen* years later in the wrong venue. This Tribunal should reject this baseless allegation, and rule that such unsubstantiated accusations cannot deprive it of jurisdiction over the Claimants' claims.

e. It is not likely that the Respondent's agencies would ever bring an action against the Claimants under the 51% Rule.

296. Despite the Respondent's bold proclamation in the Rejoinder that the Claimants' April 30, 2002 transfer of La Canícula shares amounts to a *fraud de ley*,²⁷⁷ there is evidence on the record that suggests Costa Rican authorities are less than rigorous in their enforcement of it. Despite Dr Jurado's personal opinion that enforcement should be made more rigorous regarding the 51% Rule, Dr Jurado acknowledged that he is well aware of the practice where "*Costa Ricans (...) 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.*"²⁷⁸ There is evidence on the record that indicates that this practice is common.

297. In the Constitutional Chamber Opinion 2010-11351 of June 29, 2010 discussed by both Dr Jurado and Mr Ortiz, the Chief Judge of the Constitutional Chamber, Ana Virginia Calzada, observed that in practice, Costa Rican

²⁷⁵ English Transcript, 149:17-19.

²⁷⁶ English Transcript, 1289:4-17.

²⁷⁷ For the avoidance of doubt, any finding of a *fraud de ley* under the Costa Rican Criminal Code would require a criminal process involving a full investigation of the facts. This never happened in the case of La Canícula.

²⁷⁸ English Transcript, 1540:20-22.

nationals *often* act as trustees to allow foreigners to participate in and develop concessions.²⁷⁹

298. Likewise, Mr Ortiz testified at the Hearing that foreign hotel chains and other foreign nationals and entities avail themselves of trust arrangements in order to operate legally under the 51% Rule:

20 | If you study Costa Rican ZMT Concessions--we
21 | have Marriott hotels. We have Four Seasons. We have
22 | Spanish hotels. Do you think that Costa Ricans are

1 | really the owners of the 51 percent of the shares?

2 | PRESIDENT SIQUEIROS: Well, remember that many
3 | hotels only manage rather than own the asset.

4 | THE WITNESS: Yeah, but--

5 | PRESIDENT SIQUEIROS: Many of these hotel
6 | chains manage and not own because of capital reasons.

7 | THE WITNESS: Exactly. But in many of those
8 | cases, they are really the owners. At least the
9 | experience I have with my clients, those two--one of
10 | those it's my--it's my client, but not the--not the
11 | Four Seasons, but the experience I have with my
12 | clients.

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299. This practice is notwithstanding the many constitutional challenges brought against the 51% Rule for which the Constitutional Chamber has yet to give a final decision.²⁸¹ As discussed at length at the Hearing with both Mr Ortiz and Dr Jurado, there exist strong constitutional challenges to the 51% Rule based on the principle of transparency that are yet to be finally resolved by the Constitutional Chamber.²⁸² It is likely that the Claimants would raise this

²⁷⁹ See Exhibit C-310, at p. 10 (“*porque para evadir las limitaciones impuestas por las normas aquí cuestionadas, muchas veces los extranjeros recurren a testafierros.*”).

²⁸⁰ English Transcript, 1400:20-1401:12.

²⁸¹ English Transcript 1398:21-1400:18; and 1510:10-1515:20.

²⁸² See Exhibit C-310, at p. 10.

(hypothetical) defense to any hypothetical challenge not yet brought against them.

300. Given the spirit and general practice of non-enforcement of the 51% Rule, it is unsurprising that the Respondent has never raised any issue regarding the Claimants' alleged non-compliance with the 51% Rule until this arbitration. It is not for this Tribunal to now speculate how a properly filed action would conclude, if one was ever filed.

2. **The Claimants complied with other requirements applicable to the Concession, including paying relevant taxes and fees.**

301. Although the Respondent failed to pursue its *post-hoc* allegation regarding Concession fees during the Hearing, for the sake of correcting the record, the Claimants complied with their obligations to pay fees for the Concession. Mr Aven explained this in his Second Witness Statement that these fees were paid,²⁸³ and this was confirmed with receipts obtained from the ZMT and Municipality's own files demonstrating payments made from 2001 to 2013.²⁸⁴

302. Nevertheless, in its Rejoinder, the Respondent argues that Concession fees had not been paid, entitling the ZMT to cancel the Concession.²⁸⁵ Rather bizarrely, the Respondent alleges (in what can only be accurately described as a conspiracy theory) that “*On October 22, 2013, Mr Fernando Morales [Azofeifa], under the instructions of Claimants and Mr Sebastian Vargas Roldan, submitted a complaint against La Canícula with the Costa Rican Institute of Tourism requesting the cancellation of the Concession for La Canícula's failure to pay annual fees in the past four years.*” What follows is an unsubstantiated, hyperbolic, and (frankly) paranoid fairy-tale regarding an alleged effort by the Claimants to “*defraud*” the Respondent into giving it the Concession for free.

303. The Respondent alleges that “*Claimants planned to willfully obtain the cancellation of the Concession, to later have it granted to their counsel Mr*

²⁸³ See David Aven Second Witness Statement, para. 38-40

²⁸⁴ See Exhibit C-268.

²⁸⁵ See Respondent's Rejoinder, paras. 473-486.

Sebastián Vargas Roldán, and operate it through him without paying any of the outstanding fees to the Municipality.”²⁸⁶ The Respondent labels this conspiracy theory as the “*Claimants’ fraudulent scheme to keep the Concession for free.*”²⁸⁷

304. This is a ridiculous assertion. Why would the Claimants ever seek to cancel their own Concession? The Claimants knew nothing of any actions filed by Mr Fernando Morales,²⁸⁸ and were not aware of any involvement by Mr Sebastian Vargas Roldan, who by 2013 had ceased to be the Claimants’ legal advisor for years.
305. If anything, the Municipality’s Resolution to uphold the Concession against Mr Morales’s attempt to cancel demonstrates that, faced with a challenge *actually filed* against the Claimants for the validity of the Concession, the Maritime Terrestrial Zone and Municipality nevertheless upheld the validity of the Concession.²⁸⁹ After recounting the history of La Canícula, the Municipality stated that La Canícula continued paying Municipal fees, and that the Municipal Invoicing System contained records of payment for “*several millions.*” The Municipality therefore recommended that Mr Morales’ application to cancel the Concession be rejected.
306. Like the Respondent’s failure to raise any issue regarding alleged non-compliance with the 51% Rule, the Respondent has never raised any issue regarding alleged “*non-payment of fees.*” Indeed, this Tribunal should reject the Respondent’s belated “*admissibility*” allegation that the Claimants failed to pay Concession fees because: (1) this arbitration is not the proper forum for its *post-hoc* allegation of non-compliance; (2) the only way to properly raise this issue is through a proceeding in Costa Rica to *cancel* the Concession, which the Respondent’s agencies have never done; (3) any hypothetical local law challenge to the Concession based on a failure to pay fees would fail, just as Mr Morales’ attempt to cancel the Concession on the same basis failed; (4) any challenge based on the

²⁸⁶ See Respondent’s Rejoinder, para. 489.

²⁸⁷ See Respondent’s Rejoinder, para. 493.

²⁸⁸ See Exhibit R-310, Complaint filed by Mr Morales seeking to cancel the Claimants’ Concession.

²⁸⁹ See Exhibit R-315, November 20, 2013 Municipality Resolution (SM-2013-748), sent to Mr Morales.

Respondent's conspiracy set forth in its Rejoinder would be doomed to fail at its outset.

3. **The Respondent has failed to substantiate its allegations of unlawful activities at Las Olas.**

307. The Respondent's allegations that the Claimants engaged in illegal activities are not borne out by the evidence, and regardless cannot shield the Respondent from liability under the DR-CAFTA.

308. The Respondent's contemporaneous allegations can be boiled down to three categories: (1) allegations that the Claimants continued to progress works at Las Olas after the Municipality's Shutdown Notice; (2) allegations from community members; and (3) that the Claimants illegally constructed sewers that impacted the local community. As next shown, these allegations remain unsubstantiated, and are evidence only of the Respondent's failed effort to avoid responsibility under the DR-CAFTA.

a. **The Respondent's allegation that the Claimants continued to work after the May 11, 2011 Shutdown Notice is unfounded.**

309. The Respondent in its Rejoinder accused Mr Damjanac of lying in his witness statement when he confirmed that the Claimants stopped all work after receiving the Municipality Shutdown Notice.²⁹⁰ The Respondent, in an unsuccessful effort to discredit Mr Damjanac cites three reports, none of which have not been presented accurately by the Respondent:

310. First, the Respondent argues in its Rejoinder that a June 9, 2011 inspection report by the Department of Inspectors to the Social and Urban Development Manager (Exhibit R-103) "*reports that works were being performed on the*

²⁹⁰ See Respondent's Rejoinder, para. 455.

Easements and other lots site.”²⁹¹ The Respondent’s description completely misrepresents the contents of this document.

311. Exhibit R-103 memorializes a site inspection conducted by the Municipality, who reviewed whether the Claimants were complying with the SETENA injunction. The report states that “*no machinery was found working, we just observed traces of entrance of a back hoe to remove small landslides caused by the rain. No trucks were observed performing any type of works to level the waste stone, we just observe staff sowing grass.*” The Report concluded that “*as an important point for the report, we observed a movement of land in a different area of the property which, according to Mr. Jovan, was made to construct a new easement to ensure access to another area of land. We proceeded to verify this information and we were told that this movement of land took place by a property of Noches de Esterillos S.A., in relation to which we received the corresponding construction permit for the construction of this easement.*” This inspection report did not report that the *Claimants* were performing illegal works on the Easements. Incidentally, contrary to the Respondent’s attempt at the Hearing to argue that the Municipality was misled by the Claimants’ Environmental Regent, Mr Bermudez, into believing that all construction work at Las Olas was covered by an EV, this report evidences the Municipality’s understanding that the construction work taking place on the Easements was outside the scope of SETENA’s EV for the Condominium Section.
312. Second, the Respondent argues that a May 18, 2011 SETENA inspection report shows “*once again that works were still being conducted.*”²⁹² Yet again, the Respondent fails to explain that the SETENA inspection report does not state that the *Claimants* performed these works. Rather, the report observed that individuals were “*constructing a house*” and “*sowing grass.*” Maintaining grass does not constitute construction works subject to the Municipality

²⁹¹ See Respondent’s Rejoinder, para. 456.

²⁹² See Respondent’s Rejoinder, para. 456.

Shutdown Notice, and the Claimants never built houses on the property. Rather, the only house built on the property was constructed by David Tory Lane Mills,²⁹³ and he is not one of the Claimants.

313. Doubtless aware of these weaknesses in its pleaded position, at the Hearing, the Respondent focused only on the third document cited in its Rejoinder, a May 12, 2011 report describing works with “*a backhoe*” on the site, attaching photographs.²⁹⁴ The Claimants have explained that they stopped all work after receiving the Municipality Shutdown Notice on May 11, 2011 and that this report, released one day after the Shutdown Notice, is inaccurate.²⁹⁵
314. Mr Damjanac calmly reiterated his testimony that the Claimants did not engage in illegal construction after receiving the Shutdown Notice. Mr Damajanc also explained that the photographs shown to him by the Respondent’s counsel were not dated, and therefore, he disputed that those photographs were taken on or around the date of the Municipality document in question:

²⁹³ See Exhibit C-294.

²⁹⁴ See Exhibit R-270.

²⁹⁵ See Jovan Damjanac Second Witness Statement, paras. 50-52.

1 Q. So, let's read from the first paragraph of
2 that Exhibit R-270, which says--and I'm going to read
3 from the translation: "That on Thursday, May the
4 12th of the present year, at 2:00 p.m., a follow-up
5 inspection was carried out at the site of Las Olas
6 Condominium Project located in Esterillos Oeste."

7 And then I'm going to skip a paragraph, and
8 then in your translation, it's the next paragraph
9 that's there, the only other paragraph that's there.
10 It says: "The presence of a backhoe was witnessed,
11 which was performing leveling of the ballast on the
12 roadways. Also during the visit a light truck
13 proceeded to leave more ballast at the site, which
14 was then leveled by the aforesaid machine. The
15 respective photographs are attached to the report."

16 Do you see that, sir?

17 A. Yes, I see that statement.

18 Q. And then if you turn the pages of the
19 original R-270--and I think hopefully the next page,
20 you can see some color photos showing the truck
21 leaving the ballast at the site.

22 Do you see that, sir?

1 A. Yeah.

2 Q. Although you say in Paragraph 50 of your
3 Second Witness Statement that this does not show
4 anything, and it's, quote, "impossible to respond."

5 That is what you say in Paragraph 50 of your
6 Second Witness Statement; is that correct, sir? It's
7 the last line of Paragraph 50.

8 A. Okay.

9 Q. Is that still your testimony today?

10 A. I will say that there is no evidence that
11 these photos were actually taken on the date
12 indicated here in the Report. This --we always came
13 across photos or--photos were always submitted in
14 this case, and there were never any definite markers
15 or verification on the photos as to when work was
16 done or when these photos were taken. So, I don't
17 remember--or I don't know when these photos were
18 taken. They could have been submitted into this
19 Report after having been taken much earlier than
20 this--the Report.

21 Q. Although on the last page where we have the
22 color photographs, there's a stamp with the date of

1 13th of May 2011; is that right?

2 A. Well, anybody could make a stamp on a
3 document. That doesn't verify that these photos were
4 taken on the 13th or the 12th of May.

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315. What ensued at the Hearing was a rather unseemly barrage of accusations by the Respondent's counsel, accusing Mr Damjanac of lying in his witness statement. On the other hand, Mr Damjanac's responses were respectful and even, and perfectly logical because the photographs referenced by the

²⁹⁶ English Transcript, 696:1-698:5.

Respondent's counsel were not dated.²⁹⁷ This exchange continued for a lengthy period of time, with Mr Damjanac calmly continuing to explain that the Claimants had stopped any construction work on the property, despite the continued accusations by the Respondent's counsel:

18 | Q. So, you are operating in contravention of an
19 | injunction, but you don't challenge the evidence
20 | which is showing that you're operating in
21 | contravention of an injunction.

22 | A. We never operated in contravention of an

1 | injunction, sir.

2 | Q. Well, that's not what this document is
3 | telling us. This document is showing works--excuse
4 | me--works being undertaken during the period that the
5 | property was subject to the SINAC injunction.

6 | A. Well, this document is showing photos of a
7 | truck laying gravel and another machinery--another
8 | machine on the road; but it doesn't--I don't agree
9 | with your statement that work was being done after
10 | the injunction, because all I know is, the minute we
11 | received the injunction, we stopped working.

12 | There may have been a backhoe--a backhoe
13 | moving around the project from time to time after the
14 | injunction. There may have been basic maintenance
15 | work being done, like the clearing of trees.
16 | Sometimes we'd have very bad wind storms, and there
17 | would be branches and trees falling, and removing
18 | debris does not constitute construction work.

19 | And if you have a machine and you can do it
20 | in ten minutes as opposed to four hours with two
21 | laborers, it--you know--I don't believe there was a
22 | law whereby we couldn't use our backhoe. As long as

²⁹⁷ See Exhibit R-270. The document itself is stamped with a date, but as Mr Damjanac testified, the photographs themselves do not indicate when they were taken.

1 | we weren't building or constructing the project, I
2 | don't believe there was a law that said our driver
3 | couldn't go onto the property with our backhoe.

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316. Mr Damjanac's reluctance to accept that the photographs were taken on the same date as the issuance of the Municipality Report is prescient, in light of Ms Monica Vargas's subsequent confirmation that the photographs included in *her* official reports were not contemporaneous with the dates of her reports.²⁹⁹
317. But even more fundamentally, the Respondent's allegations that the Claimants violated the Municipality Shutdown Notice the day after it was issued, even if true (which is denied), cannot shield it from being held accountable for DR-CAFTA breaches. The typical sanction for constructing without a valid permit is a fine, plus payment of a construction tax for 1% of the amount of the illegal construction.³⁰⁰ Importantly, the Respondent has not formally issued a sanction for the Claimants' alleged work, and raises it only in the context of this arbitration. Further, the Claimants submit that any such challenge would be out of time, as discussed in relation to other of the Claimants' alleged breaches of Costa Rican law.
318. Nevertheless, the Respondent in its Rejoinder stated that even minor breaches should have an effect of inadmissibility, because "*the cumulative effect of the series of illegalities is what is important in this arbitration.*"³⁰¹ Unsurprisingly, the Respondent fails to cite any authority for this proposition. Unfortunately for the Respondent, there is no such thing as a "*cumulative*" admissibility objection to valid international law claims, especially if the objection is based

²⁹⁸ English Transcript, 700:18-702:3.

²⁹⁹ English Transcript, 1209:4-1213:16 (Ms Monica Vargas agreeing that she is not sure the precise dates of when the photographs in her reports were taken.)

³⁰⁰ See Sections 88-96 of the Costa Rican Construction Laws. Section 88 sets forth the possible sanctions, which include fines. Certain municipalities prescribe the 1% construction tax explicitly in the law, but the Parrita Municipality does not. Sections 93-96 establish the procedure to be applied for an allegation of illegal construction, which includes providing the developer with a 30-day cure period to file proper documentation, which may be extended by another 30-day term. Exhibit C-205.

³⁰¹ See Respondent's Rejoinder, para. 510.

on imagined allegations of local law violations, for sanctions that were never issued against the Claimants at the time.

b. The Respondent's allegations from community members, disseminated by Ms Monica Vargas, are recycled complaints from Mr Steve Allen Bucelato or lack credibility.

319. Another main feature of the Respondent's "*illegality*" defence is based on community complaints that were disseminated to public agencies by Ms Vargas.
320. As Ms Vargas explained in her First Witness Statement, part of her role was to respond to complaints from community members and to disseminate reports regarding these allegations.³⁰² Through no fault of Ms Vargas, it became clear at the Hearing that she has been offered up by the Respondent to stand in the place of scores of absent witnesses, including Mr Bucelato, any member of the Parrita Municipal Council, or any member of SETENA and SINAC – to name only a few.
321. Because of the second-hand nature of many aspects of her reports, Ms Vargas's testimony raised serious questions about the reliability of those reports, upon which the Respondent heavily relies to attest to conditions of the Las Olas site and the actions of the Claimants. First, in regard to the report issued after her inspection of April 27, 2009,³⁰³ Ms Vargas confirmed that she had little to no familiarity with the contents of the photographic logbook, and in fact was relying on the statements of the individuals who took the photographs (including Mr Bucelato) as to when those photographs were taken and whether they were even taken on the Las Olas site. Indeed, a number of the photographs were from 2007 received from Mr Bucelato, and she has no first-hand knowledge of whether they came from the site or the date they were taken:

22 | Q. So, Ms. Vargas, just looking at those |

³⁰² See First Witness Statement of Monica Vargas Quesada, para. 8.

³⁰³ See Exhibit R-26.

1 photographs at Page 3 of the Report under Tab 5, just
2 looking at the first two, you indicated already that
3 those were taken by a neighbor in 2007.

4 That's your understanding, isn't it?

5 A. Correct.

6 Q. Which neighbor?

7 A. That was Mr. Bucelato.

8 Q. And which month in 2007?

9 A. That's not indicated. When he provided the
10 photographs, he just said that they were from 2007.

11 Q. So, you don't even know if they were from
12 2007.

13 A. That's what that person from the community
14 told us.

15 Q. And you don't know--you have no indication as
16 to where these--what these photographs are of. You
17 don't know which precise location these photographs
18 were taken from, do you?

19 A. What Mr. Bucelato said is that it comes from
20 the Las Olas property and that the photographs were
21 taken in 2007.

22 Q. Mr. Bucelato said.

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322. Later, in regards to the fifth photograph, Ms Vargas could not confirm whether it was definitively from the Las Olas site, and she could only guess that the photograph was from March 17, 2009:

15 A. This was in 2009.

16 When inspections are done--I was very clear
17 about the photograph, specifically this one. That
18 means that yes, it was taken on 17 March.

19 Q. But was it taken in your presence, or because
20 somebody gave it to you and said, "This was taken on
21 17 March 2009?"

22 A. When inspections were carried out at Las Olas,

³⁰⁴ English Transcript, 1208:22-1209:22.

1 | there are a number of photographs relating to the
2 | project. So, we don't always use all of the
3 | photographs to include them in the photographic log.
4 | We only select some.

5 | And this one, we only selected what it says
6 | here, one from the 17 March. And it's specifically
7 | the one that's here. Just as in the above, it
8 | specifically indicates it's from 2007.

[...]

20 | Was that fifth photograph taken in your
21 | presence, or were you relying on somebody else telling
22 | you that it was taken on the 17th of March, 2009?

1 | A. In March, as we pointed out, an inspection had
2 | been conducted jointly with MINAE. This photograph
3 | very likely came from that date, with that inspection.

4 | As I said, lots of photographs are taken, but
5 | we only select a few to include in--with the report.

6 | Q. Right. But the relevant words there are "very
7 | likely," which means that's what you believed that you
8 | believe and you trusted that, but you can't know from
9 | your direct knowledge. Equally, you can't know--you
10 | can only think that it's very likely that this is an
11 | even photograph of the Las Olas site; correct?

12 | A. Correct.

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323. Ms Vargas then was asked about the additional site visits in January and May of 2010. Ms Vargas confirmed that she did not actually enter the site, but only recorded observations from the property boundary. Furthermore, according to Ms Vargas, she conducted these observations on the basis of "new claims" that there were works being carried out on site. However, when interrogated

³⁰⁵ English Transcript, 1211:15-1213:12.

further, she could offer no explanation why no contemporaneous documents or recordings were kept regarding the source or context of these alleged “*new claims*”:

13 Q. You say here that you made those further site
14 visits in January and May 2010 following new claims
15 that there were works being carried out on the site.
16 My point to you is, you don't refer to any
17 documentation, there are no footnotes to documentation
18 received from neighbors, from anybody; so, there isn't
19 any documentation recording those specific complaints,
20 is there?
21 A. Correct.

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324. Ms Vargas further conceded her statements regarding the alleged existence of flooded soil were actually based on nothing other than her own observations from the boundary of the property over time, without any contemporaneous photographs. She also confirmed that her observations did not constitute any finding of wetlands, which determination is left to SINAC:

³⁰⁶ English Transcript, 1214:13-21.

5 Q. Right. So, if we're to understand the
6 observations that are recorded in your 31st May 2010
7 report, we should ignore what's in the photos. That's
8 something else; is that right?

9 A. It is the photography log.

10 Q. But it's not a photography log for the
11 observation that I've taken you to that the observed
12 area is characterized by land with soil that can be
13 completely or partially flooded.

14 You don't have a photograph to prove that
15 point or confirm that point in any way; correct?

16 A. Precisely, because no mention is made of a
17 photography. When a mention is made of the
18 photograph, we indicate parenthetically, "Go to
19 Figure X or Figure Y."

20 Q. Other than your statement that the observed
21 area is characterized by land with soil that can be
22 completely or partially flooded, there's nothing else

1 in these documents that we've been examining to bear
2 that point out, is there? There's nothing to prove
3 that there is often flooding in these areas, is there?

4 A. Correct, which is why we asked for cooperation
5 from SINAC.

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325. Ms Vargas then confirmed during her testimony that her allegation of the cutting and burning of trees at Las Olas on the weekends was based on the hearsay of neighbors:

³⁰⁷ English Transcript, 1220:5-1221:5.

15 Q. If you look at the third sentence in Paragraph
16 14 of your Witness Statement, what you actually say is
17 that "According to what the neighbors told me, this
18 practice took place during the weekends, given that
19 public officials do not work on those days we cannot
20 say exactly when the practice was occurred."

21 So, at least in part, you were relying on what
22 you were told; right?

1 A. Correct. I also received phone calls during
2 the weekend from the community.

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326. This is all despite the fact that Ms Vargas herself recognized that a neighbor's complaint, in and of itself, cannot justify the shutdown of a project or the paralyzing of permits – precisely what happened in the case of Las Olas:

6 Q. And--of course. I mean, the point you're
7 making here is that you can't just take a neighbor's
8 complaint and do anything with that in terms of
9 refusing permits and so on. There's going to be
10 something much more that's needed, no matter how many
11 times those neighbors might complain; right?

12 A. Correct. It is important to do an
13 investigation.

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327. Under these circumstances, where allegations against the Claimants are based almost entirely on the complaints of neighbors, and the fact that Ms Vargas was made to testify in the place of essential witnesses from SINAC, SETENA, and the Municipality (who actually made decisions impacting the Las Olas project), the Respondent cannot now seek to cover itself through these hearsay complaints.

³⁰⁸ English Transcript, 1223:15-1224:2.

³⁰⁹ English Transcript, 1226:6-13.

- c. **The Respondent fails to take account that its own agents, including the Municipality, the Ministry of Transportation, and others, have conducted extensive construction works on public roads and culverts.**

328. In paragraphs 747 to 749 of its Rejoinder, the Respondent alleges that the Claimants have illegally assisted the Municipality in building a sewage system for Esterillos Oeste. This must be the case (the Respondent proclaims) because the Claimants' assistance to the Municipality "*probably was just a smoke curtain to cover the drainage and refilling of wetlands they were undertaking on the Project Site.*"³¹⁰ It is clear that the Respondent has not taken the time to assess the veracity, or plausibility, of this mind-boggling allegation.
329. As Mr Aven and Mr Damjanac have explained in their Witness Statements and in oral testimony at the Hearing, they were more than happy to collaborate with the Municipality of Parrita to improve drainage and sewage systems in the immediate vicinity of Las Olas. For the Respondent to turn this fact on its head and refuse to recognise these community-minded contributions, whilst at the same time accusing the Claimants of devious conduct is doubly offensive.
330. As has already been discussed elsewhere in this Post-Hearing Brief, the Respondent's refusal to acknowledge its own works in the vicinity of Las Olas is a recurring theme. First, it was in the context of Mr Martínez's refusal to investigate clear evidence of Municipality works to drain an alleged wetland at Las Olas, as noted by Mr Picado in his criminal complaint. Then, as Mr Erwin was forced to admit at the Hearing, he simply ignored the fact that works to unblock a culvert passing under the Municipality road to the east of Las Olas, adjacent to one of his so-called wetlands, were taking place on the occasion of his second site visit.
331. Finally, the Claimants' counsel team has recently learned that the Costa Rican Ministry of Transport and Public Works (the "**MOPT**") is now carrying out works to replace the sewage system under the main highway (the "*Costanera*") passing immediately to the north of the Las Olas Project Site – where Mr

³¹⁰ Rejoinder, para. 749.

Erwin's alleged Wetland 5 is located. Upon learning of these works, the Claimants' counsel wrote to the Respondent's counsel, (i) requesting an explanation of the nature and purpose of the works and the extent of any environmental assessments that have been undertaken and (ii) noting the Claimants' view that these works constituted a development of which the Tribunal should be informed.³¹¹ For the record, the Claimants do not object to works of this nature, which are a perfectly normal aspect of the Respondent State's responsibilities, as the Claimants' past collaboration on Municipality works of this type demonstrates. There has long been a problem with flooding and blocked culverts in the area, which is why the Municipality, sometimes with the assistance of the Claimants, have historically undertaken works to alleviate the situation. Nonetheless, in circumstances where the Claimants' property stands to be affected, the Claimants are entitled to make enquiries and be kept informed.

332. The Respondent's counsel responded to the Claimants' enquiries by letter dated March 8, 2017.³¹² Regrettably, the Respondent's explanations are unsatisfactory. The Respondent simply states that (i) the works form part of the general highway maintenance works conducted by a private company on the MOPT's behalf, (ii) the works are authorized and comply with local laws and regulations and (iii) none of the works have taken place on the Las Olas Project Site and "*no harm to the land will occur.*" In response to the Claimants' enquiries about environmental assessments, the Respondent simply refers to an exception for the requirement for an Environmental Viability for works constituting the "*repair of existing streets and access roads.*"
333. First, the Respondent failed to explain how the works being conducted constitute mere maintenance of public roads and therefore would, in theory, qualify for this exception. By the Respondent's own admission, they involve "*replacing the sewage system on each side of the road*" and the Claimants' on-

³¹¹ V&E email to HSF, March 6, 2017

³¹² HSF letter to V&E, March 8, 2017

site observations are that these works are substantial and involve significant earthworks. It is clear that the works involve the installation of substantial new drainage infrastructure, and it clearly goes beyond maintenance works.

334. Second, the Respondent has failed to clarify how “*replacing the sewage system on each side of the road*” means that “*no entry to the [Claimants’] land has taken place*” or what it has done to satisfy itself that “*no harm to the land will occur.*”
335. Third, and most significantly, the Respondent’s assertion with regards to the lack of any need for an Environmental Viability permit for the works in question betrays the fact that, contrary to the position it has adopted in these proceedings, the Respondent (at the very least, the MOPT) does not consider there to be a wetland in the vicinity of the current works at all. Wetlands are environmentally sensitive areas and require that an environmental assessment of the likely effect of any works on the land (including any adjacent land, up to between 500 meters and 1 kilometer from the proposed area of the works) be conducted, prior to commencement. The exemption for repair works to existing streets does not apply where environmentally sensitive areas are concerned and an environmental impact assessment is required. The Respondent cannot have it both ways. Either Mr Erwin’s alleged Wetland 5 (which is adjacent to the location of the ongoing MOPT works) is a wetland (and therefore an environmental assessment for the current works is required), or, as the Claimants, Mr Mussio, SETENA, INTA and the Claimants’ environmental expert witnesses in these proceedings have said all along, it is not a wetland. The fact that the Respondent openly admits to not having conducted an environmental assessment and sees no reason why it ought to have done, demonstrates its lack of conviction in its own position in these proceedings. The Respondent must accept the untenable nature of its duplicitous position.

336. The reality is that as a result of these works to replace the blocked drainage system beneath the highway, the land in the area of Mr Erwin's alleged Wetland 5 has been drained. This supports everything the Claimants and Mr Mussio know to be true – the accumulation of run-off water on the Claimants' property over time was simply a result of the poorly maintained public drainage system beneath the public roads that border the Las Olas site on all four sides. There are no, and never have been, wetlands at Las Olas.

4. **The EV for the Condominium Section was not “*fraudulently obtained*”**

337. As previously explained, the Claimants' EVs (issued by SETENA) and construction permits (issued by the Municipality) are binding on all bodies of the public administration.³¹³ It is not disputed that, as a general proposition, the Claimants obtained EVs and construction permits.

338. Because it cannot avoid this immutable fact, the Respondent has engaged in a backward-looking, after-the-fact campaign against SETENA's issuance of the Claimants' Condominium EV in 2008, solely for the purposes of this arbitration. Indeed, the epitome of the Respondent's *post-hoc* illegality strategy is to attack the findings of its own governmental agency, SETENA, in issuing the Claimants' EV for the Condominium Section. In order to make out its illegality claim, the Respondent simply alleges that the Claimants' D1 Application for the Condominium EV was “*fraudulent*.”³¹⁴ This Tribunal should reject the allegation because it is utterly without basis.

339. As an initial matter, the Respondent irresponsibly uses the term “*fraud*” (or similar terms like “*dupe*” or “*misrepresent*”) in nearly all of its admissibility objections.³¹⁵ This unsavoury, imprecise, and bullying use of this terminology

³¹³ See section V, B, 1.a of the Claimants' Post-Hearing Brief

³¹⁴ See Respondent's Rejoinder.

³¹⁵ See Respondent's Rejoinder, para. 190 (alleging that a violation of the 51% Rule is “*constructive fraud*”); para. 199 (“*Claimants made material misrepresentations regarding the physical conditions of the Project Site and obtained the EV by deceit. SETENA relying on these false misrepresentations issued the EV for the Condominium site on 2008.*”); para. 493 (“*As Claimants' fraudulent scheme to keep the Concession for free was taking place in the late months of 2013...*”); para. 709 (“*The construction permit for the Condominium site was obtained*

has been indiscriminately employed against the Claimants personally, and against the Claimants' advisers, employees, and even experts.

340. This misuse is completely inappropriate given the specific facts of this case, especially where the Respondent has failed to produce any witness from SETENA to support its allegation of fraud. As Mr Aven explained at the Hearing:

3 Look, I don't--I didn't dupe anybody. You
4 know, duping the federal government is a very serious
5 crime. Deceiving a government is a very serious
6 crime.
7 And what I would say is this: I think--I
8 still think SETENA is a governing--an agency that is
9 still in business in Costa Rica. I haven't heard
10 that it's closed its doors. And when you--when you
11 make a serious charge like that, where is SETENA?
12 Where is their statement?
13 Where is somebody--you know, they could--the
14 government could go--they work for the government.
15 They could go to their office--SETENA office and say,
16 "Look, we have evidence that David Aven duped you.
17 We want do get a statement from you to confirm that."
18 Isn't that what you do normally when you try
19 to--before you start accusing somebody of serious
20 crimes? Go get your evidence to prove it.

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341. This misuse is *doubly* inappropriate because the Respondent has never cited the precise standard for "*fraud*" under Costa Rican law in any of its "*post-hoc*

fraudulently because Claimants had not complied with all of the legal requirements and were duly informed by the Municipality.")

³¹⁶ English Transcript, 873:3-20.

illegality” allegations.³¹⁷ This is despite the fact that all of the Respondent’s illegality objections are raised as a matter of Costa Rican law.

342. Without having the benefit of *any* witness testimony from SETENA to corroborate the Respondent’s threadbare allegation of fraud in the Claimants’ submission of the D1 Application, it is a practical *impossibility* for any tribunal to reasonably verify the allegation. Accordingly, the Claimants’ requested at the Hearing that an adverse inference be taken against the Respondent for its failure to produce material witnesses from SETENA:

8 In much the same way that the Respondent
9 failed to impugn Mr. Briceño's character and
10 credibility, we submit that the same is true of the
11 efforts the Respondent has undertaken to blacken the
12 names of Mr. Aven and other investors, especially
13 given that it failed to produce any witnesses from
14 SETENA who could have spoken to this alleged fraud
15 perpetrated on them.
16 It's, therefore, my final submission in
17 relation to Mr. Briceño that the Tribunal ought to
18 draw an adverse inference against the Respondent for
19 its failure to produce witnesses from SETENA.
20 We submit that if Sonya Phillips, the SETENA
21 official responsible for issuing the 21 November 2011
22 declaration, had been made available to the Tribunal

1 | by the Respondent, her evidence would have clinched
2 | the fact that work on the Las Olas Project should have
3 | been back underway by the end of 2011.

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³¹⁷ Although the particular claims for “fraud” under Costa Rican law vary depending on whether the case is under civil, administrative, or criminal jurisdiction, all require a finding of **fraudulent intent, or “dolo”** in the commission of the fraudulent act. (*See, e.g.*, Exhibit R-402, Costa Rican Criminal Code Sections 30-31, and 216-224).

³¹⁸ English Transcript, 2349:8-2350:3.

343. The Claimants hereby reiterate their application that an adverse inference be drawn against the Respondent for its failure produce material witnesses,³¹⁹ including witnesses from SETENA. This finding is vital as a matter of due process for the Claimants, as the Respondent cannot be allowed to profit from its failure to fully engage in this arbitration.
344. With no evidence from SETENA, after this Tribunal sifts through the Respondent's empty rhetoric and *ad hominem* attacks, the sum of the Respondent's evidence on fraud in the obtaining of the Condominium EV is that it proclaims (pointing primarily to the so-called "*Protti Report*") that "*there have always been wetlands on the site.*" From this, the Respondent claims the Claimants defrauded SETENA into issuing the Condominium EV.
345. The Respondent's farfetched theory that the Claimants duped SETENA into issuing the Condominium EV ignores that (1) the Protti Report makes no findings of wetlands; and (2) SETENA *actually issued* the Condominium EV after an *in situ* site inspection and review of the D1 Application.
346. Moreover, in cobbling together its *post-hoc* defense, the Respondent fundamentally misconstrues the "*burden of proof*" standard of Article 109 of the Biodiversity Law which *applies only in a formal adversarial legal proceeding involving environmental protection*. The Respondent erroneously applies the standard to the Claimants' submission of the D1, which is not an adversarial proceeding. Because the D1 Application is not an adversarial legal proceeding to which the Article 109 "*burden of proof*" applies, the Respondent's *post-hoc* claim that the Claimants had the burden of disproving any and all of the Respondent's hypothetical environmental challenges fails.

³¹⁹ This application shall also apply to other material witnesses from whom the Respondent has failed to produce evidence, including Mr Christian Bogantes (from SINAC), and Mr Nelson Masis Campos and Mr Marvin Mora Chinchilla (from the Municipality of Parrita).

- a. **SETENA's contemporaneous findings in issuing the Condominium EV are the best evidence that the Claimants did not obtain the EV by fraud.**

347. At the Hearing, the Claimants demonstrated, through witnesses and documentary evidence, that the Respondent's fraud claim has no anchor in reality. The strongest evidence of the lack of fraud is the steps that SETENA took to review the D1 Application and the Las Olas property when issuing the Condominium EV in 2008.

348. SETENA duly issued the Condominium EV on June 2, 2008 after an *in situ* inspection by SETENA's Institutional Management Department on November 8, 2007.³²⁰ SETENA subsequently reconfirmed that no bodies of water were on the property after another *in situ* inspection on August 18, 2010.³²¹ SETENA reaffirmed the EV yet again on November 15, 2011 after reviewing the basis of the injunctive measures.³²² As Mr Ortiz described at the Hearing, under Costa Rican law, it is within SETENA's specific competence to verify the Las Olas site conditions before the issuance of an EV:

12 | Furthermore, SETENA creates legitimate
13 | expectations for the investors because in Article 83,
14 | 84 of the environmental law establishes the obligation
15 | and not just as a power to carry out inspections
16 | before issuing agreements. And Article 13(d) of
17 | Decree 338815, which reorganized SETENA--SETENA must
18 | do mandatory *in situ* inspections. | 323

349. Although Dr Jurado disputes Mr Ortiz's opinion that SETENA has an affirmative obligation to undertake *in situ* inspections to verify every D1

³²⁰ See Claimant's Reply Memorial, para. 226 (g).

³²¹ See Exhibit C-78 (SETENA inspection report). This formed the basis of SETENA's dismissal of Mr Bucelato's complaint to SETENA, and Exhibit C-83.

³²² See Exhibit C-144.

³²³ English Transcript, 1284:12-18. and 1406:2-7 (Ortiz testifying that Article 84(d) of the Organic Law states that SETENA's duties include its duty to carry out the corresponding *in situ* inspections before issuing its resolutions).

Application,³²⁴ this disagreement is academic in this case because it is not disputed that SETENA did, in fact, visit the site on multiple occasions, including both before and after it issued the Condominium EV.

350. As Mr Ortiz explained at the Hearing, even though these findings made during site inspections by, *inter alia*, SETENA, SINAC, or INTA are not “*final acts*,” they nonetheless must be respected by entities of the public administration:

11		And so, it's not so true that internal acts		
12		are worthless. Rather, that they are mandatory. In		
13		other words, if they are not going to follow what the		
14		provisions usually are, they have to explain why.		325

351. It cannot be accepted that, as a matter of Costa Rican law, these SETENA acts are to be outweighed or overridden by a single report, the Protti Report. Nevertheless, as next discussed, the Protti Report is not the magic bullet that proves that the Claimants defrauded SETENA, as the Respondent claims it to be.

b. The Protti Report provides no evidence whatsoever that the EV was fraudulently obtained.

352. The Respondent has devoted much of its allegation of fraud to the so-called Protti Report.³²⁶ The Protti Report is a document submitted to the Municipality by Mr Aven’s attorney, Mr Sebastian Vargas, in response to the SINAC notification in February 2011.³²⁷ Thus, the Claimants did indeed submit the Protti Report, and have never “*buried*” it. The report pertains to observations made by Mr Roberto Protti at the Las Olas site in July 2007.

353. Prior to these arbitral proceedings, none of the Respondent’s government agencies had ever referenced or cited the Protti Report – thus, it is only in the

³²⁴ English Transcript, 1431:8-1432:5.

³²⁵ English Transcript, 1283:11-14.

³²⁶ See Exhibit R-11.

³²⁷ English Transcript, 837:2-21.

Respondent's counsel's hands that the Protti Report has reached near mythological status in the Respondent's defense. As belied by the document itself, and by the witness testimony at the Hearing, the Respondent's interpretation of the Protti Report is, at best, misguided and, at worst, deliberately misleading.

354. As Mr Mussio explained at the Hearing, Mussio Madrigal hired a number of experts and specialists to assist in the completion of the D1 Application, including an environmental consultancy named TecnoControl, which specialized in soil studies.³²⁸ In turn, TecnoControl hired Mr Protti to analyze the contamination risk of the aquifer that would serve Las Olas.³²⁹
355. As Mr Mussio testified, the Protti Report provided information about the generally good drainage conditions at the Las Olas site,³³⁰ and the different levels of saturation, porosity, and other hydrogeological parameters of the soil underneath sedimentary rock.³³¹ Mr Protti took these measurements and others to determine whether there was a risk that the aquifer in question would be contaminated. Mr Protti concluded that there existed little to no threat of contamination of the aquifer, but also recommended that a treatment plant be built to treat the waters, in order to minimize the direct discharge risk of untreated water off the property:

One can deduct from applying the previously described methodology that construction and operation of this project raises a threat of--low to no contamination threat for the aquifer, underground aquifers. Nonetheless, given the closeness of the project with surface water areas that are susceptible to contamination, it is recommended that a treatment plant be built to treat the waters in order to minimize the discharge--direct discharge risk of untreated water into these bodies of water and, in

³²⁸ English Transcript, 423:9-424:4.

³²⁹ English Transcript, 474:7-19.

³³⁰ See Exhibit R-11, p. 4 (handwritten p. 125); and English Transcript, 465:18-466:10.

³³¹ See Exhibit R-11, p. 4 (handwritten p. 125); and English Transcript, 466:11-467:3.

*particular, towards the Aserradero Swamp that are a few meters southwest of the project site.*³³²

356. As Mr Mussio explained, the Protti Report is a technical document related to a “*Transit of Contaminants*” study, which is meant to identify whether bacteria levels in the water could possibly contaminate an aquifer. The Protti Report recommended that the project design contain a treatment plant, and Mr Mussio confirmed that his architectural firm’s design did indeed incorporate a treatment plant into its plans.

357. Critically, the Protti Report’s conclusions make no mention of potential wetlands on site – or anything of the sort:

5 What would you say this report is actually
6 about?
7 A. It's basically a technical study that is
8 called the Transit of Contaminants. The purpose of
9 such a study is to identify whether bacteria in
10 treated water could perhaps contaminate an aquifer.
11 In the case of this report, it clearly states
12 that it's low risk. Nonetheless, the recommendation
13 is that there be a treatment plant.
14 This is a healthy recommendation that, in any
15 event--and it's worth mentioning this here that it was
16 indeed done. There was a--on the design a treatment
17 plant was included. A treatment plant was--design was
18 contracted. This is a study--or it's an indirect cost
19 that the developer incurs.
20 It was done. The location was sought because

[...]

³³² See Exhibit R-11, p. 7 (handwritten p. 128); and English Transcript, 469:20-470:9.

6 And the aim is for these waters to be
7 treated. And one of the characteristics of the
8 water--treated waters are called DBOs in
9 Spanish--should be acceptable before it can flow into
10 a constant-flow body. And it says so in the
11 documents. It talks about constant-flow waters.

12 Q. And looking at the--those principal
13 conclusions in Section 7, do you observe any that
14 relate to suspicions of there being wetlands on the
15 site?

16 A. No.

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358. It cannot reasonably be disputed that the clear context of the Protti Report is that it relates to a study pertaining to the treatment of contaminants. Indeed, its primary recommendation is that a wastewater treatment plant be part of the Las Olas project design.
359. Despite this, the Respondent concludes that *one* word found in the Protti Report (“*pantanososa*,” describing a “*swampy*” type area)³³⁴ *affirmatively proves* that there are wetlands at Las Olas, and that the Claimants not only knew about those wetlands on the property, but then “*buried*” the Protti Report in order to defraud SETENA.³³⁵ As demonstrated through the witness testimony of Mr Mussio and others, the Respondent’s conspiracy theory is offensive and lacks any basis in reality.
360. As the Claimants explained in their Reply Memorial, the Protti Report (as a study pertaining to the treatment of contaminants) did not meet the requirements of the Geology Protocol set forth in Executive Decree N. 32712-MINAE for submission with the Environmental Viability, and it did not integrate geotechnical information required by the Executive Decree.³³⁶ Therefore, the Claimants, through their hired experts, made a wholly rational

³³³ English Transcript, 474:5-475:16.

³³⁴ English Transcript, 551:6-11.

³³⁵ See Respondent’s, Rejoinder, para. 239 (“*Claimants make the following arguments in a desperate attempt to justify why the Protti Report was **buried** and replaced with the Hernández Report.*”).

³³⁶ See Claimant’s Reply Memorial, para. 242.

decision to submit reports that complied with SETENA's legal requirements. It is not surprising (and *not* fraudulent) that the Claimants submitted other reports besides the Protti Report to meet SETENA's requirements.

361. If the Respondent truly intended to make the point that Mr Protti saw protected wetlands at Las Olas in 2007, it could have obtained a witness statement from Mr Protti or otherwise called him to testify. The Respondent chose not to do so.

c. The D1 Application

362. The Tribunal has asked the Parties, in its Closing Questions, to clarify the submission of the TecnoControl Report contained in the Claimants' D1 Application for the Condominium EV, located at Exhibit R-13.³³⁷
363. Upon interrogating the document at Exhibit R-13, an exhibit submitted by the Respondent as part of the Counter-Memorial, the Claimants can confirm that the TecnoControl document that appears on page 33 of Exhibit R-13 is not from the Las Olas Project. Rather the TecnoControl Report is for "*Proyecto en Playa Chaman Punta Ballena*," a project unrelated to the Las Olas Project and unconnected to the Claimants. The Claimants first raised this issue of an apparent error *sua sponte* during the cross-examination of Ms Priscilla Vargas. The Claimants did not know of the full nature of this document until interrogating it after the Hearing.
364. **Was this report submitted by mistake in the D1 Application?** It is evident that the TecnoControl Report for "*Proyecto en Playa Chaman Punta Ballena*" should not be in SETENA's Las Olas file – and it is fair to characterize its presence in the file as a "*mistake*." However, it is not possible to determine, based on examination of the file itself, whether this mistake is attributable to the SETENA authorities who are responsible for managing the files and documentation that are submitted to it in the exercise their competences, or, if

³³⁷ See Exhibit R-13.

it was a mistake by GEOAMBIENTE – the company hired by Mussio Madrigal to obtain the EV when they filed the D1 Application. The Claimants’ subsequent follow-up investigation did not make clear who made the error in terms of what is on the relevant file.

365. **Did Las Olas ever complete a geotechnical study for Las Olas?** Yes, the Claimants, through their experts GEOAMBIENTE and TecnoControl, completed the requisite geotechnical studies. After an extensive search of Mussio Madrigal’s files, the Claimants have now located the correct geotechnical study for Las Olas and are happy to make this available to the Tribunal.
366. **Was the correct TecnoControl Report ever submitted?** Yes, the Claimants’ witness, Mr Mussio, has confirmed that the TecnoControl report at Exhibit R-13 was subsequently updated to include the correct report. Should the Tribunal so wish, Mr Mussio is prepared to provide a short witness statement to this effect.
367. **How can we determine that the correct TecnoControl Report was submitted, without SETENA confirmation?** Without relying on the additional documents themselves or on SETENA confirmation that it did in fact receive the correct TecnoControl report for the Las Olas Project Site, an interrogation of the documents already in the record pertaining to SETENA’s technical review of the D1 Application (conducted by SETENA on May 27, 2008)³³⁸ confirms that the correct TecnoControl report was submitted – resulting in the final SETENA Resolution 1507-2008 that granted the Condominium EV on June, 21 2008.³³⁹ The final SETENA Resolution 1507-2008 provides the following indicators that the correct TecnoControl Report was duly filed and reviewed prior to the issuance of the Condominium EV.

³³⁸ See Exhibit R-19.

³³⁹ See Exhibit C-52.

368. Point 3, subsection 1 (of the “*RESULTANDO*”) demonstrates that SETENA required additional information after an initial review of the documentation. It provides:

THREE: *On April 3, 2008, the information was received that was requested in official letter SGP-DGI 098 – 2008 dated February 23, 2008, requesting the developer submit: updated vegetation cover map, registry certification of the property, determination from ACOPAC-MINAE, affidavit of non-initiation of works without an environmental viability permit (VLA), three georeferenced points and a photographic record of the project area (PA).*

369. None of this documentation refers to problems with the geotechnical report that was submitted.
370. Point 3, subsection 2 (of the “*CONSIDERANDO*”) reflects that the D1 that was submitted has been presented with all the technical, legal and supplementary information that is required.³⁴⁰

THREE: *In accordance with the analysis of the Department of Institutional Management, the documentation contained in the administrative file and the site inspection, the following has been determined: [...]*

2- The initial environmental assessment document (called D1) meets the requirements for technical, legal and supplementary information, in subsections 1.3. and 1.4.

371. Point 3, subsection 6 (of the “*CONSIDERANDO*”) is clear in referencing that the different technical studies have been presented including the correct geology, geotechnical, and environmental hydrogeology studies.³⁴¹ Notably, the geotechnical report is explicitly referenced.

³⁴⁰ In Spanish (“*El Documento inicial de evaluacion ambiental (denominado D1), cumple con la informacion tecnica, legal y complementaria, en los apartados 1.3 y 1.4.*”)

³⁴¹ In Spanish (“*Presenta los Estudio Tecnicos establecidos en el Manual de instrumentos Tecnicos para el Proceso de Evaluacion de Impacto Ambiental (No. 32712-Minae). Estudio de Ingenieria basica del Terreno: Estudio Geotecnico de capacidad sopotante, certificacion sobre la consideracion de riesgo antropico, y el studio de hidrologia basica del cauce de agua mas cercano. Presenta el studio tecnico arqueologico rapido del terreno del AP, el cual indica que no requiere mas estudios arqueologicos en el AP. Presenta el Estudio de Geologia basica del terreno AP: studio de Geologia basica de la finca, la condicion de amenaza natural del AP y el studio de Hidrogeologia ambiental de la finca.*”)

THREE: *In accordance with the analysis of the Department of Institutional Management, the documentation contained in the administrative file and the site inspection, the following has been determined: [...]*

6- *The applicant has submitted the Technical Studies specified in the Manual of Technical Instruments for the Environmental Impact Assessment Process (No. 32712-MINAE (Ministerio de Industria, Ambiente, Energía y Telecomunicaciones [Ministry of Industry, Environment, Energy and Telecommunications])). Basic engineering study of the land: Geotechnical bearing capacity study, certification regarding consideration of anthropic risk, and the basic hydrology study of the nearest course of water. The applicant has submitted the summary PA land technical archaeological study, which indicates that no further archaeological studies on the PA are required. The applicant has submitted the basic geology study of the PA land: Basic geology study of the property, the natural threat status of the PA and the environmental hydrogeology study of the property.*

372. It would have been impossible for SETENA to make these findings if it had not had the benefit of the updated geotechnical report from TecnoControl. In addition, not only had SETENA reviewed the Claimants' documentation attached to the D1 for the purposes of the issuance of the Condominium EV – SETENA also reviewed the file on at least six other instances known on record:

- i. ASA-590-2011-SETENA (R-77).
- ii. SETENA 839-2011 (C-20)
- iii. Site inspection conducted by SETENA (R-97)
- iv. SETENA 1190-2011 (R-100)
- v. SETENA 2030-2011 (C-138)
- vi. SETENA-2185-2011 (R-112)

373. This does not include the dozens of public agencies and functionaries of the Costa Rican government that have also reviewed the SETENA Las Olas file.

374. Furthermore, it is reasonable to conclude that SETENA already had in its possession sufficient geological information regarding the Las Olas property since 2002, and was already familiar with the property – even prior to receipt of the corrected TecnoControl report. This is because SETENA had issued at least two other EVs for the Las Olas Project, including a prior EV granted to the Condominium Section.
375. Prior to D1 in question, the Claimants had applied for an EV for a different condominium project that included both the Condominium Section and parts of the Easements Section. Inversiones Costco had applied for this EV in 2002, and SETENA issued Resolution 2164-2004 on November 31, 2004.³⁴² While SETENA’s Resolution 2164-2004 had a slightly different scope and coverage than the Condominium EV issued in 2008, this was SETENA’s first review of the Las Olas Project, including the conditions of the site. Notably, SETENA extended this EV on February 27, 2007.
376. SETENA also had issued a separate EV for the Hotel Colinas del Mar in March 2006.³⁴³ This EV analyzed parts of the Condominium site and the Easements area.³⁴⁴
377. The scope of the Castro de La Torre geotechnical study also embraced the Easements and the Condominium Sections, in addition to the Concession area which was the subject of the EV.³⁴⁵
378. Accordingly, at the time of the D1 Application and the receipt of the Condominium EV in 2008, SETENA had at least five years of previous involvement with the environmental, geological, geotechnical, and hydrological conditions of the Condominium Section of the Las Olas Project.

³⁴² See Exhibit R-9.

³⁴³ See Exhibit C-36.

³⁴⁴ See Exhibit R-4; and Exhibit C-223.

³⁴⁵ See Exhibit R-12.

379. The Claimants submit this information, in addition to their confirmation that the proper geotechnical study from TecnoControl was completed, in order that the Tribunal has the benefit of all relevant information available to it relating to geotechnical studies for Las Olas. However, for the avoidance of doubt, the fact that the Condominium EV was duly issued by SETENA after a full technical review of the Project Site, granting rights to its holder and resulting in the issuance of later construction permits for the Condominium Section in 2010, is the best contemporaneous evidence that the government authorities were aware of the relevant conditions of the Las Olas site and that the Claimants did not obtain the permits by “*fraud.*”

d. Ms Priscilla Vargas’s evidence critiquing the D1 Application is not credible.

380. Ms Priscilla Vargas’s report epitomizes the Respondent’s *post-hoc* critique of the Claimants’ D1 Application – the Respondent in this arbitration has, by and large, chosen to submit evidence through paid experts *in lieu of* offering any contemporaneous witness evidence from SETENA or other government functionaries.

381. A cursory review of Ms Vargas’s report reveals that it is a continuation of the Respondent’s pleadings and arguments, only with Ms Vargas acting as a surrogate for the Respondent’s counsel. As a result, this Tribunal cannot accept Ms Vargas’s report as independent and impartial. As Ms Vargas confirmed at the hearing, she did not even state the scope of her instructions from Mr Erwin, and her instructions are not in evidence:

18	BY MR. BURN:
19	Q. Ms. Vargas, your Report was appended to Mr.
20	Erwin's Second Report; that's correct?
21	A. Yes, sir.
22	Q. There's no statement here, is there, of

1 any--of the scope of your instructions, is there?

2 A. Yes, sir.

3 Q. Did you receive your instructions from Mr.
4 Erwin, from counsel for the Respondent, from COMEX?
5 From whom did you receive your instructions in
6 relation to this matter?

7 A. From Mr. Erwin.

8 Q. You haven't recorded those instructions in
9 order that we or the Tribunal can assess your opinions
10 against those instructions, have you?

11 A. They are in the presentation. In the written
12 Report, no.

13 Q. They're not set out in the presentation;
14 they're not set out in your Report. We do not know
15 the basis of which you've expressed your opinion, do
16 we?

17 A. Is that a question?

18 Q. Indeed, it is.

19 A. Well, you've just heard me say what it is.

20 Q. Can you point to a slide or to a page in your
21 Report where you set out your instructions?

22 PRESIDENT SIQUEIROS: I think the more direct

1 question is: From whom did you receive the
2 instructions, and are those instructions reflected in
3 your Report?
4 THE WITNESS: The instructions, I received
5 them from Mr. Erwin, and the summary of the scope is
6 Slide 1, I think, after the cover of the presentation.
7 And, of course, it's very summarized, because it is a
8 presentation here.
9 BY MR. BURN:
10 Q. So, this slide that I'm showing you is
11 your--these set out your instructions; is that right?
12 Is that your evidence?
13 A. I submit this as a summary of the scope that
14 was requested from me.
15 Q. Okay.
16 MR. BURN: Well, for the Tribunal's benefit,
17 we do not accept that those are adequate or even
18 remotely adequate instructions in order to understand
19 the scope of Ms. Vargas's testimony.

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382. It is plain that the Respondent and Ms Vargas have never disclosed to this Tribunal the nature and scope of her work with the Respondent, and have never established her independence and expertise. This Tribunal must discount her testimony because it does not qualify as fact evidence nor can it be accurately classified as an independent expert report.³⁴⁷
383. With that preface in mind, the positions that Ms Vargas set forth in her report are also not credible, especially with regard to her testimony critiquing the D1 Application. Her report is based solely on the presumption that protected wetlands and forests existed at Las Olas, and that the Claimants were derelict in disclosing them.

³⁴⁶ English Transcript, 1842:18-1844:19. Note that the Claimants do not accept that Ms Vargas would be entitled to submit her instructions as evidence within the demonstrative slides presented at the Hearing.

³⁴⁷ It is worth noting that Ms Vargas did not even sign her report in accordance with Procedural Order No. 1. *See* Procedural Order No. 1, para. 22.3 (“*Each witness statement and expert report shall be signed and dated by the witness.*”)

384. For instance, in paragraph 1(d) of her report, Ms Vargas presumes that “*the different ecosystems or plant associations [...] were clearly more than ‘pastures’*” without any reference in support;
385. Likewise, in paragraph 1(g) of her report, Ms Vargas argues that “*the EMP did not identify all of the onsite waterways draining into the Aserradero River (KECE wetlands 6, 7, 8).*” This conclusory finding adopts the Second KECE Report’s findings – yet does not state its assumptions anywhere in the report.
386. Moreover, Ms Vargas’s critique of the Claimants is devoid of any reference to SETENA, including its technical review and approval of the Claimants’ Condominium EV. As Ms Vargas confirmed in cross-examination, she did not contact SETENA to discuss the various EVs issued for Las Olas, and has no knowledge of how SETENA conducted its technical review process to reach its conclusions. Moreover, she did not consider the Claimants’ EVs obtained prior to the Condominium EV in 2008, which covered parts of the Condominium and Easements Sections:

3 You didn't contact SETENA to discuss the
4 Environmental Viability permits that they issued in
5 respect to the project, did you?

6 A. Correct.

7 Q. So, you do are not aware, are you, that in
8 2004, SETENA issued an EV covering the entire
9 project--the Condominium and the Easement Section.
10 You're not aware of that, are you?

11 A. That's not the whole project. The whole
12 project, even if that were the case, includes
13 commercial lots that are not described in the scope
14 you mentioned --

15 Q. Apologies for interrupting, but you're wasting
16 time by not answering the question. You are not
17 aware, are you, that in 2004, SETENA issued an EV
18 covering the Condominium and Easement Section, are
19 you? Yes or no?

20 A. Yes.

21 Q. Thank you.

22 And SETENA--nobody from SETENA is before us in

1 these proceedings, are they?

2 A. Correct.

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387. Finally, Ms Vargas's testimony must be wholly discounted because, as discussed above, she failed to recognize that the TecnoControl report, which formed the basis of an entire section of her report, was not from the Las Olas project at all:

³⁴⁸ See English Transcript, 1846:3-1847:2.

13 Q. Very simple question: Could you just read the
14 addressee--I'm sorry, the--yes, the addressee of this
15 Report, starting with the word "Señor" near the top.

16 A. Mauricio Mussio.

17 Q. Thank you. And below that?

18 A. "Project in Playa Chaman in Puntarenas."

19 Q. So, this document is not about the Las Olas
20 Project, is it?

21 A. I think it does refer to it even though the
22 geographic reference is wrong.

1 Q. I put it to you that this is not a document
2 that relates to the Las Olas Project.

388. Ms Vargas doubled down on her refusal to admit that she failed to analyze the correct document, even after follow-up questions with the Tribunal. In audacious fashion, Ms Vargas also asserted that none of her conclusions actually depend on analysing the correct document:

15 PRESIDENT SIQUEIROS: I have a question. The
16 Claimants' counsel asked you to look at the Report
17 that appears from Page 000187, and I'm referring here
18 to Tab 2.

19 This is an Annex of Exhibit R-13. And this is
20 the reference showing that this Report is addressed to
21 Architect Mauricio Mussio, but is refers to a
22 different project, not the Las Olas one.

1 Have you got it before you? Could you tell me
2 what the relevance of this is? Help me understand why
3 Architect Mussio attached to his D1 request to SETENA
4 for the Las Olas Condominium project, why did he
5 attach the Report from another project?

6 THE WITNESS: Well, quite honestly, my
7 impression is that this Report does actually
8 correspond to Las Olas, and the geotechnical study,
9 because this is a geotechnical, one talks about the
10 soils and the sedimentation of the construction, it's
11 one of the seven or eight basic studies that is
12 required by regulation, and they are to be attached to
13 D1, as well as a biology, geology, hydrogeology,
14 archeology, all of those reports.

15 It's a long list of studies that are to be
16 annexed. And the soils, geotechnical, is one of them.

17 PRESIDENT SIQUEIROS: But how did you come to
18 that conclusion that this one actually does correspond
19 to the project? What is it that induces you to
20 believe that it is, in fact, this project that it
21 refers to?

22 I'm looking at some pages further into the

1 document; for instance, Page 174--000174, and even the
2 plan for the site looks different.

3 THE WITNESS: Well, more or less. It's a
4 terrible map, I won't argue that. It's quite
5 shameful. It's a very poor--very bad map. But if you
6 look at the upper portion, you can see a wide street
7 that seems to say "Carretera Costanera" which is the
8 name of the main road between Jaco and Quepos, and it
9 is the road that is adjacent to the northern part of
10 the Las Olas sector.

11 And in the southwest, there is another smaller
12 road with some limited access, and it looks very
13 similar to what we have seen in the context of Las
14 Olas.

15 I get the impression that it is this project.
16 However, none of the conclusions that I've pointed out
17 changes in any way based on this Report.

18 PRESIDENT SIQUEIROS: But it's simply that;
19 it's your impression that it refers to this project.
20 There's nothing in this document--

21 THE WITNESS: Well, I cannot prove that it was
22 conducted on the site. There is no clarification by

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- 389. It is troubling at the least that Ms Vargas admits that her conclusions do not depend on reviewing the correct D1 Application, and that her conclusions would be the same regardless.

- 390. In sum, Ms Vargas's report should not receive any weight from this Tribunal because (1) she is not (and does not purport to be) an independent expert; (2) she failed to disclose her instructions and the scope of her report; (3) she devoted an entire section of her report to an incorrect TecnoControl Report (yet failed to recognize that it had nothing to do with Las Olas); and (4) she

³⁴⁹ English Transcript, 1854:15-1856:22.

proclaims that her findings would be the same regardless of the contents of the geotechnical information filed.

e. The Respondent misinterprets Article 109 of the Biodiversity Law and the “burden of proof” on the developer.

391. During the Respondent’s cross-examination of Mr Mussio, the Respondent’s counsel cited Article 109 of the Biodiversity Law as authority for the proposition that the developer has the burden to affirmatively prove that there is no risk of environmental degradation when applying for an EV:

2 Q. Are you aware of the burden of proof that a
3 developer is under when submitting a D1 Application?

4 A. Excuse me. I don't know what you mean by
5 "burden of proof."

6 Q. Well, let's turn to C-207. This is the
7 Biodiversity Law. And that's in Tab 4 of your binder.

8 You just said to me you don't understand
9 what's meant by (in Spanish [carga de la prueba]), or
10 burden of proof. Look at Article 109. Do you see
11 that, sir? Is this the--yes. Is that the first time
12 you've looked at this article?

13 A. Yes. It is the first time that I have seen
14 it.

15 Q. Let me read it to you, sir.
16 Article 109--this is C-207. Hopefully the Tribunal
17 will have it to hand--it says, "The burden of
18 proof--the burden of proof of the absence of
19 pollution, degradation, or nonpermitted impacts will
20 correspond to the person requesting the approval, the
21 permit, or access to the--to biodiversity or the
22 person who is accused of having actually caused

1 | environmental damage. |

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392. The Respondent's counsel's attempt to read Article 109 in isolation is misleading, as noted in his reference to the text of Article 109 itself, which references a "*person who is accused of having actually caused environmental damage.*" The Respondent's counsel failed to explain that Article 109 is a provision that falls under the heading "*Procedimientos, Procesos y Sanciones en General,*" pertaining to adversarial proceedings brought against the developer in administrative or regular courts.³⁵¹ It is in *adversarial proceedings* where the burden of proof on the developer applies – *not* in the developer's initial D1 Application where there is no accusation of environmental degradation.
393. As is the Respondent's practice, it repeated this misinterpretation of Costa Rican law multiple times in order to argue with the witness and confuse the relevant issues of law. These misstatements escalated to the point that the Claimants' counsel was forced to object.

20 | Q. Sir, the burden of proof, as we've just seen |
21 | from Costa Rican law, puts it on the developer. |
22 | MR. BURN: Sir, I have to object-- |

³⁵⁰ English Transcript, 408:2-409:1.

³⁵¹ See Exhibit C-207, p. 44.

1 MR. LEATHLEY: No, I'd like to know--

2 MR. BURN: No, I'm sorry. I have to object
3 because this question--this line of questioning has
4 been put to the witness based on a fundamental
5 misunderstanding of the law to which Mr. Leathley has
6 taken the witness. There is a fundamental mistake of
7 law that is underlying this line of questioning.

8 I'm happy for it to proceed. It's a waste of
9 time because it's based on an error of law, but--and
10 we can come back and fix it. But I do need to object
11 to make it very clear to the Tribunal that this is
12 based upon a fundamental error.

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394. Upon the Claimants' redirect examination, this error in the Respondent's argumentative questions were corrected:

19 Q. Do you recall that Mr. Leathley took you to
20 Article 109 headed "Burden of Proof"?

21 A. Yes.

22 Q. And he also put a series of propositions to

³⁵² See English Transcript, 414:20-415:12.

1 you about the importance of this provision for the
2 way in which developers and those working with
3 developers need to conduct themselves in relation to
4 environmental matters? You recall that?

5 A. Yes.

6 Q. Could you just look on the previous page and
7 read onto the record the heading starting with
8 Capitulo IX. Nueve. So, this is the page before, the
9 heading immediately above Article 105. I think you're
10 going the wrong direction.

11 A. What article?

12 Q. Look at 105.

13 A. Okay.

14 Q. Do you see a heading?

15 A. Okay. Procedures, processes, and penalties
16 in general.

17 Q. And do you see an Article 105 immediately
18 below it?

19 A. Yes.

20 Q. Could you just read the text out loud?

21 A. "Everyone will have standing to present a
22 case in administrative or courts or in the regular

1 courts to defend and protect biodiversity."

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395. The testimony of Dr Jurado confirms that the burden of proof in Article 109 applies only in the context of a litigation to try to determine whether or not the environment is affected:

³⁵³ English Transcript, 463:19-465:1.

5 SEÑOR JURADO FERNÁNDEZ: La carga de la
6 prueba implicaría eso si estamos en un litigio para
7 tratar de determinar si hay afectación o no del
8 ambiente. En el caso de una evaluación ambiental se
9 parte del supuesto de que puede haber una afectación
10 del ambiente. La carga de la prueba aquí lo que
11 quiere decir es que el desarrollado tiene que
12 decirle a la administración cuáles podrían ser los
13 efectos dañinos de su proyecto y qué medidas propone
14 adoptar para mitigar esos efectos. Esa es la carga
15 de la prueba.

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396. Upon a correct interpretation, this “*burden of proof*” applicable in adversarial proceedings against a developer cannot be applied to the developer’s submission of the initial D1 Application. In this case, the Respondent has failed to initiate a principal administrative proceeding to annul the Condominium EV or construction permits as required by Costa Rican law, where this burden of proof might actually be applicable.

5. **The Respondent’s challenges to the Easements fail.**

397. As discussed above, the Respondent’s *post-hoc* trail of illegalities defense has no place in this arbitration, not least because there has never been any final determination in Costa Rica that the Claimants have acted illegally. This applies doubly to the Respondent’s backward-looking, illusory accusations pertaining to the Easements. Like the Respondent’s unsubstantiated allegation that the Condominium EV was fraudulently obtained, *supra*, the Respondent similarly seeks to undermine duly issued construction permits obtained from the Municipality of Parrita. And like the *post-hoc* “*fraud*” accusations before it,

³⁵⁴ Spanish Transcript, 1069:5-15. The English Transcript did not have a complete and accurate translation.

the Respondent's shoddy attempt to challenge the Municipality's issuance of construction permits after the fact cannot preclude the Claimants' claims.

398. As previously explained, Dr Jurado and Mr Ortiz agree that the Claimants' construction permits are final acts that grant rights to the Claimants, and are binding on all bodies of the public administration.³⁵⁵ Like the EVs discussed above, the Respondent cannot avoid the fact that the Municipality did indeed issue construction permits for the Easements. Instead, the Respondent attempts to build a retrospective, invented narrative where the Claimants, through illicit planning, sought to circumvent Costa Rican environmental laws in order to move forward with construction on the Easements.
399. Like its other *post-hoc* admissibility defenses, the Respondent cannot reference any document during the relevant time period indicating that its government agencies expressed concern that illegal fragmentation was occurring. The Respondent also fails to point to any evidence that the government authorities, at the time, had questions regarding the legality of the manner in which the Easements were planned. The Respondent's fragmentation argument, therefore, is a product developed by the Respondent's counsel solely for the purpose of this arbitration.
400. Yet in its haste to deflect attention away from its violations of the DR-CAFTA, the Respondent presents an incomplete and self-serving version of Costa Rican law with regard to fragmentation, land division, and site planning. As next explained, the Claimants (through their locally-hired experts, including Mr Mussio) followed applicable laws with regard to the planning, fragmentation, and permitting of the Easements.
401. Furthermore, the Respondent's accusation that the Claimants illegally fragmented the project (1) disregards the steps the Claimants took to consult with the Municipality prior to the issuance of the relevant construction permits; (2) wrongfully faults the Claimants' permissible reading of local law; (3) ignores the fact that both SETENA and the Municipality knew, at all relevant

³⁵⁵ See section V, B, 1.a of the Claimants' Post-Hearing Brief

times, the Claimants' plans regarding the Easements; and (4) contemplates a hypothetical "*fragmentation*" challenge to the construction permits that never occurred in Costa Rica.

- a. **The Claimants engaged in a permissible and good faith reading of the INVU law, regulatory plan, and other applicable land use and planning provisions when obtaining the Easements' construction permits.**

402. At the Hearing, Mr Mussio demonstrated himself to be a knowledgeable witness with regard to Costa Rican land use and planning provisions. Both Dr Jurado and Mr Ortiz supplemented Mr Mussio's practical knowledge with a discussion of relevant provisions of Costa Rican land use and planning law. Before engaging with the Respondent's admissibility objection regarding "*illegality*" with respect to the Easements, it is useful to first summarize these relevant land use and planning provisions for the Municipality of Parrita, in the context of the Las Olas Project.

- b. **The Claimants consulted the applicable regulatory plans from the Municipality of Parrita prior to obtaining construction permits for the Easements, which indicated that the land was suitable for construction.**

403. At the most basic level, there is no dispute between the Parties that the individual municipalities (rather than the environmental agencies) issue construction permits for projects that fall within their jurisdiction. Mr Mussio confirmed this at the Hearing:

9 ARBITRATOR BAKER: Do I understand your prior
10 testimony from cross-examination this morning that the
11 plans for--or the permits for construction are
12 actually issued by the Municipality, not by one of the
13 other environmental agencies?
14 THE WITNESS: The local government issues the
15 construction permits, yes.

³⁵⁶

404. Although the project planning process with the municipality culminates in the issuance of a construction permit, this is not how a developer initiates a project. Rather, as Mr Mussio testified, the developer initiates the process by consulting with the Municipality and its regulatory plan, as well as undertaking a variety of studies. This regulatory plan is critically important: it governs how a developer may use the land because the developer cannot make use of the land in a manner inconsistent with the regulatory plan:

³⁵⁶ English Transcript, 508:9-15.

17 | before--before the construction permit, you have to
18 | consult with the Municipality, as I've said in my
19 | Statement. You have to ask for permits for the
20 | treatment plants, also for stormwater, for water,
21 | potable water. A project is not a project without
22 | potable water.

1 | The land use, that's an administrative
2 | document. In the case of Las Olas it's important to
3 | highlight that there is a regulatory plan.

4 | Now, this is a plan which is more specific
5 | than the general law or the general standard, and it's
6 | my understanding that it is a law--regulatory plan
7 | becomes law because when the plan goes into effect, it
8 | refers to the maps of the regulatory plan, and so you
9 | don't use the construction code because the regulatory
10 | plan has that encompassed within.

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405. Dr Jurado confirmed and expanded upon Mr Mussio's description of the regulatory plans issued by the individual municipalities, and their legally binding nature. Dr Jurado's testimony clarified that the regulatory plans govern land use, and are completed in liaison with INTA according to taxonomy of soils and Land Use Methodology set forth Executive Decree No. 20501-MAG-MIRENEM.³⁵⁸ (As a note, this is the same Land Use Methodology that is used to determine the existence of hydric soils.)
406. Accordingly, the regulatory plan is obliged to take into account the Land Use Methodology set forth Executive Decree No. 20501-MAG-MIRENEM, and the Municipality issues land use certifications based on these regulatory plans:

³⁵⁷ English Transcript, 461:17-462:10.

³⁵⁸ See Exhibit R-401.

20 | Q. Since you know Costa Rican law, you know that
21 | regulatory plans are determined by local municipalities
22 | in your territory--in each territory with the

1 | assistance of INTA?

2 | A. Correct.

3 | Q. These urbanization plans determined by the
4 | Municipality are laws; correct?

5 | A. They are laws. They have, actually,
6 | regulatory effects.

7 | Q. So, these--

8 | A. They have the rank of law.

9 | Q. Yes. Yes. These regulatory effects establish
10 | a division of zoning that the Municipality carries out
11 | based on its analysis and studies and determines the
12 | zones and characteristics and soil uses; correct?

13 | A. Yes, the regulatory plans do regulate the use
14 | of land and that is based on zoning.

15 | Q. So, a municipality has a regulatory plan and
16 | issues these permits for use of land. It has to do
17 | that on the basis of that regulatory plan; correct?

18 | A. What do you mean by--when you say "issues"?

19 | Q. Issues Uses of land.

20 | One of the requirements when somebody wants to
21 | carry out a project of any kind is to go and request a
22 | certification on the use of land?

1	A.	Speaking about certifications?	
2	Q.	Yes. So, the Municipality issues them on the	
3		basis of the regulatory plan if it exists?	
4	A.	<u>Yes. What the certification indicates</u>	
5		<u>regarding a specific lot is what is the allowed use</u>	
6		<u>according to the zoning.</u>	359

407. Since the Municipalities issue regulatory plans in consultation with INTA, they are obliged to consult the same Land Use Methodology (Executive Decree No. 20501-MAG-MIRENEM) which is used to determine the presence of hydric soils under Executive Decree 35803-MINAE.³⁶⁰ Thus, a developer’s consultative process with the Municipality in verifying and obtaining a land use certification based on the Municipality’s regulatory plan is the first step in ensuring the development complies with applicable laws – and would be the first indicator confirming that the land is suitable for construction. Alternatively, the regulatory plan would be the first indication that construction is not feasible because of the presence of hydric soils.
408. Because this consultative process with the Municipality culminated in the issuance of construction permits, it is clear that the Municipality did not have any concern that Mr Mussio’s plans might be in contravention of the regulatory plan. Importantly, in ultimately issuing the construction permits for the Easements, the Municipality did not voice any concern that construction would occur on hydric soils based on the information in the regulatory plan. This Tribunal will have in mind that the presence of hydric soils is a mandatory condition for the finding of a wetland under Costa Rican law under Executive Decree 35803-MINAE.³⁶¹
409. This consultative process with the Municipality also involved a discussion of the Claimants’ suggested construction and development plans, including any

³⁵⁹ English Transcript, 1503:20-1505:6.

³⁶⁰ As discussed previously, the criteria for determining wetlands is found in Executive Decree 35803-MINAE, and comprises of a finding of hydrological conditions, hydric soils, and hydrophitic vegetation.

³⁶¹ See section IX of the Claimants’ Post-Hearing Brief

fragmentation. Mr Mussio explained that he had engaged in this consultative process with the Municipality and had discussed fragmentation:

1 ARBITRATOR BAKER: So, that is my next
2 question, and that is: If a client was coming to you
3 today with a tract of land to be developed that was
4 about this size, in your mind, the concept of
5 fragmentation would be appropriate. Even after having
6 lived through this case.

7 THE WITNESS: Well, it is important to
8 clarify one thing. First, we have what the client
9 wants. So, the purpose of what the--of the client,
10 what the customer wants for his project, that is
11 Number 1, of course.

12 Now, assuming that he wants to do that, and
13 in spite of that, it's something that is within the
14 law. It's something that--apart from that, it's
15 something that is in the law, it's something allowed
16 by the law. So, I would be a poor adviser, from my
17 point of view, and given my knowledge if, next week,
18 somebody comes with a property before a public road
19 that does comply--and that, of course, is very
20 important. If it does comply with what is there--when
21 I say "with what is there," I mean the rules,
22 regulatory plan, a very detailed regulatory plan, or

1 the construction law, which is very broad, very
2 general.

3 So, basically, it allows for very small
4 fragmentation. And in that case--well, the regulatory
5 plan of the La Parrita canton is a very visionary type
6 regulatory plan. It's a regulatory plan, which if I
7 remember correctly, was implemented in 1997, and
8 there's a relationship between the slope and the size
9 of the lot.

10 What do I mean by that? That today, we have
11 regulatory plans which the only thing they do is be
12 confusing regarding coverage, density, et cetera. But
13 that regulatory plan is very visionary, and in my
14 opinion, and in spite of the fact that it is a rather
15 old regulatory plan--in spite of that, it is quite
16 intelligent.

17 ARBITRATOR BAKER: Let me go back to
18 something you observed a minute ago, and I want to
19 make sure I heard this correctly.

20 I understood you to say that prior to the
21 filing of the D1 that you or members of your firm
22 traveled to the township of Parrita in order to

1 discuss with them and seek their knowledge and consent
2 to the fragmentation plan; is that correct?

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410. Accordingly, prior to the Parrita Municipality's issuance of construction permits for the Easements, Mr Mussio had consulted with the Municipality on behalf of the Claimants regarding the Claimants' proposed development plan for Las Olas, including on issues surrounding the fragmentation of the site. Therefore, the Municipality had knowledge of the Claimants' planned and actual activities in the Easements prior to issuing the construction permits. The Municipality's ultimate approval of the construction permits for the Easements – which are final acts that grant rights to its holder and have effects on third parties – are the best contemporaneous evidence that the Claimants' planning with regard to the Easements was not “*illegal*.”

³⁶² English Transcript, 506:1-508:2.

411. Finally, it is not in dispute that SETENA (the government agency with competency to issue EVs) visited the Las Olas site *three* times³⁶³ and never once raised an issue regarding the Claimants' plans to develop the property, including the Easements. This merely confirms the fact that the Respondent has only raised this issue for purposes of a misguided, artificial and cynical admissibility defense in *this arbitration*, rather than in a proceeding in Costa Rica

c. The Claimants also consulted INVU's regulations which allow for the creation of easements.

412. In addition to consulting with the Municipality beforehand, the Claimants also consulted with the applicable laws of INVU. At the Hearing, Mr Mussio explained that INVU, the National Institute for Housing and Urban Development, an autonomous entity of the Government of Costa Rica, on whose board he serves, provide needed technical expertise.³⁶⁴ Mr Mussio is, therefore, intimately familiar with the practice of developers in applying the regulations promulgated by INVU.

413. As noted by Mr Ortiz in his Expert Report³⁶⁵ and in his testimony at the Hearing,³⁶⁶ the Regulation for the National Control of Fragmentation and Urbanization issued by INVU authorizes the fragmentation of land using easements:

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20 |           The easements are regulated in the civil code. |
21 | It is simply the division of a lot where one of the |
22 | lots has an encumbrance for the other lots. In other |
```

[...]

³⁶³ English Transcript, 1334:4-12 and Section IX, D, 5.d of the Claimants' Post-Hearing Brief

³⁶⁴ English Transcript, 386:12-387:3.

³⁶⁵ See Luis Ortiz Expert Report, paras. 108-112.

³⁶⁶ English Transcript, 1334:1-1335:4.

6 Now, the easement is not free--it's not that
7 you don't have to process any paperwork. The
8 easements had to be presented to the National
9 Institute for Housing and Urban Planning, for their
10 authorization, for the authorization of the
11 Municipality. If the Municipality had thought those
12 easements required an Environmental Impact Study, they
13 would not have granted those permits. Furthermore,
14 and they are then registered in the National Property
15 Registry.

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414. Later, Mr Ortiz concurred that Article II(2)(1) of the Regulation provides the basis for the segregation and fragmentation:

*All the plots resulting from a subdivision will have direct access to a public road. In certain cases, the INVU [Instituto Nacional de Vivienda y Urbanismo – National Institute of Housing and Urbanism] and the Municipalities may accept the subdivision of lots by means of easements, provided they comply with the following regulations: The easement shall be accepted in special areas in which, due to its location or dimension, it is demonstrated that it is impossible to subdivide with adequate access to existing public roads, preferably using those for cases in which housing already exists on the lot.*³⁶⁸

415. Mr Ortiz testified that, in practice, the concept of using easements as part of this type of subdivision is very common in Costa Rica.³⁶⁹
416. The Respondent, as a general matter, does not dispute that under the Regulation, there exists exceptions to the requirement of obtaining an EV in certain cases regarding easements.³⁷⁰ Under Article II.2.1 of the National Control Fragmentation Rules and Regulation “*In certain cases, the INVU*

³⁶⁷ English Transcript, 1286:20-11287:15.

³⁶⁸ See Article II.2.1 of the National Control Fragmentation Rules and Regulation (Exhibit to Luis Ortiz Expert Report).

³⁶⁹ English Transcript, 1335:2-3.

³⁷⁰ See National Control Fragmentation Rules and Regulation, Article II.2.1.3 (Exhibit to Luis Ortiz Expert Report).

[Instituto Nacional de Vivienda y Urbanismo – National Institute of Housing and Urbanism] and the Municipalities may accept the subdivision of lots by means of easements, provided they comply with the following regulations:: (...)

3. There can be a maximum section of only six (6) lots fronting an easement”

However, as with the Respondent’s other *post-hoc* illegality claims, it contends that the Claimants should have submitted the construction permits as an “urbanization” project instead of on the basis of easements.

417. For example, the Respondent’s counsel posed the hypothetical question at the Hearing of whether the Claimants would have needed to obtain an EV had they applied for an urbanization instead of establishing easements:

14 Now, let's say if the Claimants had wished to
15 comply with the regulation, and if they had wished to
16 consider that this accumulation of easements and these
17 72 lots really constituted an urbanization more than
18 easement--and I'm not asking you to say that that's
19 what they did. I'm just asking you to consider that as
20 a hypothetical.

21 If that's what they wanted to--they had done,
22 if they had gone to the INVU and the Municipality with

1 an urbanization plan rather than an easement, what
2 would have been their--the steps that they would have
3 been--they would have had to take before the various
4 administrations in order to get their project going on
5 these 72 lots?
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418. The Respondent’s counterfactual inquiry misses the point. After reviewing the evidence on record, Mr Ortiz concluded that the developers, in good faith, made a reasonable interpretation of the Regulation. Furthermore, the

³⁷¹ English Transcript, 1337:14-1338:5.

Municipality, by issuing of the construction permits for the Easements, accepted the interpretation that there was no need for an EV for the Easements:

4 | If there was no EV, it is not only because the
5 | developer decided or made a reasonable interpretation
6 | that there was no need of an EV; but also, the
7 | municipality accepted that interpretation, the INVU
8 | accepted that interpretation, the National Cadastre and
9 | the Public Registry.

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d. Although this arbitration is not the proper venue to decide a hypothetical challenge based on fragmentation, the Respondent’s hypothetical challenge would fail.

419. Despite the Respondent’s plea to this Tribunal to revisit the process in which the Municipality granted the construction permits for the Easements, with respect, that is not the proper role of this Tribunal formed to resolve the Claimants’ claims under the DR-CAFTA.

420. In this regard, the Respondent argues that the Claimants’ acts are illegal under Article 94 of the Biodiversity Act³⁷³ which provides that an Environmental Impact Assessment for a single project must be done “*globally*,” even if the project is realized in different stages.³⁷⁴ As noted previously, the Respondent’s agencies have never raised this issue in a proceeding in Costa Rica, either to challenge the issuance of the construction permits for the Easements, or to challenge the Condominium EV as “*illegally fragmented*.” This alone is fatal to the Respondent’s illegality allegations.

³⁷² English Transcript, 1369:4-9.

³⁷³ Ms Priscilla Vargas’s allegations pertaining to Fragmentation and Article 94 of the Biodiversity law should be disregarded by this Tribunal for the reasons set forth in paragraphs 335 to 343. Ms Vargas’s report is merely an extension of the Respondent’s pleadings, and is not independent and impartial. This Tribunal must discount her testimony because it does not qualify as fact evidence nor can it be accurately classified as an independent expert report.

³⁷⁴ English Transcript 1345:18-1352:1 (argument between Respondent’s counsel and Mr Ortiz regarding the application of Article 94 of the Biodiversity law to the Easements).

421. Instead of properly seeking to annul construction permits or EVs in a principal proceeding as is required under Costa Rican law, the Respondent illegally shut down the project through sustaining interim injunctions indefinitely. As explained in Section X, 1, A, the Respondent's failure to apply its law in good faith violated DR-CAFTA Article 10.5's prohibition against the frustration of the Claimants' legitimate expectations.
422. In order to annul the construction permits based on an alleged failure to obtain an EV for the Easements, or alternatively to annul the Condominium EV for failure to include the Easements, SETENA or any public agency with standing would hypothetically first need to initiate an ordinary administrative proceeding under the LGAP in order to determine whether or not there was an "*illegal EV fragmentation*." This was never done.
423. The Claimants would then need to be duly informed of the proceeding, and would have constitutional rights under Costa Rican law – including rights of due process, a right to set forth their case and to file any evidence, etc;
424. At the end of the proceeding, if SETENA (or the agency bringing a challenge) were able to successfully demonstrate that there was an illegal fragmentation (which is denied), it could decide to: (1) request the developer to broaden the Condominium EV to cover the Easements; or, (2) request the Attorney General's Office for an authorization to annul the Condominium EV, or initiate a "*lesividad*" procedure. The same process would be required to annul the Claimants' construction permits for the Easements. Until that process is complete, the construction permits and EVs are considered valid.
425. As long as the administrative act has not been declared null and void, either by the competent administrative body following the ordinary administrative proceeding, or otherwise by a judge, the administrative act remains valid and must be enforced. This was confirmed by Mr Ortiz in his Expert Report:

an EV can only be voided ex officio by the authority as long as the administrative proceeding was held and the act's nullity is absolute, evident and manifest [para. 66]

the only way to declare [an EV] null and void is by declaring its absolute, evident, and manifest invalidity thru (sic) an ordinary administrative proceeding, prior opinion of the Attorney General's Office, or else file a judicial review before the Administrative Court [para. 72]

As long as an administrative act [such as a construction permit] has not been declared null and void, either by the competent administrative body following the ordinary administrative proceeding, and with the authorization of the Attorney General, or else by a judge, such act is deemed valid and it must be enforced. [para. 114]

426. Accordingly, the proper venue to have brought that process is *in Costa Rica, at the time of the alleged infraction, through a principal procedure to annul the EVs or construction permits.*³⁷⁵ It is entirely improper for the Respondent to raise the issue for the first time as an “*illegality*” admissibility defense to avoid its obligations under the DR-CAFTA.
427. In any case, any hypothetical challenge brought today in Costa Rica based on a theory that the Claimants “*illegally fragmented*” the EV process, or otherwise obtained construction permits for the Easements illegally, would fail.
428. Even if this hypothetical challenge would reach the stage of a review of the merits, the Claimants have demonstrated that they based their interpretation on a permissible reading of the INVU Law and Regulations and Article 94 of the Biodiversity Law,³⁷⁶ and did so in regular consultation with the Municipality of Parrita (who duly issued construction permits for the Easements and the Condominium Section) and SETENA (who issued, *inter alia*, the Condominium EV and visited the Las Olas property at least three times).³⁷⁷ The Claimants also consulted with local experts and attorneys with regards to

³⁷⁵ See section V, B, 1., c of the Claimants' Post-Hearing Brief

³⁷⁶ English Transcript, 565:2-567:5 (Mr Bermúdez explaining that his understanding of the term “*project*” is that the Condominium is one “*project*,” the Concession is another project, and the Easements are a third project.)

³⁷⁷ See section IX, D, 5., d of the Claimants' Post-Hearing Brief

all aspects of the development of Las Olas.³⁷⁸ On the other hand, the Respondent relies on, *inter alia*, a 2015 SETENA resolution stating that this applies to adjacent properties held by the same owner.³⁷⁹ As Mr Ortiz suggests, the 2015 SETENA resolution interpreting Article 94 cannot apply retroactively to the Claimants' actions from 2007 to 2010.

429. Accordingly, this Tribunal should reject the Respondent's *after-the-fact* attempts to undermine the construction permits for the Easements, brought only to avoid its responsibility for breaches of the DR-CAFTA.

C. The Respondent's misguided defense based on the Claimants' non-existent denial of justice claim.

430. The Respondent insists that the Claimants have made a denial of justice claim, and so it must be treated as such by the Tribunal, but it offers no authority for the proposition that it ought to be entitled to recast claims submitted under Article 10.16 by fiat. The DR-CAFTA provides no mechanism for revision of claims by a responding party. It only provides the Article 10.16 mechanism for other parties' investors to articulate claims arising out of conduct that breaches an obligation found in Section A of Chapter 10. While trite, it appears nonetheless necessary to explain to the Respondent that it is for the Claimants, alone, to enunciate their claims and provide sufficient evidence and argument to support them. Claims can only succeed or fail on this basis, not by being "*revealed*" by a respondent as having been a different kind of claim after all.

431. The Respondent says that the Claimants' claims arising from the conduct of Mr Martínez must be considered denial of justice claims because the ultimate forum for a prosecution would be a court. The same arguments were made – unsuccessfully – by the respondent in *Rompetrol v. Romania*, which also involved allegations that the conduct of a prosecutor constituted a breach of the

³⁷⁸ English Transcript, 904:4-905:6 (Mr Aven explaining that he relied upon his experts and attorneys, including Mr Gavridge Perez, in developing the project).

³⁷⁹ English Transcript, 1346:9-1347:7; and Exhibit R-344.

fair and equitable treatment standard contained in a bilateral investment treaty. It was on the following basis that the *Rompetrol* Tribunal concisely despatched Romania's admissibility objection:

The Tribunal is not persuaded by the Respondent's assertion that, once the Claimant's claims are subjected to proper legal analysis, they can be seen to be equivalent to classic claims for denial of justice, which therefore attract all the technical rules that have grown up over the years around claims of that kind, notably the inadmissibility of such a claim until local remedies have been exhausted. The objection against the Respondent's assertion is rather one of substance. Once a Claimant investor has established its entitlement to the protection guaranteed under an investment treaty (as the Tribunal has already decided, in TRG's favour, in its Decision on Jurisdiction and Admissibility), it becomes simply a matter as to whether the facts which the investor alleges, if they can be substantiated, do or do not constitute contraventions of those standards of protection, and, if they do, what the consequences are in terms of remedies. It would not, in the Tribunal's view, be consistent with the established norms for the interpretation of treaties to read into a given investment protection treaty additional conditions or limitations that could readily have been incorporated into the treaty text had the parties so wished, but are not there.

[...]

It matters little in this context whether the question of the availability and effectiveness of local remedies is put in terms of a procedural issue as to whether a claim for injury is ripe for determination by an arbitral tribunal, or in terms of a substantive issue as to whether the alleged injury has in fact been sustained. To the mind of the Tribunal, both come down in the end, within the context of an investment treaty arbitration, to the same qualitative evaluation of the effects of the particular State conduct that has been put in issue by a claimant before a tribunal.³⁸⁰

432. The *Rompetrol* Tribunal did not just accept the proposition that a fair and equitable treatment claim *could* be made out against a host State solely on the basis of the conduct of its prosecutorial officials; it found liability. Parallels

³⁸⁰ *Rompetrol Group NV v. Romania*, Award, ICSID Case No ARB/06/3, IIC 591 (2013), 6 May 2013, Sir Franklin Berman, KCMG, QC (President); Mr Donald Francis Donovan (Claimant appointment); The Honorable Marc Lalonde PC, OC, QC (Respondent appointment) ¶¶160 & 167.

with this case included: delays attributable to prosecutorial machination; procedural irregularities; persistence in the face of facts that should have convinced a reasonable prosecutor to adopt a different course of conduct; and a sense of wilful blindness as to the detrimental impact that the prosecutor's conduct would obviously have on a protected foreign investment.³⁸¹

433. The *Rompetrol* tribunal was also keen to establish that proximate cause existed between conduct attributable to the host State and harm demonstrably suffered by a protected investment. Its concern emanated from the fact that the impugned prosecutorial (mis)conduct had been visited upon two Romanian nationals, who served as executives of Rompetrol's investment enterprise. The Tribunal reasoned that – all else being equal – prosecutorial (mis)conduct could simultaneously serve both as the basis for some kind of denial of justice or human rights complaint, on the part of the targeted individuals, **and** as the basis for a fair and equitable treatment claim on the part of the protected investment enterprise for which the individuals served as executives. The Tribunal's focus was on the impact of prosecutorial maltreatment on the protected investment enterprise, especially given how that was the nature of the claim submitted by Rompetrol.

434. This case is less complex because one of the two individuals who suffered maltreatment at the hands of Mr Martínez was also an investor himself, David Aven. Much like the *Rompetrol* scenario, the Claimants in this case have additionally pursued claims, both on behalf of themselves and on behalf of their investment Enterprises. Hence, the relevant questions for the Tribunal to determine, in respect of the conduct of Mr Martínez, is whether it caused harm to the Claimants' interests in the overall business enterprise that was the Las Olas Project, *in toto*.³⁸²

³⁸¹ *Id.* ¶¶ 198-200, 245, 247-248, 251, 279

³⁸² *Aven et al v. Costa Rica*, Notice of Arbitration, 4 February 2014.

3. Claimants commenced this action against the Government of Costa Rica pursuant to article 10.16(1)(a), on their own behalf and under article 10.16(1)(b), on behalf of enterprises incorporated in Costa Rica, which Claimants directly or indirectly own or control (“the

D. The Respondent's so-called counterclaim

435. The Respondent's so-called counterclaim did not feature heavily at the Hearing, a fact which, in the Claimants' submission, is illustrative of the Respondent's lack of conviction in pursuing the same. If the Respondent were serious about recovering damages from the Claimants for so-called environmental infractions, it would have engaged properly with the Claimants' legal arguments and made real effort to substantiate its vague "damage" claims. That it did not is telling; the Respondent's so-called counterclaim is advanced without conviction and merely as a ploy to distract the Tribunal from the Respondent's very serious violations of the DR-CAFTA, which is where the real damage in this case lies, as will be addressed further in Section VII, F below.

436. As the Claimants demonstrated in their Reply Memorial, the DR-CAFTA does not contemplate counterclaims. Instead, the Tribunal's authority is expressly confined to rendering a final award "against a respondent" in Article 10.26(1). That a claimant investor cannot be construed as a "respondent" is evinced in the language of Article 10.26(8) which provides that:

If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 20.6 (Request for an Arbitral Panel).

437. Dispute settlement under Chapter 20 of the DR-CAFTA is the reserve of state Parties to the treaty. As such, it is impossible for a "respondent" as described in Article 10.26 to be anything other than a host state Party to the DR-CAFTA. Even if one were to accept that some qualified right of a DR-CAFTA State Party to pursue a counterclaim existed, the Tribunal would not have the necessary authority to award the restitution the Respondent demands. Had the Parties to the DR-CAFTA intended respondent States to have the ability to

Enterprises") under the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR").

pursue counterclaims, they would have specified the Tribunal’s authority in this regard in the same way as they did in the case of investors’ claims.

438. Further, as the Claimants noted in their Reply Memorial, the Respondent has made no effort – beyond the bald assertions of Mr Erwin in his First and Second Reports – to quantify the alleged damage to the environment the Claimants would allegedly have caused. The Respondent instead makes wholly unsubstantiated allegations about the “*filling and draining of wetlands*” which has allegedly “*directly destroyed habitat for fish and wildlife species thus reducing the biological diversity of the Las Olas ecosystem*” – no evidence of which has been provided.

439. In its Rejoinder, the Respondent merely asserts that “*the First and Second KECE Reports speak from [sic] themselves as to damage caused to the Project Site by Claimants*”³⁸³ and that “*Respondent reaffirms that there is not [sic] more conclusive proof than the findings on the actual conditions of the Project Site.*”³⁸⁴ The Claimants submit that this is simply more of the same, unsubstantiated bluster and invite the Tribunal to disregard these hollow statements, in favor of the evidence (or in this case, lack thereof) before it.

IX. THERE ARE NO WETLANDS AT LAS OLAS

A. By basing its case on 2016 Las Olas Site conditions, the Respondent obfuscates the relevant environmental inquiries.

440. The Respondent’s emphasis on 2016 Las Olas site conditions is the high-water mark of its *post-hoc* attempt to redefine the relevant issues in this case.

441. Unfortunately, the outcome of the Claimants’ claims in this arbitration ultimately does not turn on the 2016 site conditions. Instead, this case concerns the Respondent’s failure to accord fair and equitable treatment to, and its

³⁸³ See Respondent’s Rejoinder, para. 1150.

³⁸⁴ See Respondent’s Rejoinder, para. 1154.

unlawful expropriation of, the Claimants' investment.³⁸⁵ The Respondent's ongoing, indefinite suspension of all construction and environmental permits at Las Olas without initiating a principal administrative proceeding cannot be justified by reference to any Costa Rican or international legal principle.

442. Nonetheless, and in now familiar fashion, the Respondent has sought to distract the Tribunal from the crux of the case, with a hyperbolic description of the so-called "*Las Olas Ecosystem*" and misguided assertion that there are, and always have been, wetlands at Las Olas. Whilst the Claimants do not accept that the current status of the Las Olas site has any bearing on the questions before the Tribunal, they have, regrettably, been forced invest time and money addressing the Respondent's poorly framed and largely irrelevant arguments.

443. However, to fully understand the Respondent's attempts to hide the ball with regard to the legal framework for the determination of wetlands in Costa Rica, it is necessary to account for dynamic changes in the applicable Costa Rican laws on wetlands from the time that the Claimants first acquired the investment, until present day.

1. The applicable legal framework for the determination of wetlands in Costa Rica in the context of Las Olas.

444. In its closing questions, the Tribunal asked the Parties to explain the hierarchy among Costa Rican agencies charged with the determination of environmental issues involving wetlands and to explain, in those cases where there are shared responsibilities, which agency has final determinative authority.

445. In order to answer those questions fully, the Claimants will describe briefly the applicable legal regime for the determination of wetlands in Costa Rica in historical perspective, because the agencies charged with this determination (and the manner in which those agencies make this determination) has changed considerably since the Claimants first acquired the investment in 2002.

³⁸⁵ For more on the Claimants' expropriation claim, see Claimants' Memorial, paras. 393-414.

- a. **Prior to 2009, wetlands in Costa Rican were required to be delimited by executive decree.**

446. Prior to 2009, all wetlands under Costa Rican law had to be delimited by a specific executive decree issued by the Ministry of Environment, according to the Organic Law of the Environment and the Wildlife Conservation Law. Since their enactment, the Organic Law of the Environment and the Wildlife Conservation Law have governed the creation and delimitation of wetlands in Costa Rica:

- a. Article 32 of the Organic Law of the Environment provides that the Executive, through the Ministry of the Environment, is empowered to establish Wildlife Protected Areas, which include wetlands. Article 37 of the Organic Law then provides that any declarations of Wildlife Protected Areas on private property (determined by the Ministry of Environment) will become effective *only* when the Costa Rican State lawfully expropriates the property in question by executive decree or by law.³⁸⁶
- b. Article 7 of the Wildlife Conservation Law provides that “*the creation and delimitation of wetlands shall be carried out by executive decree, according to technical criteria.*”³⁸⁷

447. Prior to a change in law in September 2009, the position regarding creation and delimitation of wetlands was bounded by these two laws. Wetlands could only be created and delimited by Executive Decree based on the Wildlife Conservation Law, Article 7. Likewise, based on the Organic Law of the Environment, Article 32, wetlands were Wildlife Protected Areas – and when wetlands were to be delimited on private property (such as Las Olas), it was legally required for the Ministry of the Environment (or the President of the Republic) to expropriate the wetland in question Articles 37 and 38 of the

³⁸⁶ See Exhibit C-184.

³⁸⁷ See Exhibit. C-307.

Organic Law of the Environment, and declare that wetland as part of the Natural Patrimony of the State.

448. The position is therefore clear: prior to September 2009 (that is, prior to SETENA's issuance of EVs for the Las Olas Project), all wetlands in Costa Rica had to be created by Executive Decree. That position is reflected in the criminal court judgments dealing with the creation of wetlands, three out of four of which provide as follows:

*the Wildlife Conservation Act establishes the following as functions of the Directorate General of Wildlife of the Ministry of Environment and Energy: 'Administer, monitor, and protect wetlands. The creation and demarcation of wetlands will be made by executive decree, according to technical criteria.'*³⁸⁸

449. The requirement, pre-2009, that all wetlands be created and delimited by executive decree was also recorded in two executive decrees, as follows:
- a. Executive Decree No. 31849 of 2005 (Regulations for the Environmental Impact Assessment Procedure), which defines Environmentally Fragile Areas (including wetlands) as those declared by the State by means of an Executive Decree or law³⁸⁹ and those located on public property belonging to the State.³⁹⁰
 - b. A previous version of Executive Decree No. 35803-MINAE which establishes in Articles 2 and 3 that continental and marine wetlands must be part of a Wildlife Protected Area, reinforcing the need for an Executive Decree in order to point to the existence of a wetland.³⁹¹

450. Under the above-mentioned regime for the delimitation of wetlands, the Claimants followed all required steps to ensure their compliance with the law. In June 2008, when SETENA issued the EV for the Condominium Section of

³⁸⁸ See Exhibit R-236

³⁸⁹ See Exhibit C-208.

³⁹⁰ See Exhibit C-170 Law 7575, Article 13.

³⁹¹ These two articles (articles 2 and 3) were declared unconstitutional by the Constitutional Chamber of Costa Rica in 2011, after the relevant environmental and construction permits were issued to Las Olas.

the Las Olas Project, the only method for determining wetlands at that time required an executive decree specifying the relevant area as a Wildlife Protected Area. In these circumstances, it was sufficient to consult SINAC (which in turn consulted the register of Wildlife Protected Areas) and request a certificate confirming whether or not the Las Olas Property contained any Wildlife Protected Areas. The Claimants did this.

451. Once SETENA received a confirmation from SINAC that Las Olas was not in any Wildlife Protected Area on April 8, 2008,³⁹² it was satisfied that no wetlands existed on site and proceeded to grant the requested EV. This is confirmed by:

- a. The text of the June 2, 2008 EV for the Las Olas Condominium Section which specifically references the April 8, 2008 SINAC certification that the site did not form part of a Wildlife Protected Area,³⁹³
- b. SETENA's September 1, 2010 Resolution rejecting Mr Bucelato's complaint regarding destruction of alleged wetlands at Las Olas, which notes in the "*Conclusion of Law*" section that "*through Official Letter No. ACOPAC-OSRAP-00282-08 dated April 2, 2008, Mr. Gerardo Chavarria Amador, Head of the Subregional Office of Aguirre-Parrita, stated that the project area is not located within any protected wilderness area, such as wetlands, which are considered protected wilderness areas.*" (emphasis added),³⁹⁴ and
- c. SETENA's November 15, 2011 Resolution reconfirming the EV for the Las Olas Condominium Section, which provides that the EV was issued based on the April 8, 2008 SINAC certification that the Project Site was not within a Wildlife Protected Area.³⁹⁵

³⁹² See Exhibit C-48.

³⁹³ See Exhibit C-40.

³⁹⁴ See Exhibit C-83.

³⁹⁵ See Exhibit C-144.

452. It is also relevant to note that at the time of SETENA's 2010 and 2011 Resolutions reconfirming the 2008 EV for the Condominium Section, SETENA cited back to the law applicable in 2008, when the EV was issued. This is the correct procedure in circumstances where the EV, an administrative act which grants right to the developer (in this case, the Claimants), had already been issued, as confirmed by Dr Jurado in cross-examination.³⁹⁶

b. After 2009, wetlands in Costa Rican did not have to be created by executive decree.

453. Costa Rican law pertaining to the delimitation of wetlands changed on September 9, 2009. On that day, a ruling of the Constitutional Chamber declared unconstitutional one part of the Wildlife Conservation Law, Article 7. By resolution 14288-2009, the Constitutional Chamber of Costa Rica declared unconstitutional part of the last paragraph of the Wildlife Conservation Law, Article 7.³⁹⁷ Following that Constitutional Chamber ruling, Article 7 of the Wildlife Conservation Law now reads as follows:

The delimitation of wetlands shall be done by executive decree, based on technical criteria.

454. The deletion of the words “*creation and*” before “*delimitation*” was confirmed by Constitutional Chamber Resolution 016938-2011 of December 7, 2011,³⁹⁸ which modified Articles 2 and 3 of Executive Decree 35803-MINAE.³⁹⁹

455. As explained by Dr Jurado in cross-examination, Constitutional Chamber rulings are binding on all institutions and citizens alike⁴⁰⁰ but cannot affect vested rights already granted to third parties, such as already issued EVs:

³⁹⁶ See Section, V.B, 1. of Claimants' Post-Hearing Brief

³⁹⁷ See Exhibit C-308.

³⁹⁸ See Exhibit R-489.

³⁹⁹ See Exhibit C-64.

⁴⁰⁰ English Transcript, 1480:19-1481:12 (Jurado confirming that “*the jurisprudence of the Constitutional Chamber is binding upon judges*” and that “*under the principle of *actos propios* [...] the Constitutional Chamber [...] is the last word in [the environmental field].*”)

6 Q. And it is only starting the declaration of
7 unconstitutionality. From there on, then that it stops
8 being applied; correct?

9 A. Correct. But, as you know--well, not
10 necessarily. Because the effects of the decisions of
11 the Constitutional Chamber--since they are
12 nullification chambers, they have retroactive effects.

13 Q. Not in all cases because the Chamber could
14 contextualize them.

15 A. But it has to do so expressly.

16 Q. And it could also not violate acquired rights
17 given under the mandate of a rule that was in effect at
18 that point?

19 A. Yes, it would have to respect vested rights.

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456. In the circumstances therefore, the post-September 2009 procedure for determination of wetlands did not apply to the Las Olas Project Site in 2008, when the EV for the Condominium Section was issued. Furthermore, the change in law could not affect the Claimants' inherent rights acquired by obtaining EVs, most notably the Condominium EV. Again, this is a fact which SETENA recognised when citing back to the pre-September 2009 status of the law in its September 1, 2010 and November 15, 2011 Resolutions, as outlined above.

c. The Costa Rican agencies in charge of wetlands determination

457. Now that the applicable legal framework for delimitating wetlands is set forth, a full description of the Costa Rican agencies in charge of wetlands determination is warranted.

458. Prior to September 2009, only the Executive (that is, the Minister of the Environment and the President of the Republic) had the authority to create and

⁴⁰¹ English Transcript, 1503:6-19.

delimit wetlands, as only they could prepare and issue the requisite Executive Decree.

459. Post-September 2009 however, the position has changed. SINAC is now empowered to follow the technical criteria set out in Executive Decree 35803-MINAE in order to determine the existence of a wetland. Nonetheless, as determined by the Constitutional Chamber in its September 9, 2009 ruling, the *delimitation* of any wetland, once identified by reference to the applicable tripartite technical criteria in Executive Decree 35803-MINAE, has to be done by Executive Decree.
460. In addition, as the Respondent acknowledges, SINAC does not have the requisite technical expertise to carry out all the studies necessary to determine whether or not a wetland exists. For that reason, SINAC relies on the assistance of INTA, as the national authority that administers and executes Executive Decree 23214-MAG-MIRENEM,⁴⁰² which establishes the methodology that has to be followed in the identification and determination of wetland soils, in accordance with Article 5(b) of Executive Decree 35803-MINAE.⁴⁰³
461. Notably in this case, SINAC has never made any final wetlands determination, nor could it, because INTA's soils study in April 2011 did not find hydric soils at Las Olas and there has not been any Executive Decree delimiting any wetlands at Las Olas.

d. The final authority on the determination of wetlands

462. In its Closing Questions, the Tribunal asked the parties to explain which agency is the final authority on the determination of wetlands in Costa Rica, in the event of any shared responsibilities.

⁴⁰² See Exhibit R-401. Note that at footnote 300 of the Rejoinder, the Respondent mistakenly identifies the exhibit as Executive Decree No. **20501**-MAG-MIRENEM in error. (Executive Decree No. 20501-MAG-MIRENEM is a prior version of the official methodology, released in 1991.)

⁴⁰³ See Exhibit C-64.

463. As outlined above, pre-September 2009, the final authority on the determination of a wetland was the Executive, as only the Executive could decide whether or not to issue an Executive Decree.
464. Post-September 2009, the final authority for the determination of wetlands and issues related to wetlands is SINAC, in accordance with Executive Decree 35803-MINAE, which in turn specifies that Executive Decree 23214-MAG-MIRENEM⁴⁰⁴ be applied for the determination of hydric soils. However, in accordance with the Constitutional Chamber's September 9, 2009 ruling, the final delimitation of any such wetland must then be done by Executive Decree.
465. In practical terms therefore, SINAC must first be satisfied by reference to the mandatory tri-partite technical criteria for the determination of wetlands (which includes the presence of hydric soils, of which INTA found none at Las Olas) that a wetland exists. Then a *delimitation* of that wetland may be carried out by Executive Decree. It is undisputed that this did not occur in the case of Las Olas.
466. At Las Olas, SINAC confirmed prior to issue of all EVs for the Las Olas Project (not just the June 2, 2008 EV for the Condominium Section) that no wetlands existed at Las Olas, and it was based on that confirmation that SETENA issue the EVs and the Municipality of Parrita issued the relevant construction permits. As stated by Dr Jurado in both his First Witness Statement⁴⁰⁵ and during cross-examination, those administrative acts are binding on everyone, including judges and other public agencies including SINAC, and must therefore be respected.

⁴⁰⁴ See Exhibit R-401. The relationship between Executive Decree 35803-MINAE and Executive Decree 23214-MAG-MIRENEM is discussed *infra*, Section C, in rebutting the Respondent's experts' *post-hoc* allegations regarding site conditions.

⁴⁰⁵ See Julio Jurado Frist Witness Statement, para. 105 and English Transcript, 1467:1-1468:9.

B. The lack of evidence of wetlands on site at the relevant time

467. Against this backdrop, it is clear that absent a certification from SINAC that the Las Olas Project Site was located within, or contained, a Wildlife Protected Area, or an Executive Decree creating and delimitating a wetland at Las Olas, there cannot have been any wetland at Las Olas pre-September 2009 when the EVs for Las Olas were issued.
468. Post-September 2009, and therefore at the time of the Respondent's unlawful suspension of the construction and environmental permits and Las Olas, the position is equally clear. Executive Decree 35803-MINAE sets out the ecological characteristics that identify a wetland. They are:
- a. hydrophilic vegetation, composed of species related to aquatic and semiaquatic environments;
 - b. hydric soils, defined as "*soils that develop in conditions with a high level of humidity reaching the point of saturation*"; and
 - c. hydric condition, characterized by the climatic influence of a specific area, considering geomorphical process, topography, soil material, and other processes or events.⁴⁰⁶
469. Executive Decree No. 35803-MINAE provides that the technical criteria must be followed to "*determine and mark out a specific area of land as a wetland.*"⁴⁰⁷
470. Specifically in relation to the presence of hydric soils, Executive Decree No. 35803-MINAE provides that the Costa Rican Land Use Methodology contained in Executive Decree 23214-MAG-MIRENEM, must be employed and that hydric soils will generally correspond to soil classes VII and VIII in that methodology.

⁴⁰⁶ See Exhibit C-218.

⁴⁰⁷ See Luis Ortiz Expert Report, para. 59.

471. In accordance with Executive Decree 35803-MINAE therefore, the Respondent’s agency, SINAC – and only SINAC – is empowered to determine (by reference to specific technical criteria) whether or not a wetland exists at Las Olas. As stated above, as part of that determination, it is necessary for SINAC to consult INTA, as the agency that administers and executes Executive Decree 23214-MAG-MIRENEM concerning the identification of wetlands soils, to determine whether or not the requisite hydric soils are present.⁴⁰⁸
472. Without the confirmed presence of hydric soils, SINAC cannot make a definitive finding of wetlands and it does not have the expertise in-house to conduct any soils studies.
473. As Mr Barboza made clear in both his First and Second Expert Reports, SINAC failed to fulfil the three mandatory criteria in relation to Las Olas. As Mr Barboza explained in his presentation at the Hearing:

10 The second part, that is Decree 35803 that is
11 mentioned in the report, provides a protocol to
12 determine and classify a wetland in Costa Rica. This
13 Decree provides that three fundamental characteristics
14 are to be met in order to determine that a zone is a
15 wetland. These are the hydrophilic vegetation, hydric
16 soil, and hydric condition.

17 The process for that determination must go
18 through a soil sampling conducted by a specialist and
19 inventory of the hydrophilic vegetation and a
20 description of the hydric condition of the site.

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⁴⁰⁸ Importantly as even Mr Erwin admits, the study of hydric soils is needed because of the temporary nature of “*wet areas*,” because “*hydric soils don’t disappear because of drainage*.” 1924:19-20. As Green Roots agreed at the Hearing, INTA is “*the agency responsible for soil classification in Costa Rica*.” 1986:13-16.

⁴⁰⁹ English Transcript1608:10-20.

474. Mr Barboza went on to explain at the Hearing that the SINAC determination of a wetland at Las Olas “*is incorrect and lacks technical legal substance.*”⁴¹⁰ In so doing, Mr Barboza cited, *inter alia*, the following documents in order to establish that SINAC’s determination lacked the technical information necessary to find a wetland under Costa Rican law:
- a. Exhibit C-8, which determined that there is no protected area at Las Olas;⁴¹¹
 - b. Exhibit C-72, the July 2010 SINAC Report by Mr Manfredi and Mr Bogantes which confirmed (among other things) that there are no characteristics that can justify the presence of wetlands at Las Olas, and no environmental damage;⁴¹²
 - c. Exhibit R-262, the January 2011 SINAC Report which recommended that (1) the National Wetlands Program send an official to verify whether there is a wetland at Las Olas, and (2) INTA send an official to take soil samples to determine whether hydric soils were present at Las Olas.⁴¹³ Mr Barboza noted the “*strong discrepancy*” between the January 2011 SINAC report and the July 2010 SINAC Report.⁴¹⁴
 - d. Exhibit C-116, the March 16, 2011 SINAC Report attended by Mr Picado, which stated that a non-tidal palustrine wetland was found at the site (but did not verify the technical criteria required for an determination of a wetland under Executive Decree 35803-MINAE).⁴¹⁵

⁴¹⁰ English Transcript 1617:11-12.

⁴¹¹ English Transcript, 1609:2-5.

⁴¹² English Transcript, 1609:10-1610:7; 1611:2-5. Note that Mr Barboza erred in the exhibit number referenced in the transcript regarding the Manfredi report. The correct reference is Exhibit C-72, not R-20.

⁴¹³ English Transcript, 1610:8-20.

⁴¹⁴ English Transcript, 1611:2-7.

⁴¹⁵ English Transcript, 1611:8-1612:10; and Claimants’ Memorial, para. 218.

- e. Exhibit C-124, the INTA Report, in which Mr Cubero concluded that the soils at Las Olas were not typical of a wetland system, and that there were no hydric soils.⁴¹⁶
475. As the evidence conclusively demonstrates in this case, INTA made no finding of hydric soils at the time of the expropriatory measures in 2011.⁴¹⁷ Rather, INTA conducted a soils study of the alleged wetlands at Las Olas and concluded in April 2011 that no hydric soils were present.⁴¹⁸ Accordingly, that should be an end to the matter: there simply were no wetlands at Las Olas in 2008 when the EVs were issued, or in 2011 when the Respondent paralyzed the Claimants' Project.
476. Against this backdrop, the Respondent's *post-hoc* attempt to argue that the Claimants "*duped*" SETENA into issuing an EV for the Condominium Section of Las Olas by burying the Protti Report, which according to the Respondent "*conclusively proves*" through its use of the word "*pantanosos*" ("*swampy*" in English) that there were wetlands at Las Olas in 2008, is laughable.
477. As regards forests, the Claimants have already explained in detail in their Memorial and Reply Memorial the clear deficiencies in the Respondent's so-called forest findings.⁴¹⁹ Mr Arce also has provided extensive commentary on the poor methodology employed by SINAC/MINAE,⁴²⁰ and the untenable nature of the Respondent's assertions of destruction of a forest as a result. Mr Arce has explained in both of his Witness Statements that:
478. MINAE failed to employ sound methodology in determining whether a forest existed at the site during its 2011 determinations;⁴²¹

⁴¹⁶ English Transcript, 1612:13-1613:2; and Exhibit C-124

⁴¹⁷ See also Claimants' Reply Memorial, para. 95(d).

⁴¹⁸ See Exhibit C-124.

⁴¹⁹ See Respondent's Rejoinder, para. 307-310 (citing Ms Monica Vargas's accusation of the destruction of a forest); and para. 416 (citing criminal complaint alleging damage to forests and SINAC report alleging clearing of a forested area).

⁴²⁰ See First Witness Statement of Minor Arce, paras. 18-28; Second Witness Statement of Minor Arce, paras. 26-35.

⁴²¹ See First Witness Statement of Minor Arce, paras. 18-20.

- a. MINAE failed to define the study area;⁴²²
- b. MINAE failed to evaluate the parameters required for defining a forest as a matter of Article 3 of the Forestry Law (Law 7575);⁴²³
- c. MINAE included “*all trees*” in its study, including trees that are not included in the legal definition of a forest under Costa Rican law.⁴²⁴

479. Furthermore, Mr Arce explained the imprecise use of the word “*forest*,” which permeates the contemporaneous documents and reports and documents upon which the Respondent relies. For example, Mr Arce has already taken note of Ms Monica Vargas’s imprecise reference to “*forests*,” “*tree cutting*” and “*tree burning*” in the accusations found in her reports.⁴²⁵ At the Hearing, Mr Arce reiterated that the Respondent has failed to adequately apply the law in determine whether a forest existed at the site at the time – and that it cannot simply be assumed by looking at a photograph that a forest exists:

3 However, the concept of "forest" is clearly
 4 defined in the law. So, it is not a romantic concept.
 5 It is a legal concept. It is not a technical concept.

[...]

18 Law tells me that in order for there to be a
 19 forest, three basic conditions need to be met. There
 20 has to be a type of vegetation. Three parameters need
 21 to be considered:
 22 1, that it be a native autochthonous

⁴²² *Id.* at para. 21.

⁴²³ *Id.* at paras. 22-25.

⁴²⁴ *Id.* at para. 26.

⁴²⁵ *See* Second Witness Statement of Minor Arce, paras. 12-19.

1 ecosystem with over 2 hectares of area; next, it must
2 have mature trees of different species, different
3 sizes, covering--one or two canopies covering over 70
4 percent of the surface; and 3, it must have more than
5 60 trees per hectare with a diameter greater than
6 15 centimeters at breast level, which we know as the
7 DBH.

8 Sometimes, we want to force the issue that a
9 certain type of vegetation is not a forest, and with
10 simple observation, this cannot be done. With a
11 simple photograph, we cannot do it. Why? Because I
12 cannot say with this same photograph that I took today
13 that this vegetation--yeah though I would like it to
14 be a forest, I can't say it's a forest, because I have
15 to stick to the definition provided in Article II of
16 the Forestry Law and Article 3 of the regulations of
17 that law.

18 So, that is what I'm referring to here. I
19 cannot with certainty say that this photograph--not
20 even I, who have spent 32 years looking at forests, I
21 cannot say that this is a forest that somebody burned.

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480. The Claimants submit that the contemporaneous findings presented by the Respondent regarding forests at Las Olas are, by a long distance, insufficient to find that a forest existed at Las Olas. Moreover, an examination of the satellite imagery⁴²⁷ reinforces the conclusion that, at the relevant time, the Las Olas site was better characterized as “*cow pasture*” with “*scattered trees*.”⁴²⁸ The Claimants also submit that the Respondent’s notable failure to advance its forestry case at the Hearing should be borne in mind by the Tribunal, as being indicative of the Respondent’s lack of conviction in its own forestry allegations.

⁴²⁶ English Transcript, 653:3-654:21.

⁴²⁷ See Exhibit C-60.

⁴²⁸ See Exhibit C-40.

C. The Respondent’s cheap parlour trick of conflating 2016 site conditions with site conditions in 2008 or 2011 are of no help to the Respondent, and must immediately be rejected.

481. As already discussed, the Respondent’s *post-hoc* attempt to prove that wetlands exist on the site in 2016 should have no bearing on the Claimants’ claims, because neither Mr Erwin nor the Green Roots Experts can reliably testify to the conditions of the Las Olas site during the relevant time (2007-2011). Neither Mr Erwin nor the Green Roots experts were present when SETENA issued the Condominium EV in 2008, nor were they present when INTA found no hydric soils in 2011. It is evident that the Respondent is more than content to pretend that Mr Erwin and Green Roots made contemporaneous findings regarding wetlands and forests rather than producing *any* witnesses from SETENA, SINAC, or INTA to testify to the same.
482. It also must not be lost on this Tribunal that the Respondent, in its previous submissions, has interchangeably referenced the findings of SINAC, SETENA, and Ms Monica Vargas with the assertions of its current-day experts, Mr Erwin and Green Roots – as if Mr Erwin and Green Roots made their findings contemporaneously with the events in dispute.⁴²⁹ The Respondent’s cheap parlour trick must immediately be rejected by this Tribunal because these expert opinions shed no light on the events at the time they allegedly occurred.
483. At bottom, there is a massive gulf between the contemporaneous findings of government functionaries, and the *post-hoc* assertions by paid experts in an international arbitration, some six to nine years after the relevant events. Nevertheless, even these experts, having the benefit of years of hindsight (and the benefit of knowing what legal case they need to prove), still make critical errors in the relevant standards under Costa Rican law in their 2016 observations. These errors include:

⁴²⁹ See Respondent’s Rejoinder para. 642 (“*The First and Second KECE Report have proven extensively how Claimants’ works impacted Wetland No. 1.*”); para. 1150 (“*...the First and Second KECE Reports speak for themselves as to the damage caused to the Project Site by Claimants.*”); para. 1151 (“*KECE detailed the works that were performed by the Claimants on the Project Site...* ”).

- a. Failing to apply the technical criteria for the delimitation of new wetlands not yet registered in Costa Rica’s wetland registry, as specified by Executive Decree 35803-MINAE.
- b. Failing to apply the correct methodology for the determination of hydric soils under Executive Decree 23214-MAG-MIRENEM,
- c. Failing to apply the technical criteria for the determination of a forest under the Forestry Law (Law 7575).

484. Moreover, as next discussed, the current status of the Las Olas site cannot be seen as a reliable indicator as to site conditions in 2007/8 or 2011. In the interim period, as a result of the Respondent’s illegal shut down of the Las Olas Project, squatters have caused damage to the land. Furthermore, when the Claimants’ routine maintenance ceased, vegetation began to accumulate rapidly – as is to be expected in a lowland tropical region with high rainfall. Finally, the Claimants’ counsel is aware that the Municipality of Parrita has conducted extensive works on the public roads surrounding Las Olas, significantly impacting the drainage patterns by installing culverts and those works appear to be ongoing, even now.

1. Mr Erwin has failed to apply the correct criteria to delimitate wetlands under Costa Rican Law.

485. As previously discussed, Executive Decree 35803-MINAE provides the essential framework under Costa Rican Law used to delimitate a new wetland.⁴³⁰ This is despite the Respondent’s considerable (but failed) effort to deny that its criteria applies,⁴³¹ or its attempt to rely on more ambiguous definitions of wetlands when delimitating alleged wetlands at Las Olas.⁴³² It should be noted here that none of the Respondent’s experts, including Mr

⁴³⁰ See section IX,A,1. Claimants’ Post-Hearing Brief; *see also* English Transcript, 1608:10-20.

⁴³¹ See Respondent’s Rejoinder, para. 321-329 (arguing that any environmental law in Costa Rica must consider the precautionary principle, and reject that the technical criteria of the Executive Decree be applied “*strictly*.”)

⁴³² See First KECE Report, para. 43 (providing five different criteria for wetlands and applying all five definitions broadly).

Erwin, has the authority under Costa Rican law to delimitate a wetland – only SINAC has that authority, and has never exercised it.

486. Article 6 of Executive Decree 35803-MINAE sets forth the three criteria that must be present in order to delimitating a new wetland:

*Article 6.- Ecological Characteristics of Wetlands. **Essential** ecological characteristics that an area should have to be considered a wetland are:*

*(a) **Hydrophilic vegetation**, made up of types of vegetation associated with aquatic and semi-aquatic media, including phreatophytic vegetation that grows in layers of permanent water or shallow water tables.*

*(b) **Hydric soils**, defined as those soils which develop under conditions with a high degree of humidity, up to reaching a degree of saturation, **and***

*(c) **Hydric condition**, characterized by climactic influence over a determined territory, in which other variables, such as geomorphic, topographic, soil makeup material, and occasionally other processes or extreme events are involved.⁴³³*

487. As next discussed, the Respondent's experts have failed to accurately consider the requirements of hydric soil and hydrophilic vegetation as required by Executive Decree 35803-MINAE.

a. Mr Erwin has failed to meaningfully consider soil data in alleged wetlands 2-7, and his assertion regarding soils in alleged wetland 8 is not credible

488. As this Tribunal will recall, the First KECE Report was devoid of any meaningful data on hydric soils,⁴³⁴ just as SINAC in 2011 failed to properly analyse hydric soils (and later ignored INTA's findings) in concluding that wetlands existed at Las Olas.⁴³⁵

489. The Second KECE Report, even with the benefit of the Claimants' criticisms regarding the First KECE Report's lack of soil data, nevertheless failed to obtain any data for any part of the site besides Mr Erwin's alleged Wetlands 1 and 8. Immediately, therefore, the Respondent's Wetlands 2 to 7 must be

⁴³³ See Exhibit C-218.

⁴³⁴ See, Respondent's Rejoinder, para. 95(b); para. 121-130.

⁴³⁵ See, e.g., Respondent's Rejoinder, paras. 95(d), 185, 202, 286, 287(c), etc.

discounted by this Tribunal, as they have not been shown to meet the mandatory tri-partite criteria for a finding of wetlands under Costa Rican law. As Mr Erwin explicitly stated in his Second Report, he is “*not a soil scientist*,” and, in any case, “*KECE discontinued the soil sampling effort*.” When asked about this glaring omission at the Hearing, Mr Erwin made further excuses about his failure to obtain soil data:⁴³⁶

19 | I am not a soil scientist, but I am a
20 | well-experienced wetland ecologist. So, I get a
21 | chance to dig holes periodically. But we typically
22 | don't do significant soils analysis, especially in

1 | cases where we have the wetland hydrology
2 | well-established. If it's inundated for a prolonged
3 | period of time, in every occasion we have hydric soils
4 | except under extenuating circumstance where somebody's
5 | done something to the soil. In this case, we had that
6 | in Wetlands 2 through 8.
7 | In this particular instance, we were not able
8 | to take those cores to a laboratory. We tried. I
9 | couldn't get them there quick enough, and I did not
10 | feel comfortable. This would have violated my
11 | methodology as far as, you know, getting the samples
12 | prepared properly and getting them to a lab at a
13 | university or someplace where they could be identified
14 | by a soils scientist.

⁴³⁷

490. Thus, after two visits to the site, the Respondent’s primary environmental expert, Mr Erwin, failed to make efforts to obtain adequate soil data for the vast majority of alleged wetlands he alleges to exist. Likewise, the Green Roots

⁴³⁶ English Transcript, 1900:16-1901:1.

⁴³⁷ English Transcript, 1282:19-1283:14.

team analysed only the area that comprises alleged wetland 1,⁴³⁸ confirming that the Respondent entirely failed to get any soil data for alleged Wetlands 2 to 7.

491. With regard to Wetland 8,⁴³⁹ Mr Erwin’s “*soil analysis*” does not constitute an accurate finding of hydric soil. At paragraph 25 of the Second KECE Report, Mr Erwin, in completely this analysis, merely states that “*a photo of this auger pit sample clearly shows hydric soil indicators, including mottling and gleying within 50cm of the soil surface.*” However, if one actually examines the photograph provided as the basis for Mr Erwin’s assumption, there is no gley in it.⁴⁴⁰ Moreover, as Mr Erwin explains, he is “*not a soil scientist,*” and his conclusory finding with regard to alleged wetland 8 should be passed over.

b. Mr Erwin imprecisely and misleadingly classified “*hydrophilic vegetation*” as wetland species, where these same species are found in upland habitats.

492. In cross-examination at the Hearing, Mr Erwin was forced to concede that only around 13% of the species he observed at Las Olas are purely wetland species:

18	So, in this section of your second report, you
19	summarize your observations and findings with respect
20	to vegetation on-site. You see that?
21	A. Yes, sir.
22	Q. So, you start--Page 9 you see Table 2 down at

⁴³⁸ English Transcript, 1983:17-18.

⁴³⁹ In addition to the faulty soil analysis of alleged Wetland 8, Mr Erwin failed to identify any significant presence of hydrophitic vegetation in alleged Wetland 8 (approximately only 5% of vegetation in that area). *See* English Transcript, 1900:16-1901:18.

⁴⁴⁰ *See* Figure 105 at page 124 of the Second KECE Report. There is no gleying in photograph taken of auger soil sample.

1 the bottom, and you have a summary table. And we see
2 the now-familiar distinctions drawn in columns, so we
3 have U--a column "U" for Uplands, "W" for Wetlands,
4 and "W/U," Wetland or Uplands, and then a "Total"
5 column. And that's broken down by rows according to
6 what I will annoyingly, from your point of view, call
7 the alleged wetlands.

8 So, we see that all summarized in Table 2.
9 Arithmetically, you will have no difficulty in
10 confirming for me that of the 108 species observed
11 across the eight alleged wetlands, only 14 are purely
12 wetland species. Arithmetically, you accept that as a
13 correct statement? Yes?

14 A. I haven't counted them lately, but I am sure--

15 Q. Well, you see, you, in fact, have totaled it
16 up. If you look at the Total column--

17 A. I'm not disagreeing.

441

493. As a result, 87% of the species he observed in his alleged Wetlands 1 to 8 are not necessarily indicative of wetlands at all.
494. Furthermore, Mr Erwin's attempt to argue (after the fact) that the Wetland/Upland classification could contain more "*wetland-predominant*" or "*facultative wet*" species is unpersuasive. Importantly, Mr Erwin could have subdivided his categorization more accurately as "*facultative wet*" and "*facultative dry*" in his reports—but instead used the ambiguous and unhelpful "*Wetland/Upland*" categorization:

⁴⁴¹ English Transcript, 1890:18-1891:17.

2 Q. When I say--these are your--these are your
3 definitions.
4 A. No, no. I'm looking at--at, you know,
5 Wetland/Upland, W and U, as something that would be
6 facultative wet in this case.
7 Q. And it could be--
8 A. You might choose a better example other than
9 Wetland Number 1 since Wetland Number 1 is disturbed.
10 The trees have been cut down and the site cleared.
11 Q. That's what you say.
12 A. That's what I know.
13 Q. It could also be facultative dry, couldn't it?
14 A. And it could.

442

495. Mr Erwin's methodology in the collection of plant data was also shown at the Hearing to have been poor. Dr Langstroth described Mr Erwin's approach to plant species classification as "*a perilous enterprise*."⁴⁴³ He observed that Mr Erwin failed to account in his wetlands finding for the fact that 38 of the 108 species of plant that he observed on site were upland species, and therefore associated with non-wetland habitats.⁴⁴⁴ The significance of this finding is all the more apparent when contrasted with the very small number (13) of wetland-only species that he was able to observe. Dr Langstroth also noted the "*confusion on the use of these classifications*"⁴⁴⁵ in the KECE Report, where wetland and wetland upland species are grouped together and all stated to be wetland plants, something Drs Calvo and Langstroth disagree with strongly.

496. In his presentation, Dr Calvo explained how one *should* go about determining whether or not there is a wetland on site:

⁴⁴² English Transcript, 1894:2-14.

⁴⁴³ English Transcript, 1742:10-11.

⁴⁴⁴ English Transcript, 1734:12-21.

⁴⁴⁵ English Transcript, 1742:14.

10 | there's some plants that look typical. So, what would
11 | we do to determine if there's a wetland?

12 | To use a systematic approach, we would have to
13 | go to, say, to the center of the site which is full of
14 | water and do a hopefully quantitative analysis and
15 | determine if there is a preponderance of wetland
16 | plants, the hydrology, and then whether the soils are
17 | hydric or not.

18 | You do that in the center, and you start
19 | moving outwards until at some point, you get to a
20 | point where you don't find those three
21 | characteristics; and somewhere in there, you say, this
22 | is the boundary, the upland wetland boundary.

1 | There should be a systematic approach in doing
2 | so.

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497. Dr Calvo went on to explain the deficiencies in Mr Erwin's methodology:

3 | So, I'm focusing more on the Second Report by
4 | Mr. Erwin and his team, and I read the methodology.
5 | And my conclusion is that a poor methodology results
6 | in unreliable results. You read the methodology, and
7 | all I find is, "We walked the perimeter of the target
8 | wetland. We took GPS points. We made a list of
9 | species, plant species. And we visually estimated the
10 | percent cover of each of the 108 species that they
11 | found."

[...]

⁴⁴⁶ English Transcript, 1731:10-1732:2.

14 | football field. How do I do that without a systematic
15 | approach? Walk around, I already--it sounds like I
16 | already determined what the boundary is, so, I walk
17 | it, I take GPS points, take a list, and I go, oh, the
18 | one species--1 percent. Another species, 3 percent.
19 | I--in the text, there's nothing that tells me exactly
20 | how that was done.

21 | And yet, they have results that go very much
22 | into saying there are wetlands and there are these

1 | species, and they classify the species into wetland
2 | and wetland upland species and upland--the results do
3 | not follow the methods.

447

498. In the circumstances, it is clear that, without a properly accountable methodology and by pre-judging the outcome of his analysis, Mr Erwin's findings with regards to plant species are wholly unreliable must be discounted.

2. With Regard to Soil Analysis, both Green Roots and Mr Erwin apply the wrong classification system and methodology to determine hydric soils at Las Olas

a. The Costa Rican Land Use Methodology set forth in Executive Decree 23214-MAG-MIRENEM is to be used, not the U.S. Field Indicators.

499. As outlined above, the Costa Rican definition of wetlands requires a finding of hydric soils.

500. Executive Decree 35803-MINAE, at Article 5(b) provides that for the purposes of identifying hydric soils, the Costa Rican Land Use Methodology contained in Executive Decree 23214-MAG-MIRENEM is to be used, and that hydric soils will generally correspond to soil classes VII and VIII in that methodology.⁴⁴⁸

⁴⁴⁷ English Transcript, 1731:3-1733:3

⁴⁴⁸ See Exhibit C-218, which provides that "Based on the Classification of Usability of Lands (Executive Decree No. 23214-MAG-MIRENEM) usually wetland soils correspond to Class VII and VIII. Therefore, these lands have utility only as zones for preservation of flora and fauna protection areas aquifer recharge, gene pool and scenic beauty."

501. This is the methodology that the Claimants' soils expert, Dr Baillie, employed. As Dr Baillie explained in his presentation at the Hearing, the Costa Rican Land Use Methodology "is, in fact, a very well-proven system. It dates back and has been adapted from USDA Handbook 210 from 1961. And this has been tested and found to be very robust, flexible, and satisfactory, in a large number of countries, including in the tropics."⁴⁴⁹

502. Dr Baillie went on to explain that:

15 | So, it's primarily aimed at determining whether land
16 | is best-suited for arable, pasture, or production
17 | forestry, or should be left for conservation purposes.

[...]

21 | It works on the principle of limiting factors,
22 | so, Class I has no limits. It's the best possible

1 | land. No need to qualify it. But all the other
2 | classes, you have to indicate what is the limiting
3 | factor.

8 | Now, the reason why it is a useful system for
9 | identifying hydric soils is because drainage is one of
10 | the major potential limitations and is used in the
11 | land evaluation system; and they are well-defined,

17 | The value of this quantitative-specific set of
18 | criteria were recognized in the MINAE Decree of 85803
19 | [sic], and it is stated there that "Hydric soils, for
20 | the purpose of definition of wetlands, are
21 | a--correspond to land evaluation Classes VII and
22 | VIII."

450

⁴⁴⁹ English Transcript, 1668:5-9.

⁴⁵⁰ English Transcript, 1668:15-1669:22.

503. The Land Use Methodology set forth in Executive Decree 23214-MAG-MIRENEM is the only methodology referenced in Executive Decree 35803-MINAE, which indicates that MINAE considered the Land Use Methodology as the appropriate methodology for determining hydric soils in Costa Rica. The text of Article 2 of Executive Decree 23214-MAG-MIRENEM further confirms that the methodology is to be used for environmental purposes such as the determination of hydric soils:

*Article 2.- For the purposes of studies in the fields of agriculture, livestock, forestry, **protection of natural resources** and credit, this methodology is established, **which must be applied** in the creation of all strategies, policies, projects, programs, plans and in the execution of specific activities done in the national territory by national or international institutions, public or private.*⁴⁵¹

504. Furthermore, the Respondent's own expert, Dr Jurado, explained that the under Article 11 of the Political Constitution, public administrative agencies in Costa Rica are obliged only to do what is established in the law under the *principle of legality*:

10	Obviously, since we're speaking of Public	
11	Administration, it practices its competence granted by	
12	these laws under the general law of Public	
13	Administration. Like any other sector of Public	
14	Administration, all is subject to the principle of	
15	legality established by Article 11 in the Constitution	
16	which states that a State and Public Administration	
17	cannot go beyond what is allowed expressly by law.	452

505. In circumstances where the Land Use Methodology sets out the only criteria mentioned in the law, explicitly endorsed by MINAE (and the President of the Republic) through an executive order, Mr Erwin and Green Roots' departure⁴⁵³

⁴⁵¹ See Exhibit R-401, Article 2.

⁴⁵² English Transcript, 1424:10-17. Mr Ortiz also referred to the principle of legality at the hearing. English Transcript, 1406:19-21.

⁴⁵³ Green Roots states on page 51 of its Report (Appendix 2) that "no specific hydric soil indicator method is identified within the Organic Law or in Decree 35803." Mr Erwin, in paragraph 17 of his Second KECE Report,

from this prescribed method of classifying soils, adopting instead the “U.S. Field Indicators,”⁴⁵⁴ has no basis. This is especially the case where INTA (the Costa Rican government agency that has the competence and technical expertise to conduct soil studies) *employs the Land Use Methodology* in its studies, including during its 2011 study of Las Olas determining that no hydric soils were present.⁴⁵⁵

b. Green Roots’ selective application of the U.S. Field Indicators and the Land Use Methodology for Alleged Wetland 1 should be discounted.

506. Green Roots only selectively applies the methodology found in the U.S. Field Indicators and Costa Rican Land Use Methodology order to reach the Respondent’s desired result.

507. In its presentation, Green Roots testified that it had found “*fluvaquentic endoaquept*” soils in Alleged Wetland 1:

19	What--what that makes us to believe with	
20	certainty that the soil, even it's altered, an altered	
21	state, is an inceptisol with <u>endoaquept</u> , and that's	
22	more than enough, even with--we don't have to go to	
1	what is a fluvaquentic, aquentic, or aeranic	
2	(phonetic) or aeric. There are so many definitions.	
3	Dr. Baillie has like seven or eight of them.	
4	Dr. Cubero had one, which is pretty much what we have,	
5	<u>fluvaquentic endoaquept</u> . Because there is--aquentic	
6	means there is no barrier, natural barrier, for the	
7	movement of water.	456

508. However, upon cross-examination, it was exposed that the Green Roots’ finding for alleged Wetland 1 was based on a fundamental misapplication of the USDA Keys to Soil Taxonomy⁴⁵⁷ used for this classification. The Green

similarly concludes that the Land Use Methodology “*is not a methodology of relevance to this arbitration.*” As explained above, both Mr Erwin and Green Roots are wrong.

⁴⁵⁴ See Exhibit C-300.

⁴⁵⁵ See Exhibit C-124 , p. 11-15 (concluding that Class V soils were at the site).

⁴⁵⁶ English Transcript, 1965:19-1966:7.

⁴⁵⁷ See Exhibit C-309.

Roots presentation at the Hearing distinguished between “*native surface soil*” and “*artificially modified soil*,” and explained that their inquiry wished to determine whether the “*soil in unaltered states was hydric*.” Green Roots failed to explain how they wished to make this determination in their report:

9 Do you see that? So, when you--when you
10 introduced the concept of "native surface soil," are
11 you speaking in the same territory when you refer to
12 this definition in the USDA of soils in which
13 hydrology has been artificially modified or hydric if
14 the soil in unaltered states was hydric? Is that more
15 or less the same thing to which you refer?
16 A. (Dr. Singh) Yes, it is.
17 Q. So, although you can't point to a definition
18 for this very important concept that you referred to
19 multiple times, this is roughly what we should have in
20 mind.

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509. The truth is that Green Roots selectively applied, and made erroneous presumptions regarding the application of, the USDA Keys to Soil Taxonomy’s definition of “*fluvaquentic endoaquept*.”⁴⁵⁹ The USDA Keys to Soil Taxonomy that Green Roots, Dr Baillie, and INTA (in 2011) all used to determine the classification of soils in Alleged Wetland 1 provides the following definition of “*fluvaquentic endoaquept*”:⁴⁶⁰

⁴⁵⁸ English Transcript, 1970:9-20.

⁴⁵⁹ See Exhibit C-309.

⁴⁶⁰ See Exhibit C-309, at p. 175-176.

KAJF. Other Endoaquepts that have *all* of the following:

1. A slope of less than 25 percent; *and*
2. A total thickness of less than 50 cm of human-transported material in the surface horizons; *and*
3. *One or both* of the following:
 - a. At a depth of 125 cm below the mineral soil surface, an organic-carbon content (Holocene age) of 0.2 percent or more and no densic, lithic, or paralithic contact within that depth; *or*
 - b. An irregular decrease in organic-carbon content (Holocene age) between a depth of 25 cm and either a depth of 125 cm below the mineral soil surface or

a densic, lithic, or paralithic contact, whichever is shallower.

Fluvaquentic Endoaquepts

510. Green Roots confirmed upon cross-examination that, under the definition of “*fluvaquentic endoaquept*,” the site can only have “***a total thickness of less than 50 centimetres of human transported material.***”⁴⁶¹ However, Green Roots skips over the top one-meter layer of soils in its analysis of Alleged Wetland 1 before it starts counting the 50 centimetres contemplated in the above definition – in order to find hydric soil.⁴⁶²
511. Green Roots skipped over this top one-meter layer of soil because it asserts that “*it’s a transported material, definitely,*”⁴⁶³ even though – by definition – Green Roots agrees that *fluvaquentic endoaquepts* are soils that have been deposited by rivers, with sediment depositing at different rates with different materials and cannot therefore constitute human transported material.⁴⁶⁴ Green Roots also agreed that, in naturally occurring *fluvaquentic endoaquepts*, the soil

⁴⁶¹ English Transcript, 1974:2-10.

⁴⁶² *Id.*

⁴⁶³ English Transcript, 1976:14-15.

⁴⁶⁴ English Transcript, 1974:18-1975:13.

profile of *fluvaquentic endoaquepts* would not be uniform, but would have natural discontinuities.⁴⁶⁵ This casts doubt on Green Roots' reliance on discontinuities in the soil profile in the alleged Wetland 1 as evidence of fill.

512. Green Roots nevertheless presumes that there is one meter of fill – *and* that the one meter of fill was caused by a disturbance by the Claimants. Green Roots makes this misguided assumption despite the fact that Dr Baillie's Observation 14, which was taken **across the road, off of the Claimants' property**, and therefore beyond the reach of any supposed fill activity by the Claimants, exhibited precisely the same features as the soil examined by Green Roots, Dr Baillie, and INTA on Alleged Wetland 1. This strongly suggests that Green Roots were wrong to discount as fill the first one meter of material they studied on Alleged Wetland 1, with the effect that the finding of hydric soil within the required parameters (i.e., that it be within 50cm of the surface) can only be considered incorrect.
513. Dr Baillie explained some of the reasons why it is inappropriate for Green Roots to disregard the first 105 centimeters of alleged wetland 1 in its analysis, not least of which is that the soil profile from his offsite Observation 14⁴⁶⁶ contained the same soil conditions:

22 |

But could you explain why you did not discount |

⁴⁶⁵ English Transcript, 1975:14-17.

⁴⁶⁶ See IC Baillie Expert Report, para. 50 and photograph (Plate 12).

1 the fill material that the Green Roots Report observed
2 from the surface level down to 105 centimeters?

3 A. There are a number of reasons. One was the
4 nature of the lower parts of the subsoil. As the soil
5 settles, it gradually becomes more compact, and it
6 develops natural structures. However, this takes some
7 time. If you're in a very recent fill, the soil is
8 much looser, it has a much more open friable
9 consistence.

10 And the subsoils that I was observing in Bajo
11 I had the general feeling of having been in situ for
12 some time.

13 Q. Thank you.

14 And in respect of that answer, did your
15 Observation 14, to which Ms. Paez also referred, have
16 any bearing on, again, this point about how to
17 understand the fill material above the gleyed
18 material?

19 A. What was clear was that the upper parts of the
20 mineral parts of the soils was, basically, red matrix
21 with gray mottles. And that was apparent in
22 the--absolutely clearly understood--not undisturbed

1 soil in Observation 14. Therefore, I would expect and
2 interpreted the natural soil conditions to include
3 some horizons of reddish matrix material. So,
4 therefore, to take the whole of the reddish material
5 as fill is erroneous.

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514. Green Roots never took observations off the site, the correct methodology if one wishes to control for other variables (such as the work of other individuals besides the Claimants, including the work of the Municipality in the maintenance of roads and culverts), or to verify the natural soil conditions.

⁴⁶⁷ English Transcript, 1708:2-1710:5.

7 Q. Did you--did you do anything equivalent to
8 Dr. Baillie's Observation 14 and look adjacent to the
9 site in order to satisfy yourselves that the material
10 was different? Because it would have to be different,
11 wouldn't it, if we're talking about artificial
12 movements?

13 You would have to be able to say "Adjacent to
14 the site I observed or we observed that there was
15 something different happening."

16 Did you do that?

17 A. (Dr. Perret) We did not look outside of
18 Wetland 1. However, if you look at Dr. Baillie's

Q.

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515. When pressed further, Green Roots confirmed that it did nothing to corroborate its assumption that there was a massive artificial movement of soil on alleged Wetland 1:

11 Q. Right. So, the simple answer to my question
12 is, no, you did not go to any adjacent site--

13 A. (Dr. Perret) Yeah. Yeah.

14 Q. Let me finish. No, you did not go to any
15 adjacent site in order to find comparator profiles
16 that would corroborate your view that there was
17 artificial movement of soil of the scale that you
18 imply by discounting this volume of material, did you?

19 A. (Dr. Perret) We did not.

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516. Thus, this Tribunal cannot give weight to Green Roots' conclusions, which are based on faulty assumptions, and fail to properly apply the applicable methodology.

517. At bottom, what the Green Roots report really represents is the Respondent's latest attempt, in 2016, to undermine the contemporaneous soil reports of

⁴⁶⁸ English Transcript, 1983:7-18.

⁴⁶⁹ English Transcript, 1984:11-19.

INTA at Las Olas in 2011 and substitute, after the fact, a new report from a hired expert in 2017. As Dr Singh from Green Roots aptly explained in closing:

20 | system. We need the data. And Dr. Cubero in this
21 | case--and I'm going to really go back and tell him, if
22 | I'm allowed, that, "Man, now you have lots of new

1 | evidence that we are giving you. As a scientist--as a
2 | scientist, what's going to be your opinion?"

3 | Q. But the Respondent, despite the fact that it
4 | employs Dr. Cubero today, has failed to bring
5 | Dr. Cubero to this arbitration. Does that strike you
6 | as odd?

7 | A. (Dr. Singh) Again, that's not up to me what
8 | happened.

470

518. It is for these reasons that this wide-ranging inquiry into the 2016 site conditions is entirely inappropriate and irrelevant to the core issues in dispute.

3. Mr Erwin's conclusory finding of a forest is not supportable

519. Similarly, the findings of the Respondent's expert, Mr Erwin, on forestry issues are unsupported by evidence.

520. In order to make a finding of forest under Costa Rican law, certain mandatory criteria must be met. Forestry Law 7575⁴⁷¹ defines a forest ecosystem as:

diverse plants and animal, major and minor, that interact, are born, grow, reproduce and die, depend on each other throughout their life. After thousands of years, this composition [of species] has reached an equilibrium which, uninterrupted, will remain indefinitely and will sustain transformation very slowly.

Forest is defined as an "ecosystem native or auctoconous, intervened or not, regenerated by natural succession or other forestry techniques, that occupies an area of two or more hectares, characterized by the presence of mature

⁴⁷⁰ English Transcript, 1986:20-1987:8.

⁴⁷¹ See Exhibit C-170.

trees of different ages, species and of diverse sizes, with one or more canopy levels that cover more than seventy percent (70%) of the area and where there are more than sixty trees per hectare of fifteen or more centimeters of diameter at breast height (dbh)

521. In the circumstances, certain criteria must be met before a finding of forest can be made under Costa Rican law. As Mr Arce explained during his testimony at the Hearing, *“to say there’s a forest, we really need to conduct an exhaustive analysis of a number of characteristics. And we have doubt that this is a forest.”*⁴⁷² He later explained that:

3 However, the concept of "forest" is clearly
4 defined in the law. So, it is not a romantic concept.
5 It is a legal concept. It is not a technical concept.
6 It is a legal concept. Sometimes, we look at it a bit
7 differently.

8 I was born in a forest. I studied this
9 career, and I have practiced it for 32 years. I love
10 forests. But I have to abide by what is indicated in
11 the law; and sometimes, thinking about that--I have to
12 say, there is no forest here, because the law does not
13 allow me to say that there is a forest, although that
14 is what I would like to do.

18 Law tells me that in order for there to be a
19 forest, three basic conditions need to be met. There
20 has to be a type of vegetation. Three parameters need
21 to be considered:

22 1, that it be a native autochthonous

1 ecosystem with over 2 hectares of area; next, it must
2 have mature trees of different species, different
3 sizes, covering--one or two canopies covering over 70
4 percent of the surface; and 3, it must have more than
5 60 trees per hectare with a diameter greater than
6 15 centimeters at breast level, which we know as the
7 DBH.

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⁴⁷² English Transcript, 645:6-7.

⁴⁷³ English Transcript, 653:3-654:7.

522. Nonetheless, as Drs Calvo and Langstroth observed in their Expert Report, Mr Erwin's First Report contains "no specific reference to any methods to assess whether forests are present on site," devoting "only two paragraphs to the potential existence of forests on site. Paragraph 53 states that the 'majority of the site may be considered forested.' Paragraph 54 lists some plant species that occur on site. There is no discussion of how they reach the conclusion that the majority of the site may be considered forested."⁴⁷⁴
523. Mr Erwin was forced to concede in cross-examination by the Claimants' counsel that his forestry findings are unsubstantiated and lack any grounding in the Costa Rican definition of a forest:

⁴⁷⁴ See Environmental Resources Management (ERM) Expert Report, para. 59-60.

15 Q. And what we have to find is mature trees
16 covering more than 70 percent of the surface with more
17 than 60 trees per hectare of 15 or more centimeters in
18 diameter measured from the height of the--at the
19 height of an adult breast. I think Mr. Leathley
20 described this on Day 1 as--in American vernacular--"a
21 doozy."

22 So, if we look on in your report to Paragraphs
1 53 and 54. So Page 13.

2 A. Paragraphs 50?

3 Q. 53 and 54.

4 You make various observations, and you say
5 that the Las Olas site has "various percentages of
6 canopy closure."

7 A. Yes, sir.

8 Q. Did you make a measurement of more than
9 2 hectares for the purposes of your first report?

10 A. Using the aerial photography, yes, we did.
11 And we had also conducted a site visit to be able to
12 corroborate that.

13 Q. And did you measure at least 70 percent of
14 canopy cover?

15 A. Yes. And, as I explained, we were pretty
16 conservative with our application of that canopy
17 closure. But understand, that's not just the--what
18 you see at the top of the trees; that's also the
19 substratum as well.

20 Q. Right. Where will I find that in your report?

21 A. That's in the--that's in the definition of--

22 Q. No, not as a matter of definition. Where is

1 | your observation that there were at least
2 | 70 percent--there was at least 70 percent canopy
3 | cover?

4 | A. Well, that's what we applied. We wouldn't
5 | have called this forest unless it met that
6 | 70 percent--

7 | Q. Right.

8 | A. --canopy closure because there's--there are
9 | areas on the site, as we delimited, that don't have
10 | that degree of closure.

11 | Q. Right. So, the answer is it's not stated
12 | expressly; we're just meant to imply it, infer it into
13 | what you've expressed in your first report; is that
14 | right?

15 | A. Well, I think it's more than implied. I mean,
16 | we didn't use somebody else's definition when we said
17 | "here's what the canopy was" that we measured. We
18 | applied the definition that I have in the report here.

19 | Q. All right. And where will I find reference to
20 | you having measured more than 60 trees per hectare
21 | with 15 or more centimeters in diameter measured at
22 | the height of an adult's breast? Where is that?

1 | A. It's not because we did not measure trees.

2 | Q. It's not there. Thank you. Right. Thank you
3 | very much.

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524. The evidence on record shows that although, because of its tropical location, “*the site’s natural tendency is to revert to a forested area if left untouched*” (something the Claimants have been forced to do for almost 6 years because of the Respondent’s illegal suspension of all permits), “*currently the site is an early successional area with tree patches of different sizes and densities. The site’s trees are not connected to a larger system, are not thousands of years old (see definition of forest ecosystem [above]), and are dominated by rapid growing pioneer tree species.*” This finding is supported by the available aerial

⁴⁷⁵ English Transcript, 1911:15-1914:3.

photographs of the Las Olas site over time⁴⁷⁶ and the fact that Las Olas is surrounding on all sides by public roads and major residential and commercial developments.⁴⁷⁷

4. The Respondent's deliberate failure to acknowledge external factors contributing to the current status of the site

525. In reaching its backwards-looking, self-serving conclusions of protected forest and wetlands, the Respondent wilfully ignores an abundance of external factors which could have, and have had, an impact on the current status of the Las Olas site. Just as Mr Martínez wilfully ignored evidence of Municipality works to drain parts of the Las Olas site for the purposes of his biased criminal investigation in 2011, so now does the Respondent.
526. The Claimants have always argued that the build-up of stagnant water was likely caused by poor drainage conditions in some areas of the site – a phenomenon that Mr Mussio confirmed at the Hearing he was aware of in 2008 when working on the Las Olas Project.⁴⁷⁸ The issues caused by poor drainage in Esterillos Oeste in the immediate vicinity of the Las Olas site are well documented⁴⁷⁹ and the Claimants at one point assisted the Municipality in installing new drainage, in an effort to improve the situation.⁴⁸⁰
527. Nonetheless, the Respondent has shied away from that reality in these proceedings, preferring instead to point the finger at the Claimants whilst ignoring clear evidence of the Municipality's drainage works and the implication blocked culverts might have on the Las Olas site. The Claimants were forced to draw the Tribunal's attention, at the Hearing, to the fact that Municipality works to unblock a drainage culvert under the public road bordering the South-East section of the Las Olas site were taking place during

⁴⁷⁶ See Claimants' Opening Submission Presentation, slide 44 – animated slide illustrating the growth of vegetation at Las Olas.

⁴⁷⁷ See Exhibit C-269.

⁴⁷⁸ English Transcript, 597:5-14.

⁴⁷⁹ See Exhibit C-66, David Aven Witness Statement, para. 115; and Jovan Damjanac Witness Testimony, para.109.

⁴⁸⁰ See David Aven Witness Statement, para. 73, 114 and 115.

Mr Erwin's second site visit, something which he completely failed to mention in his Second Report:

7 Q. Do you remember during your second site visit
8 the Municipality was actually doing works in relation
9 to culverts on the eastern side of the site?

10 A. They were cleaning out the culvert in Wetland
11 Number 8.

12 Q. And you remember there being a bulldozer and a
13 number of workers from the Municipality doing that
14 work?

15 A. Yes, sir.

16 Q. And those municipal workers were moving earth;
17 they were installing a culvert; they were creating a
18 cement wall for the culvert? You remember all of
19 that?

20 A. Yes.

21 Q. And you appreciated and you appreciate now
22 that the Claimants weren't doing any of that work?

1 A. No. I believe the Municipality was doing it
2 because the water that was flowing through Wetland
3 Number 8, the stream was actually causing some erosion
4 of the--of the near banks of the road. So, they were
5 doing that to actually protect the highway, I believe.

6 Q. Why didn't you include anything in your report
7 on this, any photographs or any reference to the fact
8 that you were observing works in culverts done by the
9 Municipality?

10 A. Well, I could have. But, frankly, it would
11 not--it didn't have any bearing on whether there
12 was--whether Wetland Number 8 was a wetland or not.
13 This kind of maintenance happens all the time in
14 municipalities.

15 Q. Right. It does.

16 Now, at Paragraph 69 on Page 25 of your first
17 report, you say, "The construction of the roads,
18 excavation of ditches, placement of culverts, and the
19 removal of vegetative strata of the forest have
20 dramatically decreased the capacity of the forest to
21 properly store and naturally convey water."

22 Do you see that?

1 A. Yes.

2 Q. Do you know who created these culverts?

3 A. The landowner did.

4 Q. What's your evidence for that?

5 A. Well, the culverts that I was looking at were
6 under the roads that were developed in the Las Olas
7 System. So, I guess somebody else could have put them
8 there.

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528. The Respondent's works to the drainage system around the perimeter of the Las Olas site are continuing. Only this week, the Claimants have become aware of Municipality works to unblock yet more culverts allowing water to flow under the road at the Northern perimeter of the Las Olas site. When

⁴⁸¹ English Transcript, 1905:7- 1907:8.

asked about these works in correspondence, the Respondent admitted that they were underway.⁴⁸²

529. When the Claimants' counsel visited the Las Olas site in the summer and autumn of 2016, far from a pristine "*ecosystem*," they observed culverts passing under the main highway blocked with domestic refuse, including old clothing and shoes. This is unsurprising, given the site's proximity to the main road between San José and Jaco, and the effect the very recent presence of squatters on the site will have had.
530. The Respondent's wilful blindness to these factors, as well as its refusal to engage with the clear definitions of forest and wetland under Costa Rican law mean that its (in any event, irrelevant) self-serving, *post-hoc* findings as regards the Las Olas site in 2016 must be rejected.

X. OWNERSHIP

531. The Tribunal's Closing Questions included a number of questions regarding the ownership of the various plots of land making up the Las Olas Project Site, which the Claimants will address here.
532. First, the Tribunal asked whether the Claimants agreed with the description of the structure of the Claimants' ownership interests contained in slide 19 of the Respondent's Opening Statement at the hearing on December 5, 2016, and invited the Claimants to provide a detailed explanation of the ownership structure at the date of the Notice of Arbitration, in the form of a table.
533. A detailed table explaining the ownership structure of the Properties at the time of submission of the Notice of Arbitration can be found at Annex B to this Post-Hearing Brief. This table and the slides presented by Dr Abdala in his direct testimony (slides 6, 7, 27, 28 and 29) should be used by the Tribunal as the correct record of which properties were sold and when. For the Tribunal's

⁴⁸² V&E e-mail to HSF March 6, 2017.

ease of reference, in Annex D to this Post-Hearing Brief the Claimants have provided colour-coded versions of the Master Site Plan showing the ownership status of the component parts of the Las Olas Project as at two dates: (i) May 2011 (i.e. the date of valuation); and (ii) the Notice of Arbitration (as per the Tribunal's Closing Questions).

534. As regards the slides presented by the Respondent, the Claimants would note the following points. For these purposes, the Claimants refer to the slide numbers of the electronic version of the opening statement circulated by the Respondent.
535. In relation to slide 25, the Claimants refer to Section VIII, B of this Post-Hearing Brief and note that Section 80 of the ZMT Regulations, Article 198 of the LGAP, Articles 655 of the Costa Rican Civil Code are relevant in addition to the points on the Respondent's slide.
536. Slide 26 states that the Sale Agreement for the purchase of shares was entered into on 1 April 2002. In fact, it was entered into on 30 April 2002⁴⁸³. Moreover, the description of the Sale Agreement is misleading. By the Sale Agreement, Mr Aven purchased both (i) the shares in La Canícula; and (ii) 100% of the shares in Inversiones Cotsco (16% of which were held by Pacific Condo Park and 84% of which were held by La Canícula).⁴⁸⁴ Therefore, after the completion of the Sale Agreement, Mr Aven owned 100% of the shares in Inversiones Cotsco directly, not through La Canícula, which ceased to be Inversiones Cotsco's parent company.
537. In respect of slide 28, the Sale Agreement (C-8) and the Trust Agreement (C-237) were both entered into on April 30, 2002.⁴⁸⁵ As a matter of Costa Rican law, when the initial term of this Trust Agreement came to an end the shares did not automatically revert back to the trustor, rather Banco Cuscatlan de

⁴⁸³ English Transcript, 801:16 – 803:16.

⁴⁸⁴ See Exhibit C8, clauses 2 and 3.

⁴⁸⁵ English Transcript, 801:16 – 803:16.

Costa Rica as trustee continued to hold the shares in La Canícula until they were transferred to Mr Aven's long-term personal assistant, Paula Murillo, on March 8, 2005 (C-242). For further details see Section X of this Post-Hearing Brief.

538. Slide 29 sets out the share percentages for the Claimants, two of which are incorrectly listed: the correct share percentages for Jeffrey Shioleno and Roger Raguso are 2% and 5% respectively. As noted above, it is also incorrect for the slide to state that La Canícula retained an 84% ownership interest in Inversiones Cotsco. Under the Sale Agreement, Inversiones Cotsco was owned 100% by Mr Aven after the completion of the Sale Agreement, and hence he was able to allocate the entirety of the shares amongst the investors in the proportions noted in his letter.
539. Again, slides 31 to 33 incorrectly state that La Canícula owned 84% of the shares in Inversiones Cotsco.
540. Slide 34 incorrectly states that the Claimants segregated Property No. P-142646 (the condominium section of the Las Olas property). In fact, Property No. 142646 was converted into a Condominio Horizontal, registered under the Property No. 2881-M-000 and, upon that conversion, Property No. 142646 was closed. Property No. 2881-M-000 was then subdivided into 288 lots, numbers 79209-F to 79496-F.
541. On slide 37, again La Canícula is incorrectly stated to own 84% of Inversiones Cotsco. In fact, Inversiones Cotsco was 100% owned directly by the Claimants (see Exhibit C5), who also, collectively, had a separate 49% shareholding in La Canciula. In addition, Property No. 156491 should be listed under the Enterprise Bosques Lindos De Esterillos Oeste S.A. The diagram is also incorrect as it relates to La Canícula S.A., the La Canícula Concession is owned directly by La Canícula S.A not through Inversiones Cotsco C&T, S.A. In addition, Lot No 2881-M-000 is held by Trio International as trustee for Inversiones Cotsco C&T, S.A.; this is not reflected in the Respondent's

slide. The slide is also missing the numerous easement lots owned by Mis Mejores and Cerros de Esterillos, which were created by the subdivision of the Property Numbers listed under those two Enterprises. Insofar as it is dated as at the submission of the Claimants' Notice of Intent to submit a claim, the chart is correct not to include Property No. 156490 (the site for the hotel, listed on the Master Site Plan as "*Commercial/Tourist 14,313.18*") since this was sold by the Claimants earlier in 2013. However, for the purposes of the arbitration this lot is relevant, since the 2013 sale was a distressed sale made at a much reduced price because of the measures taken by the Costa Rican authorities.

542. In relation to the properties that were sold each year as set out on slide 38, the Claimants refer to slides 27 to 29 of Dr Abdala's presentation at the February Hearing.
543. For completeness, the Claimants reject slide 39 in its entirety: as already noted, the Claimants' investment still includes all lots sold by the Project.
544. The Tribunal also asked the Claimants to confirm which lots within the Project have been sold, before and after the Notice of Arbitration. This information can be found in slides 27 to 29 of Dr Abdala's presentation at the February Hearing.
545. There is a further item to note in relation to ownership. On March 3, 2017, the Claimants concluded an agreement to sell to Mr Alberto Beto Mora, a local of Esterillos, the majority of the areas of Las Olas Project Site which they still owned, specifically the commercial sites at the northern boundary of the Las Olas project, the remaining lots in the condominium section, and the concession land. The total sale price is US\$650,000, which is payable in instalments. The first instalment was paid on March 3, 2017, and the final payment will be due around six and a half months after that date.
546. The sale price, and the agreement, reflects the fact that the land is still the subject of: (i) injunctions preventing construction work; (ii) allegations of

wetlands from the Costa Rican authorities; and (iii) the Claimants' inability to develop the property, due to the actions of the Costa Rican authorities. In particular, the Sellers under the agreement make no representations as to the injunctions still in place on the property and the permits which remain unusable.

547. The Claimants have been attempting to sell the remainder of the Las Olas property for a number of years, in mitigation of the losses that they have suffered due to Costa Rica's shutdown of the project. These efforts have always failed, however, because of the status of the project and the land following Costa Rica's actions. The Claimants have therefore decided to accept this very low offer for the property.
548. In light of the Claimants' recent sale of the remaining area of the property the Claimants have asked Dr Abdala to adjust his valuation to reflect this new information. Dr Abdala acknowledges that this new information will have an effect on the actual valuation. As with all transactions post-May 2011, it will have no effect on the but-for expected value of the Project. Dr Abdala has therefore recalculated the value of the actual scenario by including this recent sale by the Claimants to calculate the proceeds of the sales of land that took place after May 2011 rather than by using an estimated residual price of the unsold land as he had been doing so far.⁴⁸⁶
549. To do so, Dr Abdala used the transactions he identified as "*Post May 2011 Lot Sales*"⁴⁸⁷ in his direct presentation and has added the current transaction for the remaining land. Based on the information he received, Dr Abdala estimates that this last transaction involved the sale of the remaining 332,233 m² of the Project Site at a price of US\$650,000, resulting in a price per m² of US\$1.96.
550. To estimate the value generated for the Claimants by the sales of land, Dr Abdala must account for the timing of those sales. He therefore re-expresses

⁴⁸⁶ See Abdala 1st Report, Section IV.4.3.

⁴⁸⁷ See Abdala Direct Presentation, Slides 28 and 29.

the value for each post-May 2011 transaction⁴⁸⁸ from US\$ as of the date of inscription of the relevant sale to US\$ as of February 7, 2017 (which matches the date of his assessment of damages presented in the February Hearing). He does this using the three alternative pre-judgment interest rates he put forward in his reports (the combined land and WACC rate, the WACC rate and the average lending rate).⁴⁸⁹ The results of these calculations are shown in the table below. As a result the Claimants' losses are reduced slightly with respect to those calculated in Dr Abdala's Direct Presentation, and now amount to US\$95,400,000 as at February 7, 2017 using Dr Abdala's preferred combined land and WACC interest rate.⁴⁹⁰

US\$ Million			
PJI Rate	Combined Land and WACC	WACC	Average Lending Rate
(+) But-For Expected Value as of Feb 7, 2017	96.2	101.3	115.7
But-For Expected Value as of May 12, 2011	66.5	66.5	66.5
Average Pre-Judgement Rate	6.6%	7.6%	10.1%
Pre-Judgement Interest	29.7	34.9	49.2
(-) Actual Value as of Feb 7, 2017	0.77	0.81	0.82
Damages to Claimants as of Feb 7, 2017	95.4	100.5	114.9
<i>% Change with respect to Abdala's Direct Presentation</i>	<i>-0.14%</i>	<i>-0.14%</i>	<i>-0.05%</i>

XI. THE RESPONDENT'S LIABILITY IN DAMAGES

551. The Claimants repeat and rely upon the argumentation located at paragraphs III, C to III, D of the Memorial and IV, B, 1 to IV, B, 4 of the Reply Memorial. Below, we shall only briefly summarize key issues which arose during the oral hearing or identified by the Tribunal in its Closing Questions.

⁴⁸⁸ Dr Abdala assumed that transactions for which prices were not available were carried out at the price of the most recent transaction.

⁴⁸⁹ See Abdala Second Report, Section III.4.1.

⁴⁹⁰ See Abdala Direct Presentation, Slide 25. For the most recent transaction Dr Abdala assumed it took place on the Feb 7, 2017.

552. As outlined in the Claimants’ oral arguments, their Article 10.5 claims can be categorized into four categories: frustration of legitimate expectations, violations of the prohibition against arbitrariness, abuses of delegated public authority, and failures to observe due process.⁴⁹¹

A. Legitimate Expectations

553. The Claimants relied, to their detriment, on the express rights and entitlements conveyed to them in EVs and construction permits, which had been issued by duly authorised State officials. It was reasonable for the Claimants and their investment Enterprises to have relied on the representations embodied in these documents, and the Respondent must be held responsible for frustrating them.

554. The Claimants’ expectations for their investment – the Las Olas Project – were frustrated when officials other than those primarily responsible for regulating commercial real estate developments such as Las Olas intervened and interfered with the operation of the Claimants’ investment. By far the most significant aspect of the oral hearing, in this respect, was *what the Tribunal did not see or hear*: *i.e.*, witness evidence from the people at SETENA who issued the EVs for the Project, from the people at the Municipality who issued all of the construction permits, and from the people at SETENA who – after carefully considering the torrent of scurrilous allegations lodged by a jealous neighbor – re-confirmed the validity of the EV for the Condominium Section in November 2011.

555. Had the regulatory process worked the way it was likely intended by Costa Rica, or at least in a fashion that any diligent foreign investor would have reasonably expected, Las Olas would have been developed in a timely manner and would no doubt be a thriving community today. It is only ‘thanks’ to the likes of Ms Vargas, Ms Diaz, Mr Bogantes, and Mr Martínez, that the land sits empty instead.

⁴⁹¹ See English Transcript, 1997:15-2002:10 (outlining four categories of Article 10.5 claims).

556. As demonstrated in both *Arif v. Moldova* and *MTD v. Chile*, the fair and equitable treatment standard is breached when a “*direct inconsistency [exists] between the attitudes of different organs of the State to the investment.*”⁴⁹² It is simply not enough for the Respondent to proffer a witness, such as Judge Chinchilla, to explain that such contradictions are to be expected, or that in Costa Rica a prosecutor is entitled to completely ignore a final determination such as the one made by SETENA, even though it took the legs completely out from under his case against Mr Aven. Again, as the tribunal in *Arif v. Moldova* explained:

*[A]t the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act.*⁴⁹³

B. Arbitrariness

557. As explained in the Claimants’ Memorial and Reply Memorial, evidence of manifest arbitrariness is inconsistent with host State compliance under the fair and equitable treatment obligation. Rooted in the general international law principle of good faith, the doctrine of *abus de droit* encompasses every use of delegated governmental authority short of bad faith, including discretion exercised with wilful neglect or indifference. It is immaterial whether the exercise of such discretion is reviewable as a matter of municipal law, because it is open to scrutiny under international law.

558. Mr Martínez arbitrarily exercised his discretion, as a prosecutor, in relation to Mr Aven, and therefore also the investment Enterprises that Mr Aven operated and oversaw. Mr Martínez pursued a wholly unnecessary and unjustifiable prosecution of Mr Aven in October, 2011, notwithstanding the fact that EVs issued and subsequently re-confirmed by SETENA absolutely contradicted the

⁴⁹² *Arif v. Moldova*, Award, ICSID Case No. ARB/11/23, IIC 585 (2013), April 8, 2013, at ¶547.

⁴⁹³ *Ibid.*

evidentiary record required for a successful prosecution. Even if SETENA officials had been wrong about the alleged presence of wetlands (and there is no evidence before the Tribunal that they were wrong), it would have still been impossible to convict Mr Aven because he could not possibly have possessed the requisite intent – as he would have been operating under the presumed authority of SETENA EV certifications and Municipal construction permits.

559. Not only was Mr Martínez’s decision to prosecute arbitrary, so was the manner in which he proceeded. For example, in cross-examination it was revealed that he charged Mr Aven and Mr Damjanac under a law that was not even in force when the alleged offenses occurred, because it offered more onerous penalties.⁴⁹⁴ He also chose to ignore the INTA report, which he had requested, because it would not help him place Mr Aven in legal jeopardy.⁴⁹⁵ Contrary to proper investigative procedure, not to mention common sense, Mr Martínez did not subject the Allegedly Forged Document for forensic analysis.⁴⁹⁶ He also ignored clear evidence of works being undertaken by the Municipality.⁴⁹⁷
560. Mr Martínez refused to entertain a manifestly reasonable request from lawyers for Mr Aven and Mr Damjanac to extend the first criminal trial.⁴⁹⁸ And, much earlier in the process, while he knew competent agencies had completed differing and contradictory reports regarding the existence of wetlands, he brought charges nonetheless.⁴⁹⁹ He was apparently indifferent to whether his conduct was consistent with applicable prosecutorial guidelines,⁵⁰⁰ and unconcerned about the potential consequences of unreasonably pursuing Mr Aven’s extradition.
561. Mr Martínez’s conduct was so manifestly arbitrary that it would contravene even the most severe characterisation of the fair and equitable standard,

⁴⁹⁴ Transcript Day 4, p. 1072-73.

⁴⁹⁵ Transcript Day 4, p. 1115-1116.

⁴⁹⁶ Transcript Day 4, p. 1103-04.

⁴⁹⁷ Transcript Day 4, p. 1110.

⁴⁹⁸ Transcript Day 4, p. 1117.

⁴⁹⁹ Transcript Day 4, p. 1086.

⁵⁰⁰ Transcript Day 4, p. 1034.

proffered in this arbitration by the United States: the so-called “*Neer*” test. To be sure, the Claimants are by no means arguing that a 90-year old, 2-1 decision of a mixed claims tribunal, deciding a protection and security case, ought to be the standard applied in 2017 under Article 10.5 of the DR-CAFTA. The point is that the Respondent’s conduct has fallen so far short that even the following restrictive test championed by the United States, and belatedly taken up by the Respondent in its closing arguments at the Hearing, would suffice to establish State responsibility:

*Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the **treatment** of an alien, in order to constitute an international delinquency, **should amount**[: 1] **to an outrage**, [2] to bad faith, [3] **to wilful neglect of duty**, or [4] **to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency**. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial. (Emphasis added)*

562. The majority of umpires in the *Neer* case articulated four different thresholds for conduct to fall short of international standards almost a century ago. Mr Martínez’s conduct towards Mr Aven and Mr Damjanac was so bad that it reached no fewer than three of the four thresholds, much less to charge both men under the correct law.
563. It was nothing short of outrageous for Mr Martínez to have taken advantage of a constitutional due process safeguard meant for the benefit of defendants to obtain a second shot at convicting the two men, arbitrarily refusing to work with their lawyers to reschedule. It was wilful neglect of duty to not bother having the centrepiece of his potential forgery case against Mr Aven forensically tested, and to ignore applicable prosecutorial guidelines.

564. And surely any reasonable and impartial person would concur that prosecuting someone for environmental “*crimes*” that the documentary evidence shows – beyond all doubt – he simply could not have committed constitutes insufficiency in government action, obviously due to Mr Martínez’s deficient execution. Alternatively, if Judge Chinchilla’s testimony applies, to the effect that it was at least plausible for Mr Martínez to proceed as he did under Costa Rican law, then it is obvious that such law did not empower him to measure up to international standards in this case.

C. Abuse of Authority

565. As for the “*bad faith*” component of the *Neer* test, sadly we have Mr Bogantes. The Respondent does not dispute the fact that it can be held responsible under international law for the crimes Mr Bogantes committed: soliciting bribes and taking retributory action against U.S. investors who would not submit to his will.

566. The Respondent is in no position to complain about the evidence. Despite ample opportunity, and despite still employing Mr Bogantes, it never had Mr Bogantes provide a witness statement, and it has not provided any explanation, still less an adequate explanation as to Mr Bogantes’s absence from these proceedings. Furthermore, the Respondent bizarrely neglected to cross-examine Mr Aven or Mr Damjanac on their evidence regarding the bribe-solicitation issues. Thus, the uncontested evidence on the record is that Mr Bogantes shamefully took advantage of the system’s flaws in a vain attempt to line his own pockets. It appears that he entertained no compunction whatsoever about reversing his official findings, or lying under oath to a judge, if that was what was necessary either to obtain payment or to punish a foreigner for refusing to pay when solicited.

567. No doubt Mr Bogantes benefited immensely from the Respondent’s seeming crazy-quilt system of environmental challenges. Opportunistic officials without scruples only needed to wait for a conflict between a new foreign investor and

an entrenched neighbor to arise, trusting that the system could be manipulated to the point of dysfunction by an interloper such as Mr Bucelato. Once such a dispute materialised, Mr Bogantes could appear on the investor's door step and sell him the regulatory equivalent of protection. Pay up and Mr Bucelato's many complaints could be sidelined. Fail to pay and they could become fatal.

D. Due Process

568. At the Hearing, the Respondent argued that the term “*due process*,” as it appears in Article 10.5(2), is restricted to the doctrine of denial of justice. Thus, either the Claimants’ due process complaints, which have largely been trained on the conduct of Ms Vargas and Ms Diaz, should be disregarded, or the Claimants should admit that they were really denial of justice claims all along, and should therefore be dismissed because theoretically available judicial relief was not pursued.
569. The Respondent’s proposition is inconsistent with the applicable rules of interpretation, as *per* DR-CAFTA Articles 1.2(2) and 10.22(1), because it ignores context in ascertaining textual meaning, and the restrictive construction of Article 10.5 that results is not consonant with the object and purpose of the Agreement.
570. The Article 10.5(2)(a) reference to “*due process*” evidently provides the basis for a particular conception of denial of justice: *viz.* “*the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings.*” The *Corona Materials* tribunal found (albeit only in *dicta* because it found that it lacked jurisdiction *ratione temporis*), that the Parties added the adjective, “*adjudicatory*” to limit the application of the denial of justice doctrine under the provision to bodies exercising adjudicatory authority (whether criminal, civil, or administrative).⁵⁰¹ What does not follow from the language of this provision is that the “*fair and equitable treatment*” standard currently only

⁵⁰¹ *Corona Materials LLC v. Dominican Republic*, Final Award, ICSID Case No. ARB(AF)/14/3, May 31, 2016, at ¶ 251.

includes a single obligation: denial of justice. The subparagraph provides: “*‘fair and equitable treatment’ includes...*” (emphasis added); it does not provide that the standard is limited to denial of justice.

571. Similarly, just because the Parties used the term “*due process*” to explain how denial of justice doctrine should be applied to the adjudicatory decisions of certain types of municipal bodies does not mean that the general international law principle of due process is no longer relevant to the construction of the fair and equitable treatment standard in a context other than denial of justice. As codified in VCLT Article 31(3)(c), and provided in DR-CAFTA Articles 1.2(2) and 10.22(1), the treaty interpreter must take into account applicable principles of international law in construing the meaning of treaty text. Thus, the general international law principle of due process should be recalled when construing the meaning of “*fair and equitable treatment*” in context, whether in relation to denials of justice or in application to any other type of measure.
572. It is apparent that the Parties inserted the term “*due process*” in Article 10.5(2)(a) to identify a particular approach to elaborate what it means in practice: the comparative approach. This is not only way to elaborate the meaning of due process. The other traditional approach is inductive, by which one examines the practices of the objects of international law, instead of comparing practices within countries.⁵⁰² That “*due process*” constitutes a general principle of international law cannot seriously be doubted. And that due process might inform other obligations found under the “*umbrella*” of a “*fair and equitable treatment*” standard is only logical.
573. This is also undoubtedly why references to due process can be found in a wide array of awards in which the fair and equitable treatment standard was construed and applied without any reference to denial of justice. Such examples include *Gold Reserve v. Venezuela*, in which a serious lack of transparency was considered inconsistent with due process required under the

⁵⁰² See, e.g., Memorial, para. 355.; see generally CLA-18, Georg Schwarzenberger, *The Inductive Approach to International Law* (Oceana Pubs: New York, 1965) at 87-91.

fair and equitable treatment standard,⁵⁰³ and *TECO v. Guatemala*, in which a failure to accord due process within the context of a tariff review procedure was also found to violate the DR-CAFTA fair and equitable treatment standard, Article 10.5.⁵⁰⁴ Similarly, in *Quiborax v. Bolivia*, the tribunal found that the host State revoked the concessions in a manner that failed to comply “with minimum standards of due process, whether under international law or Bolivian law,” citing a description of due process articulated by the tribunal in *ADC v. Hungary* as “demanding ‘an actual and substantive legal procedure’ for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.”⁵⁰⁵ The ADC tribunal elaborated on the concept of due process, in that case related to expropriation, as follows:

*Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.*⁵⁰⁶

574. Much like the instant matter, the *Quiborax* Award demonstrated how the executive branch of a host State can engage international liability by failing to provide notice and/or a right to be heard in relation to a regulatory or administrative decision that seriously impacts a foreign investment. The same

⁵⁰³ *Gold Reserve Incorporated v Venezuela*, Award, ICSID Case No. ARB(AF)/09/1, IIC 660 (2014), September 22, 2014 at ¶¶ 609-610.

⁵⁰⁴ *TECO Guatemala Holdings Limited Liability Company v Guatemala*, Award, ICSID Case No. ARB/10/17, IIC 623 (2013), December 19, 2013, at ¶¶ 664 & 711.

⁵⁰⁵ *Quiborax SA and Non Metallic Minerals SA v Bolivia*, Award, ICSID Case No. ARB/06/2, IIC 739 (2015), September 16, 2015, at ¶¶ 221-227, also citing: *Ioannis Kardassopoulos v. Georgia*, Award, ICSID Case No. ARB/05/18, March 3, 2010, at ¶¶ 395, 396, 404; and *AJG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Kazakhstan*, Award, ICSID Case No. ARB/01/6, October 7, 2003, at ¶ 10.5.1.

⁵⁰⁶ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, Award, ICSID Case No. ARB/03/16, October 2, 2006, at ¶ 435.

could be said of the reasons for decision in awards such as *Siag and Vecchi v. Egypt* and *Middle East Cement v. Egypt*.⁵⁰⁷

575. Further, “*due process*” also appears in the DR-CAFTA text at Article 10.7(1)(d), juxtaposed with Article 10.5, indicating that the Parties must have accepted the proposition “*due process*” means more than denial of justice by an adjudicatory body. The concept can obviously be applied to the exercise of executive and/or administrative authority, quite apart from adjudication or denial of justice doctrine.
576. What all of the cases mentioned in this section have in common is that all involved violations of the fair and equitable treatment standard premised on administrative and/or regulatory failure to accord due process. None of them involved claims based upon denial of justice doctrine, and the group includes both so-called “*customary*” and “*autonomous*” flavors of the standard.⁵⁰⁸
577. Like all of these other cases – and unlike in the *Corona Materials* case – the Claimants ***have not pursued a denial of justice claim***, the additional ramifications of which are addressed further below. As this growing group of cases demonstrate, due process is an appropriate rubric by which to measure host State compliance with a fair and equitable treatment standard, in respect of non-adjudicatory exercises of discretion. The same standard applies regardless of whether the municipal framework articulated minimum standards of due process that were ignored by officials whose decisions impacted a foreign investment, or if the framework itself was deficient, in that it permitted decisions to be made without ensuring due process to the foreign investment.

⁵⁰⁷ *Siag and Vecchi v Egypt*, Award, ICSID Case No. ARB/05/15, IIC 374 (2009), May 11, 2009, at ¶ 442; and *Middle East Cement Shipping and Handling Company SA v Egypt*, Award, ICSID Case No. ARB/99/6, (2003) 18 ICSID Rev-FILJ 602, (2005) 7 ICSID Rep 173, IIC 169 (2002), April 12, 2002, at ¶ 147.

⁵⁰⁸ See, also: *Khan Resources et al v Mongolia and MonAtom LLC (Mongolia)*, Award, PCA Case No. 2011-09, IIC 719 (2015), 2 March 2015, at ¶¶ 350-365; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB/06/4, at ¶¶ 219-223; and *Clayton et al v Canada*, Award on Jurisdiction and Liability, PCA Case No. 2009-04, IIC 688 (2015), 17 March 2015, at ¶¶ 589-596.

578. Moreover, the Claimants also recall how “*due process*” additionally appears in the DR-CAFTA text at Article 17.3(1)(a). The provision expressly applies to “*procedural matters*” in environmental regulation, such as the those performed poorly in this case by Mr Picado, Ms Diaz, and Ms Vargas, as well as those undertaken properly by SETENA officials: i.e.: “*judicial, quasi-judicial, or administrative proceedings... available to sanction or remedy violations of [a Party’s] environmental laws.*”
579. Paragraph 3 of the same provision requires, in particular, that “*Each Party ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to proceedings referred to in paragraph 1.*” In addition, the relevant sub-paragraphs of paragraph 1 stipulate:

(a) *Such proceedings **shall be fair, equitable, and transparent and, to this end, shall comply with due process of law** and be open to the public, except where the administration of justice otherwise requires.*

(b) *The parties to such proceedings **shall be entitled to support or defend their respective positions, including by presenting information or evidence.***

...

(emphasis added)

580. As explained elsewhere in this Post-Hearing Brief, and in the Claimants’ memorials,⁵⁰⁹ the Tribunal does not possess the jurisdiction necessary to hold Costa Rica liable for breach of Article 17.3. Nevertheless, the content of this provision is directly relevant to the Tribunal’s consideration of the Respondent’s liability for non-compliance with Article 10.5. First, it informs the Claimants’ reasonable and legitimate expectations concerning the treatment to which they were entitled from officials such as Mr Picado, Ms Diaz, and Ms Vargas. Second, it provides an indication of the kind of conduct the Parties

⁵⁰⁹ See e.g., Claimants’ Memorial para. 256 and Claimants’ Reply Memorial, para. 71.

believed appropriate in the circumstances (*i.e.*, for administrative/regulatory matters related to the environment). In particular, Article 17.3 demonstrates the Parties' shared understanding that respecting due process in the environmental context means that "*persons with a legally recognized interest under [Costa Rican] law ... have appropriate access to proceedings*" and that investors/investment ought to "*be entitled to support or defend their respective positions, including by presenting information or evidence.*"

581. Indeed, further explanation of the manner in which the DR-CAFTA Parties obviously expected their officials to conduct themselves in a non-adjudicative process can be found in Article 18.4:

With a view to administering in a consistent, impartial, and reasonable manner all measures of general application affecting matters covered by this Agreement, each Party shall ensure that in its administrative proceedings applying measures referred to in Article 18.2 to particular persons, goods, or services of another Party in specific cases that:

*(a) **wherever possible, persons of another Party that are directly affected by a proceeding are provided reasonable notice**, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;*

*(b) **such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action**, when time, the nature of the proceeding, and the public interest permit; and*

(c) its procedures are in accordance with domestic law.

(emphasis added)

582. Both the above-cited provisions and arbitral practice demonstrate the importance of proper notice and the right to be heard as fundamental elements of due process. In this case, various enforcement actions were undertaken in response to the spiteful and manifestly false allegations of a single, disgruntled

neighbor, Mr Bucelato.⁵¹⁰ In none of these cases were the Claimants provided with notice or an opportunity to be heard. The Respondent's only answer to these specific charges is that that the officials in question were not required by Costa Rican law to provide the Claimants with any notice, much less an opportunity to comment, on their respective activities, notwithstanding the manifestly deleterious impact they could, and did, have on the Las Olas Project.

583. Surely the Respondent knows that it cannot answer an international claim – *e.g.*, that fair and equitable treatment was not provided owing to a manifest failure to accord due process – by citing compliance with municipal rules (or a lack thereof). It is no less a breach of the fair and equitable standard if a host State official was permitted by municipal rules to conduct herself in such a manner or if her conduct flouted municipal norms too.

E. Relevance of the Respondent's Failure to Adhere to Municipal Procedural Standards

584. The Tribunal's Closing Questions contains two references to the municipal laws of Costa Rica, nos. 2 and 5. The first asks whether the Respondent has breached the laws of Costa Rica. The second asks whether the laws of Costa Rica should be applied in any way to decide the case. As noted further above, the second question is primarily addressed by reference to DR-CAFTA Article 10.22(1), which necessarily excludes the proposition that the laws of Costa Rica could be applied – whether as applicable governing law or otherwise– to decide the case. Moreover, under customary international law, which is applicable under Article 10.22(1), it is axiomatic that the host State may not rely on purported compliance with municipal norms as a justification or excuse for breach international norms, obviously including Articles 10.5 and 10.7 of the Agreement.

⁵¹⁰ See Annex A.

585. In its Rejoinder Memorial, the Respondent sought to recast the Claimants' case, by suggesting that it was based on allegations of breaches of Costa Rican law, rather than international law. The Respondent based this attempted misdirection on certain observations made by the Claimants' expert on Costa Rican law, Mr Ortiz. Mr Ortiz enumerated the variety of ways in which the conduct of Costa Rican officials, *vis-à-vis* the Claimants and their investment, fell below municipal standards of procedural fairness. That Mr Ortiz even provided evidence in this arbitration was a function of the need to correct the many erroneous allegations rendered by the Respondent, as part of its unorthodox "*non-compliance with municipal law*" jurisdictional/admissibility objection *cum* defense. Had the Respondent not constructed such a side-show, to detract from scrutiny of its own conduct, as appropriate for a treaty arbitration, the Claimants would not have been forced to hire independent experts on Costa Rican law to respond to it.
586. In any event, the fact that the Respondent's officials specifically breached procedural norms contained within the municipal legal order could be relevant in establishing its responsibility under international law – but not because the breach of a municipal norm, in and of itself, constitutes the breach of an international norm. It is rather that the same conduct, which leads to a finding of non-compliance with a municipal rule of procedural fairness, may also be indicative of non-compliance with an analogous international rule.
587. Consider, for example, the late-found evidence of Mr Briceño, the Municipal Auditor who took Ms Vargas to task for engaging the Municipality in her campaign against the Claimants, by filing a complaint with the TAA, and who was equally alarmed at how the Municipality had both adopted and maintained suspensions of construction permits without valid reasons under Costa Rican law.⁵¹¹

⁵¹¹ See Jorge Briceño Witness Statement para. 32(a).

588. The cumulative impact of these and other procedural irregularities sounded the death knell for operations at Las Olas. Each failing contributed to a deficiency in according due process to a foreign investor/investment, which contributed to the fair and equitable treatment breach. Similarly, each failing also represented one further frustration of the Claimants' legitimate expectations, in respect of the manner in which their investment, the Las Olas Project, would be treated (*i.e.*, that the officials with whom they came into contact would all understand their conduct as being constrained by Costa Rican administrative, procedural, and constitutional law).

F. Relevance of the Respondent's Failure to Adhere to other International Procedural Standards

589. Similarly, because the Tribunal's jurisdiction is limited to findings of non-compliance with the substantive provisions found in Section A of DR-CAFTA Chapter 10, it cannot render a legal finding of State responsibility, on the basis of a Party's non-compliance with any other international rules (such as those located elsewhere in the Agreement, or obligations contained within other trade or environmental treaties). That such rules exist, and are observed, out of a sense of legal obligation, by all of the DR-CAFTA Parties, may be indicative of the contemporary content of the fair and equitable treatment standard. As the United States has acknowledged, the standard is not static. Indeed, it is effectively in a state of perpetual, forward motion. It may thus be relevant that obligations, which are indicative of the current content of the fair and equitable treatment standard, appear to have been breached by the conduct of a Party, but it nevertheless lies for the Tribunal to undertake the necessary steps to conclude: (i) what the current content of the Article 10.5 standard is (whether or not with reference to analogous international or municipal standards and/or practices); and (ii) whether the respondent Party's conduct in this case was inconsistent with the standard, whatever its content may be.

G. The Claimants Have Never Pursued a Denial of Justice Claim

590. The Respondent insists that the Claimants have made a denial of justice claim, and so it must be treated as such by the Tribunal, but it offers no authority for the proposition that it ought to be entitled to recast claims submitted under Article 10.16 by fiat. The DR-CAFTA provides no mechanism for revision of claims by a responding Party. It only provides the Article 10.16 mechanism for other Parties' investors to articulate claims arising out of conduct that breaches an obligation found in Section A of Chapter 10. While trite, it appears nonetheless necessary to reiterate to the Respondent that it is for the Claimants, alone, to enunciate their claims and provide sufficient evidence and argument to support them. Claims can only succeed or fail on this basis, not by being 'revealed' by a respondent as having been a different kind of claim after all.
591. The Respondent states that the Claimants' claims arising from the conduct of Mr Martínez must be considered denial of justice claims because the ultimate forum for a prosecution would be a court. The same arguments were made – unsuccessfully – by the respondent in *Rompetrol v. Romania*, which also involved allegations that the conduct of a prosecutor constituted a breach of the fair and equitable treatment standard contained in a bilateral investment treaty. It was on the following basis that the *Rompetrol* tribunal concisely despatched Romania's admissibility objection:

The Tribunal is not persuaded by the Respondent's assertion that, once the Claimant's claims are subjected to proper legal analysis, they can be seen to be equivalent to classic claims for denial of justice, which therefore attract all the technical rules that have grown up over the years around claims of that kind, notably the inadmissibility of such a claim until local remedies have been exhausted. The objection against the Respondent's assertion is rather one of substance. Once a Claimant investor has established its entitlement to the protection guaranteed under an investment treaty (as the Tribunal has already decided, in TRG's favour, in its Decision on Jurisdiction and Admissibility), it becomes simply a matter as to whether the facts which the investor alleges, if they can be substantiated, do or do not constitute contraventions of those standards of

protection, and, if they do, what the consequences are in terms of remedies. It would not, in the Tribunal's view, be consistent with the established norms for the interpretation of treaties to read into a given investment protection treaty additional conditions or limitations that could readily have been incorporated into the treaty text had the parties so wished, but are not there.

...

It matters little in this context whether the question of the availability and effectiveness of local remedies is put in terms of a procedural issue as to whether a claim for injury is ripe for determination by an arbitral tribunal, or in terms of a substantive issue as to whether the alleged injury has in fact been sustained. To the mind of the Tribunal, both come down in the end, within the context of an investment treaty arbitration, to the same qualitative evaluation of the effects of the particular State conduct that has been put in issue by a claimant before a tribunal.⁵¹²

592. The *Rompetrol* tribunal did not just accept the proposition that a fair and equitable treatment claim *could* be made out against a host State solely on the basis of the conduct of its prosecutorial officials; it found liability. Parallels with this case included: delays attributable to prosecutorial machination; procedural irregularities; persistence in the face of facts that should have convinced a reasonable prosecutor to adopt a different course of conduct; and a sense of wilful blindness as to the detrimental impact that the prosecutor's conduct would obviously have on a protected foreign investment.⁵¹³
593. The *Rompetrol* tribunal was also keen to establish that proximate cause existed between conduct attributable to the host State and harm demonstrably suffered by a protected investment. Its concern emanated from the fact that the impugned prosecutorial (mis)conduct had been visited upon two Romanian nationals, who served as executives of Rompetrol's investment enterprise. The tribunal reasoned that – all else being equal –prosecutorial (mis)conduct could

⁵¹² *Rompetrol Group NV v. Romania*, Award, ICSID Case No ARB/06/3, IIC 591 (2013), 6 May 2013, at ¶¶ 160 & 167.

⁵¹³ ¶¶ 198-200, 245, 247-248, 251, 279

simultaneously serve both as the basis for some kind of denial of justice or human rights complaint, on the part of the targeted individuals, *and* as the basis for a fair and equitable treatment claim on the part of the protected investment enterprise for which the individuals served as executives. The tribunal's focus was on the impact of prosecutorial maltreatment on the protected investment enterprise, especially given how that was the nature of the claim submitted by Rompetrol.

594. This case is less complex because one of the two individuals who suffered maltreatment at the hands of Mr Martínez, Mr Aven, was also an investor himself. Much like the *Rompetrol* scenario, the Claimants/Investors in this case have additionally pursued claims, both on behalf of themselves and on behalf of their investment Enterprises. Hence, the relevant question for the Tribunal to determine, in respect of the conduct of Mr Martínez, is whether it caused harm to the Claimants' interests in the overall business Enterprise that was the Las Olas Project, *in toto*.⁵¹⁴

H. The Temporality Requirement and the Respondent's Burden of Proof

595. As explained above, and in the Claimants' Reply Memorial, the Respondent has adopted a clever but unorthodox defense strategy, based upon a theory that the Tribunal should always first entertain allegations that its investment violates municipal law before turning to consider the merits of a claimant's treaty claims. The Respondent's tactical ploy is loosely based on cases in which the lawfulness of establishment is at issue, except that it is not at issue in this case – so now it claims that it “*is an inherent, implied and ongoing*

⁵¹⁴ *Aven et al v. Costa Rica*, Notice of Arbitration, February 4, 2014.

3. Claimants commenced this action against the Government of Costa Rica pursuant to article 10.16(1)(a), on their own behalf and under article 10.16(1)(b), on behalf of enterprises incorporated in Costa Rica, which Claimants directly or indirectly own or control ("the Enterprises") under the Dominican Republic — Central America — United States Free Trade Agreement ("CAFTA-DR").

requirement throughout the life of the investment.”⁵¹⁵ It has no merit in law, and it has no merit in fact, particularly if one is attentive to temporal logic.

596. The Respondent’s factual arguments are almost entirely of a *post-hoc* nature. It alleges that officials were misled to obtain permits, but it provides no contemporaneous evidence to demonstrate that officials ever acted on such allegations – because they were only generated as part of the arbitration process in these proceedings. It alleges that there were wetlands in need of protection at the time the Project was cancelled, but it only offers evidence which pertains to the date upon which its tests were conducted. It claims SETENA officials were misled, but does not even bother to direct a single SETENA official to give evidence to that effect. It claims that the Concession was not validly held under Costa Rican law, but it can provide no evidence that municipal officials were either unaware that the Concession was operated by foreigners or that they were taken steps to annul title to the Concession because it was being operated by foreigners. On the contrary, the evidence shows both that the Respondent was aware of Mr Aven’s role as representative of La Canícula and that the Municipality, in 2013, refused to cancel the Concession.

597. This is not just a matter of temporal logic, however. It is matter of fundamental due process. If municipal law is properly regarded as evidence in this case, and it must be, it is not for a DR-CAFTA tribunal to create its own evidence by making findings of Costa Rican law – which is precisely what the Respondent seeks. It wishes to establish that, because the Claimants were allegedly not in compliance with municipal laws at the time they were operating their investment (all allegations of which are vehemently denied in any event), they should be prohibited from enjoying standing – today – to seek compensation under the DR-CAFTA. But the only authoritative means of establishing whether Claimants *were* in compliance with the laws of Costa Rica would be to uncover a contemporaneous finding from a body responsible for law generation, such as a court. Asking the Tribunal to step into the shoes of such a

⁵¹⁵ Rejoinder at 14.

local court, or to otherwise undertake the municipal legal analysis proffered by the Respondent, is to have the Tribunal reach conclusions about the Claimants' alleged non-compliance with municipal law that were never – in fact – found.

598. A large variety of arbitral awards demonstrate why *post-hoc* propositions are deleterious to fair adjudication, starting with a line of cases rejecting the “*contribution to development*” element of the so-called *Salini* test, because it encourages arbitrators to make *post-hoc* suppositions about contemporaneous circumstances involving establishment with no direct evidence.⁵¹⁶ Other examples include: *Lemire v Ukraine*, where the tribunal rejected a host State's attempt to take a reservation for an impugned measure as a *post facto* attempt to manufacture evidence,⁵¹⁷ *Biwater Gauff*, where the tribunal rejected the respondent's *ex post facto* rationalisation for an impugned measure,⁵¹⁸ *Bayindir v Pakistan*, in which the tribunal ruled that Pakistan's ratification of the *New York Convention* in the course of proceedings could not have any bearing on the jurisdiction of the tribunal because it was a unilateral act with potentially retrospective effect,⁵¹⁹ and *HICEE v. Slovakia*, where the tribunal warned of the dangers of accepting *post-hoc* evidence concerning treaty negotiations.⁵²⁰
599. The Respondent's illegality defence is premised on *post-hoc* allegations for which no contemporaneous evidence exists. An international tribunal's jurisdiction commences on the day of the institution of proceedings. It would be an excess of jurisdiction *ratione temporis* for a tribunal to accept *post-hoc* allegations of illegality because it would lack an evidentiary basis for concluding that such a state of affairs existed contemporaneously with the

⁵¹⁶ *Philip Morris Brand Sàrl et al v Uruguay*, Award, ICSID Case No. ARB/10/7, IIC 844 (2016), July 8, 2016, at ¶ 207; *SGS Société Générale de Surveillance SA v Paraguay*, Award on Jurisdiction, ICSID Case No. ARB/07/29, IIC 525 (2010), February 12, 2010, at ¶ 107; *Deutsche Bank AG v Sri Lanka*, Final Award, ICSID Case No. ARB/09/02, IIC 578 (2012), October 31, 2012, at ¶ 306; *Alpha Projektholding GmbH v Ukraine*, Award, ICSID Case No. ARB/07/16, IIC 464 (2010), October 20, 2010, 8 November 2010, at ¶ 312.

⁵¹⁷ *Lemire v Ukraine*, Award, ICSID Case No. ARB/06/18, March 28, 2011, at ¶¶ 48-49 & 196.

⁵¹⁸ *Biwater Gauff (Tanzania) Ltd v Tanzania*, Award, ICSID Case No. ARB/05/22, July 18, 2008, at ¶¶ 497-500 & 696.

⁵¹⁹ *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/29, November 14, 2005, at ¶ 178.

⁵²⁰ *HICEE B V v Slovakia*, Partial Award, PCA Case No. 2009-11, May 23, 2011, at ¶ 124.

events that compose the factual matrix of the claim. This is why the *Achmea v. Slovakia* tribunal dismissed part of a claim, for which only evidence of events occurring after the arbitration had commenced existed.⁵²¹ This is also why the *Rusoro v. Venezuela* tribunal dismissed a respondent's defence very much like the one Costa Rica has attempted here:

*Using the powers conferred by law, the Ministry of Mines supervised (or should have supervised) the activities carried out by Rusoro, Venezuela's largest private gold producer. There is no evidence in the file that, as a consequence of such supervisory activities, the Ministry ever challenged the legality of Rusoro's conduct, filed a complaint against Rusoro or imposed any sanction. **The Bolivarian Republic is now raising, for the first time and ex post facto, previously unidentified violations of its own laws to challenge Rusoro's claim.***

*To prove this allegation, the Republic is not marshalling any direct evidence, but only what Respondent itself defines as "indirect evidence". **The Republic avers that this evidence "demonstrates that Rusoro systematically evaded mining regulations that required it to document with specificity each and every gold transaction"**.*

The Tribunal is unconvinced.

If Rusoro's conduct had indeed been as egregiously illicit as now claimed, the Ministry of Mines must have been aware of the situation and must have adopted the corresponding measures. However, there is no evidence that this actually took place. In the Tribunal's opinion, 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.⁵²²

(emphasis added)

600. The Respondent has thrown out a litany of *post-hoc* allegations about allegedly unlawful conduct by the Claimants, unsupported by contemporaneous evidence

⁵²¹ *Achmea BV v Slovakia*, Award on Jurisdiction & Admissibility, PCA Case No. 2013-12, May 20, 2014, at ¶¶ 266-270.

⁵²² *Rusoro Mining Limited v Venezuela*, Award, ICSID Case No. ARB(AF)/12/5, 22 August 2016, at ¶ 495-498.

(i.e. unsupported by evidence of legal findings made at the relevant time by a relevant municipal law authority). These included:

- a. alleged failure to have paid taxes on the Concession when due renders ownership invalid;
- b. alleged fraud, by the Claimants, in having misled SETENA officials into issuing EV by withholding the so-called “*Protti Report*,” meaning that the EV should be considered invalid *ab initio*;
- c. alleged illegal “*fragmentation*” of the Project Site and associated EV and construction permit applications, contrary to municipal law;
- d. alleged failure to obtain construction permits for the Easements (in spite of evidence on the record indicating the Municipality’s confirmation that permit records were destroyed by flooding in 2008);
- e. Alleged wilful violations of TAA and Court injunctions; and
- f. Alleged non-compliance with Article 47 of the ZMT Law

601. Again, the Claimants have demonstrated how none of these allegations has any merit, even if they were not already precluded from consideration for want of supporting, contemporaneous evidence.

I. Full Protection and Security

602. In its oral arguments, the Respondent made a series of statements that indicate a lack of appreciation for its obligations under the customary international law standard of protection and security, or its Article 10.5 counterpart, “*full protection and security*.” These statements need not evince a breach of the Article 10.5 standard of protection and security, *per se*. It is enough that the Respondent not be permitted to presume that such conduct is consistent with its obligations.

603. For example, the Respondent paid short shrift to the Claimants' concern that it did not undertake a diligent investigation of Mr Aven's corruption allegations against Mr Bogantes, and his related complaint that – rather than investigating him for corruption – Mr Martínez relied upon Mr Bogantes to provide evidence against him as part of a farcical criminal prosecution.⁵²³ The record similarly reveals a virtually non-existent investigation of the highway shooting incident.⁵²⁴ And there is also the Respondent's refusal to guarantee the physical safety of Mr Aven, so as to enable him to return to the country for a new trial.⁵²⁵ (which could only be necessary as a result of Mr Martínez's cynical manipulation of procedure). None of this conduct is consistent with a full protection and security standard and, as such, it should remain relevant in establishing proximate cause between the Respondent's DR-CAFTA breaches and the losses it suffered as a result.

J. Proximate Cause

604. Article 10.16 (1)(a)(ii) of the DR-CAFTA requires the Claimants to demonstrate that they, or the Enterprises upon whose behalf they have also claimed, have “*incurred loss or damage by reason of, or arising out of...*” the breaches they have proved under Articles 10.5 or 10.7. In this regard, Article 31(1) of the International Law Commission Draft Articles on State Responsibility prescribes “*full reparation*” for “*injury caused by [an] internationally wrongful act,*” and Article 31(2) provides: “*Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*”⁵²⁶

605. As the *S.D. Myers* tribunal observed of the identically-worded language in NAFTA Articles 1116 and 1117, the Tribunal's task in this case is to award

⁵²³ See Claimants' Memorial paras.163 – 169.

⁵²⁴ Exhibit C-162.

⁵²⁵ English Transcript 751:7.

⁵²⁶ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Report, 53rd Sess. (2001), A/CN.4/SER.A/2011, Yearbook of the International Law Commission, 2001, vol. II, part 2, as annexed to General Assembly resolution 56/83 of December 12, 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

compensation for all losses “suffered as a proximate result” of conduct that breached Articles 10.5 or 10.7 of the DR-CAFTA.⁵²⁷ “To be recoverable, a loss must be linked causally to interference with an investment located in a host state.”⁵²⁸ *S.D. Myers v. Canada* involved a measure that halted the investor’s PCB waste remediation business in Canada just as it was commencing, and damages were awarded for profits that would never be realised because of the untimely, forced-halt to the development of their business.

606. As at the date the claims were filed in this arbitration, three host State measures remained in place, each of which enjoined any development of the Claimants’ Las Olas Project: (i) the ongoing Municipal permit suspension; (ii) the TAA injunction; and (iii) the criminal proceedings injunction. Each measure constitutes an independent and substantial deprivation of the Claimants’ investment, because it constitutes the interposition of a legal instrument by the host State, which prevents the Claimants and their investment Enterprises from exercising their property and Concession rights consistent with their legitimate, investment-backed expectation to develop the Las Olas Project into a fully-fledged condominium-hotel resort.
607. These measures have remained in effect since November 2011, when each should have been withdrawn, following the issuance of SETENA’s reasoned decision to re-confirm the EVs it had previously issued, for the planned development of the Las Olas Project. As Costa Rica continues to refuse to voluntarily pay prompt, adequate and effective compensation for the deprivation caused by the interposition of these three injunctive measures, each constitutes a separate, *prima facie* breach of DR-CAFTA Article 10.7.
608. Each of these measures was the product of conduct, on the part of Costa Rican officials, which specifically targeted the Claimants as U.S. investors. None was

⁵²⁷ *SD Myers v Canada*, Second Partial Award, IIC 250 (2002), October 21, 2002, Ad Hoc Tribunal (UNCITRAL), at ¶ 6.

⁵²⁸ *Ibid.*, at ¶ 118.

in the nature of a measure of general application. Thus the evidentiary record indicates that the instant case constitutes one of the “*rare circumstances*” described in Article 4(b) of Annex 10-C on expropriation.

609. As the Claimants have previously explained, the conduct of officials for which the Respondent is responsible, and the three injunctive measures whose adoption their acts brought about, substantially interfered with the Claimants’ distinct, reasonable investment-backed expectations for the Las Olas Project. These expectations were not only premised on the express terms of the EVs and construction permits which had been issued directly to them or their Enterprises by the appropriate authorities. They were also informed by the Claimants’ justified belief that these officials would act consistently with the procedural norms contained within the DR-CAFTA and the municipal legal order. In particular, it was certainly now unreasonable for the Claimants to believe that EVs issued by SETENA would have binding authority on all other government agencies, as even Dr Jurado had no choice but to admit during cross-examination.⁵²⁹ The same expectations that inform the Respondent’s breach of Article 10.7 equally inform its breach of Article 10.5.⁵³⁰

610. The same result also accrued for other breaches of Article 10.5, because each led to the same result. Ms Vargas was personally involved both in obtaining both the TAA injunction and causing the Municipality to as suspend construction permits. The brazenly non-transparent activities of both Mr Picado and Ms Diaz not only contributed to imposition of the TAA measure, but also the criminal injunction, even as the bogus forgery charge was never properly investigated and eventually fell away. Mr Bogantes’s conduct not only spurred Mr Picado into action, but obviously abetted imposition of the criminal injunction, as Martínez elected to ignore the corruption allegations

⁵²⁹ English Transcript, 1467:1-1468:9.

⁵³⁰ Indeed, the only reason to make a distinction between the two breaches would be in a case in which the loss arising from frustration of these expectations was less than substantial, in which case only the Article 10.5 breach would apply.

against him and instead attempted to rely heavily upon him as a fact witness against Mr Aven and Mr Damjanac.

611. For his part, Mr Martínez naturally played a crucial part in causing the criminal injunction to be adopted and maintained. Rather than agreeing to the Claimants' counsel's reasonable request to wait until an ailing judge was ready to finish the first trial, he insisted on a new trial – using a constitutional time limitation rule that was obviously intended for the benefit of an accused, rather than an incompetent and headstrong prosecutor. And it was Mr Martínez who inexplicably decided to maintain his criminal case against the two men, notwithstanding the fact that SETENA's November 2011 resolution rendered it impossible for him to obtain a conviction. Mr Martínez's actions thus ensured that a criminal injunction would remain in place, ensuring that no development at Las Olas could possibly occur, both as a matter of law and as a consequence of the harm visited upon the business reputation of the Las Olas Project, with criminal charges hanging over both Mr Aven and Mr Damjanac.
612. The Respondent's answer is to blame the Claimants for the frustration of their investment, on the twin theories that Mr Aven was too obstinate to just plead guilty, pay a fine, and return to work, and that, in any event, it was his refusal to return to Costa Rica, "*to face justice*," that has maintained the criminal injunction in place.⁵³¹ The very notion that an innocent investor should be penalised for being unwilling to plead guilty to a crime he did not commit is utterly outrageous. It also ignores the obvious fact that neither Mr Martínez, nor any of the other officials whose arbitrary and discriminatory conduct offended basic principles of due process, gave Mr Aven any reason to believe that such a gesture on his part would have resolved anything. In this regard the Claimants note that Mr Martínez had even charged him and Mr Damjanac under the wrong law, because the penalties available in the newer (but non-applicable) law were more severe.

⁵³¹ See Second Witness Statement of Luis Martínez, para. 74.

613. As regards the fact that Mr Aven was unwilling to return to Costa Rica, the Respondent has nobody to blame but itself – given the ineffective investigations it conducted, not only with respect to Mr Aven’s corruption allegations, but more importantly in respect of the violent attempt that was made on his life, and that of Mr Shiolen. The Respondent seemed strikingly unaware of its obligation to provide Mr Aven with adequate protection and security, when its counsel made the stunning suggestion that he could have hired security guards for a return trip. The farcical nature of such a suggestion was belied by the fact that Mr Aven would have been returning to face a retrial, on bogus criminal charges maintained by a prosecutor who appears to have been as vindictive towards Mr Aven as he was unprincipled about safeguarding the civil rights of an accused person.
614. More to the point, even if one were to contemplate regarding the gunfire attack on Mr Aven and Mr Shiolen, and the justifiable fears it engendered in both about ever returning to the country, as an intervening incident not attributable to Costa Rica, international law provides: “*a State may be held responsible for injury to an alien investor [even] where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury... International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes.*”⁵³²
615. Thus, the conduct which constituted a breach of Article 10.5 also led directly to the near total losses the Claimants suffered after their development at Las Olas.

⁵³² *CME Czech Republic v Czech Republic*, Partial award and separate opinion, IIC 61 (2001), (2002) 9 ICSID Rep 121, (2002) 14(3) World Trade and Arb Matl 109, September 13, 2001, Ad Hoc Tribunal (UNCITRAL), at ¶¶ 580 & 583, citing: *Corfu Channel, United Kingdom v Albania*, Judgment – Compensation, ICJ GL No 1, [1949] ICJ Rep 244, ICGJ 201 (ICJ 1949), December 15, 1949. See, also: Marjorie M. Whiteman, *Damages in International Law* (Washington, U.S. Govt. Print. Off., 1937), at 1778–81, citing: Samoan Claims Award (1902), Joint Report No. II of the American and the British Commissioners, August 12, 1904, in which the State was held responsible for losses sustained from looting, by people who had been forced to flee military activities it had conducted – demonstrating how a State can be held liable despite the intervening actions of other wrongdoers.

K. The approaches of the quantum experts

616. Particularly striking in this case are the divergent approaches of the two quantum experts, Dr Manuel Abdala and Mr Timothy Hart. As the Claimants noted in their oral closing at the February Hearing, the difference in approach is clear from the expert reports submitted by the experts, but became even clearer during the Hearing itself.
617. Dr Abdala is an experienced, careful and considered economist, who approached the task of providing a damages valuation in a transparent and clearly explained way, following a solid methodology which has impeccable academic and theoretical underpinnings. He clearly identifies areas in respect of which there are limited or no data available, and then uses appropriate proxies (for example using U.S.-focussed data where there exist no Costa Rican-focussed data). Mr Hart criticizes Dr Abdala for not using Costa Rican data, but offers no alternative option (there being no Costa Rican data). It is, of course, absurd to suggest that a fair market value cannot be arrived at because in respect of one input only U.S.-focussed data are available. Yet that is the effect of Mr Hart's approach and it is symptomatic of his overall approach to the valuation exercise.
618. Mr Hart's biography does not hide the fact that, with the exception of two cases from the late 1990s, all of his appointments in investor-state cases are from respondent states, a fact he was forced to admit in cross-examination⁵³³. This is not, as he tried to paint it, a mere quirk of fortune ("*that's just who has called and who has engaged me*"⁵³⁴). Mr Hart has repeat appointments from Venezuela (six appointments), Uzbekistan (four appointments), Costa Rica (two appointments, including this case) and Romania (two appointments). Clearly, his approach to damages valuations is one which States appreciate.

⁵³³ English Transcript, 2275:16.

⁵³⁴ English Transcript, 2274:22-2275:1.

619. However, in the context of assisting this Tribunal in determining the fair market value of the Claimants' investment, Mr Hart's approach to valuations is useless. It is clear from his reports and his oral testimony that Mr Hart has not attempted to assist the Tribunal at all. Aside from arguing that a cost-based valuation is appropriate (which will be addressed further below), Mr Hart restricts himself to criticising Dr Abdala's valuation inputs, without ever offering any alternative data or figures for the Tribunal to assess.
620. Mr Hart's reports are unprofessionally aggressive and partisan and, when invited to retract his accusations that Dr Abdala had sought to "*mislead*" the Tribunal, and that Dr Abdala "*sneaks in a miscalculation*", he first argued that these were Counsel for the Claimants' words, not his. When he was taken to some of the passages of his reports which showed him using this language, he chose to stand behind it.⁵³⁵
621. What becomes clear from reading his reports and his oral testimony, is that Mr Hart's approach can be summarized in three principles. First, he tries, at all costs to his credibility, to reduce the valuation as much as possible by using a valuation method he admits does not produce a fair market valuation. Second, he sets out not to value the investment, the asset in question, but rather to value the Claimants. Third, he simply cannot counter the solid theoretical underpinning to Dr Abdala's methodology. Without anything to gainsay Dr Abdala's approach, he is limited to superficial statements that he has "*never seen*" it being used.
622. This third principle goes to the heart of Dr Abdala's valuation methodology. The methodology, as Dr Abdala carefully evidences in his reports, is not novel, speculative, or exotic. It uses familiar and respected valuation methodologies (the DCF approach and the appraisal valuation) which are regularly used by buyers and sellers and by arbitral tribunals. Based on sound evidence in the financial literature, Dr Abdala then applies these valuation methodologies, in a

⁵³⁵ English Transcript, 2283:4-2284:21.

logical way, to the specific circumstance of a pre-operational asset by weighting these conventional valuations by the probability of success.

623. Dr Abdala's methodology provides a sound and appropriate theoretical basis (for all damages valuations in these kinds of arbitration cases are theoretical – what would have happened, but didn't?) for the real-world assessment that would be carried out by any potential buyer before purchasing an asset: work out the best possible value outcome, assuming all goes well, work out the value outcome assuming things do not go well, and assess the risk as between those two extremes.
624. It may be that in the real world of a live transaction, the buyer will not estimate a specific percentage risk element to weight the two extremes, as Dr Abdala's methodology does. But it is certain that a buyer will use a scenario probabilistic analysis in its decisions: it will assess those two outcomes, and work out its maximum purchase price based on an assessment of where the risk lies. All Professor Damodaran's approach does is to formalize, in a replicable way, this real-world decision-making process. Dr Abdala can then use that formalized approach to value the Project in a way that can be objectively assessed in a hypothetical situation before an arbitral tribunal.
625. The theoretical basis for Dr Abdala's approach is clear and evidenced, and is undisputed by Mr Hart. Prior investment-treaty tribunals have found fault with applying a pure DCF valuation to a pre-operational asset. Dr Abdala's approach provides an alternative means of valuing pre-operational assets which accounts for previous tribunal's reluctance to adopt the DCF methodology. It does not behove the Respondent to argue that simply because Dr Abdala has provided a modified methodology that now accounts for previous tribunals' concerns, it should be dismissed.
626. In the following sections of this Post-Hearing Brief, the Claimants will address the key themes which emerged from the oral hearings as they relate to quantum, thereby summarising the Claimants' case on damages.

L. The Claimants' backgrounds are irrelevant to valuation

627. Mr Hart and the Respondent went to great lengths in the Supplemental Expert Report and Rejoinder to attack the backgrounds of the Claimants and their approach to the management of the Las Olas Project. This theme continued during the February Hearing, when Mr Hart continued to make wild assertions about the individual Claimants' business dealings, seemingly not having reviewed the cogent testimony of Mr Shiolen and Mr Janney in the December Hearing which addressed the accusations Mr Hart had levelled in his Supplemental Expert Report.
628. However, this bluster from the Respondent and Mr Hart is nothing more than a transparent attempt to divert the Tribunal's attention away from the real issues, and focus on an issue which has no bearing whatsoever on the fair market value of the Las Olas Project.
629. In cross-examination, the Respondent sought to force Dr Abdala to admit that the characteristics of the Claimants were relevant to valuation. Dr Abdala freely admitted, quite rightly, that as a general matter of valuation, the Claimants' characteristics are relevant. But Dr Abdala also explained very clearly what he meant by this:
- a. *"it [the specifics of the investors] might be [an important factor] if the view is just that, say, the owners of the asset are the ones to continue. But it also may not. Maybe that the assessment is done as to what would be the probabilities of success if anyone else takes [the project]."*⁵³⁶
 - b. *"it's not that it's not relevant [the business management skills of an investor]; it's just that in a fair market value assessment, you are not only assessing what the existing owners could do, but also what the willing buyers could do with the asset, in particular where you have an asset that is at a pre-operational stage."*⁵³⁷
630. These questions, and Dr Abdala's responses, were focussed on the general methodology behind a fair market valuation. Dr Abdala made clear in these

⁵³⁶ English Transcript, 2153:15-19.

⁵³⁷ English Transcript, 2155:7-12.

passages (and the surrounding questioning) that there are two potentially relevant issues: (i) the price at which the willing seller would consider selling the asset (which may well depend on the individual characteristics of the seller, since it is influenced by what they would expect to achieve if they remained in control of the project); and (ii) the price at which a willing buyer would consider purchasing the asset (which does not depend on the characteristics of the seller at all, since the buyer would be coming in and taking over the operation of the project).

631. When asked about the specifics of this case, Dr Abdala explained the position further:

10 | A. Well, what I look at the features of the
11 | sellers when assessing fair market value is exactly,
12 | first of all, what the sellers' expectations are.
13 | These are normally translated into the contemporaneous
14 | business plans at the time. And you need to match
15 | that with the expectations of the willing buyer. And
16 | so, for that, you look into market information as to
17 | what--how much someone would pay for, for this
18 | particular asset.

19 | And you'd need to value a price that you know
20 | that the willing seller would be really willing to
21 | sell. So the willing seller may have a reservation
22 | price, and you also need to understand that the

1 | willing buyer will have a price that may be different
2 | from the--what that reservation price may be.

3 | And that's the part that I look at on the
4 | willing seller. I mean, I look at their expectations
5 | as to what they think their asset is worth for, and
6 | that's normally reflected in their business plan
7 | projections. That's the main feature.

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⁵³⁸ English Transcript, 2209:10-2210 :7.

14 | the seller. But, again, in a transaction, you don't
15 | really pay too much attention to the identity of the
16 | seller or the buyer unless you're trying to assess
17 | value in use, because it could be that for a
18 | particular investor, the asset has more value because
19 | it has synergies with other assets that they may have;
20 | therefore, you will know that the reservation price of
21 | that seller would be higher than a normal buyer.
22 | But unless you have that synergies, what you

1 | really care about is what the market would pay for
2 | this asset. And that comes from kind of a neutral
3 | assessment as to who really holds the asset at that
4 | time because you know that someone else can take over
5 | and extract the value of that asset. And that's what
6 | the market would pay for it. Regardless of whether a
7 | company, say, is mismanaged or whether it's
8 | beautifully managed, it doesn't matter. What--the
9 | value of the asset is what someone would pay for it.

10 | If I want to buy a company and I see that
11 | those who run the company are doing a very poor job, I
12 | would still be competing with others that have the
13 | same perception as I do, that this company's more
14 | valuable if it were in the hands of someone who's
15 | managing that company differently or better, optimize,
16 | and that the market price is, then, independent of the
17 | identity of the actual owner of the asset.

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632. In summary, therefore, Dr Abdala's testimony is clear: the characteristics of the seller *might* be relevant to valuation insofar as they assist, to assess: (i) the seller's expectations for the sale and any reservation price; or (ii) the impact on price if there are synergies with other assets owned by the same seller but not included in the sale.

633. Outside these scenarios, as Dr Abdala confirms, the identity of the seller is simply not relevant because in this case, the underlying assumption of the valuation exercise is that the whole project is sold to a buyer, who would take

⁵³⁹ English Transcript, 2211:14-2211-17.

over the management of the project. Mr Hart readily agreed that this was the relevant benchmark for his valuation exercise:

18 | If we could just turn to methodology. You would
19 | accept, wouldn't you, that the primary objective of
20 | the damages assessment exercise in this case is to
21 | identify the fair market value of the Las Olas
22 | Project; right?
1 | A. Yes.
[...]
22 | underlying premise of the valuation is that a
1 | hypothetical willing buyer comes in and buys the whole
2 | project in May 2011; right?
3 | A. Yes.
4 | Q. And that means that the hypothetical buyer
5 | would then continue the Project development itself;
6 | right?
7 | A. Yes.
8 | Q. So, that obviously means that the sellers of
9 | the Project at that point in time fall out of the
10 | equation because they've sold their entire interest in
11 | the Project; right?
12 | A. In a complete sale, yes.
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634. Mr Hart was forced to admit that the objective of the quantum exercise in this case is to assess the fair market value, despite not having explained this in his reports. When pressed on why his reports did not explain the basis for his valuation, he simply said “*they don’t need to. I know the standard.*”⁵⁴¹ However, as the Claimants noted in oral closing, it is only by ignoring this step in his reports that Mr Hart can commit the sleight of hand that posits the lowest possible valuation – a sunk costs valuation – as a “*fair market value*”. Had Mr Hart been clear in his reports that his objective was to find the value at which a

⁵⁴⁰ English Transcript, 2275:18- 2276:1, and 2277:22 - 2278 :12.

⁵⁴¹ English Transcript, 2276:22.

willing seller and willing buyer would transact, the fallacy that a willing seller would have agreed to sell for its sunk costs in a non-distressed situation (and that this therefore represents a fair market value) would have been even more transparent than it already is.

635. In summary, therefore, both experts agree on the fundamental basis for valuation: a transaction between a willing seller and a willing buyer. Despite the Respondent's best efforts, Dr Abdala clearly explained when the characteristics of the willing seller might be relevant to valuation, and they are not relevant in this case: (i) the valuation does not focus on the seller's price expectation – which is illustrated by the December 2010 Business Plan – but on what a willing buyer would pay; and (ii) there are no synergies or other special considerations which affect the valuation of this asset in particular.
636. Despite Mr Hart's reports and oral presentation which implied that the characteristics of the Claimants were relevant to the valuation exercise as a whole, when faced in cross-examination with the questions quoted above about the exercise he was supposed to undertake, he changed tack and asserted that the Claimants' characteristics were only relevant because it was those Claimants which had put together the 2010 Business Plan, and that this plan was not realistic.⁵⁴²
637. However, Mr Hart is not, and has never held himself out to be, an expert in the planning and execution of resort developments. He tried to argue in cross-examination that his expertise extended to running resort developments, because of alleged experience “*dealing with multiple real estate portfolios and multiple real estate projects over my 30-year career and many in the context of very large insurance companies that won substantial real estate portfolios that I've been involved in valuing and helping work out.*”⁵⁴³

⁵⁴² English Transcript, 2279:5-2280:1.

⁵⁴³ English Transcript, 2269:19-2270:2.

638. This alleged experience does not appear anywhere in Mr Hart’s biography, in which he (fairly) describes himself as a “*forensic accountant experienced in the financial and quantitative aspects of international and domestic disputes and investigations.*”⁵⁴⁴ He has not put forward any expert opinion in this case as to the development of beach-front resorts, and nor could he. Rather, he has simply made vague and unparticularised assertions as to the Claimants’ “*characteristics*” and implied that this therefore renders the 2010 Business Plan unrealistic. Put simply, there is absolutely no evidence to support Mr Hart’s assertions as to the “*unrealistic*” nature of the site layout envisaged in the 2010 Business Plan.
639. In fact, Mr Hart argues that the 2010 Business Plan is “*exactly their [the Claimants’] layout, it’s exactly their number of units that they thought they could sell.*”⁵⁴⁵ In reality, however, the layout of the site contained in the 2010 Business Plan came from Mussio Madrigal architects, and the other professional consultants the Claimants hired to develop the project, since it adopts the 2008 Master Site Plan which was prepared by that firm,⁵⁴⁶ and the design for the beach club prepared by Zurcher Architects.⁵⁴⁷ In other words, Mr Hart’s criticism is baseless: the layout of the site used in the 2010 Business Plan was not an unrealistic plan dreamt up by the Claimants of their own motion, but the product of professional consideration and design.

M. Ownership of the Project Site

640. Mr Hart’s Supplemental Report, and his oral testimony, was littered with references to the Claimants allegedly “*not owning*” 22% of the land. For example, in his oral presentation, Mr Hart claimed that “*Las Olas is not a beachfront property. The property has 150 meters of beachfront that you walk*

⁵⁴⁴ See Timothy Hart Second Expert Report, Exhibit 1, page 1.

⁵⁴⁵ English Transcript, 2280:3-2.

⁵⁴⁶ See Exhibit CLEX 015.

⁵⁴⁷ See Exhibit C-44 – the preliminary design in the proposal document from Zurcher was amended slightly (Exhibits C189 and C190) and it was this amended version which was used in the 2010 Business Plan (see Exhibit CLEX 016, pages 7, 8 and 9).

through a property they don't own onto a concession area."⁵⁴⁸ This is a reference to the hotel site (the part of the Las Olas property behind the concession area – over the public road – coloured green on the map on page 14 of Mr Hart's PowerPoint presentation at the hearing). This part of the Project Site was owned by the Claimants in May 2011, the date of valuation. It was sold subsequently, for a fraction of its value as it was subject to the injunction prohibiting construction, in an attempt to mitigate the losses caused by Costa Rica's unlawful acts. To assert that the Las Olas Project, absent Costa Rica's unlawful acts, only had access to the concession through an area of land the Claimants did not own is completely wrong.

641. He also said "*the Claimants do not own all the lots on the Las Olas property. Again, I heard Dr Abdala's testimony this morning which didn't seem to comport with the facts. In the red you can see that's the property not owned by the Claimants, and its inside the area they're planning to develop. And it's a much larger number of lots than Dr. Abdala says he subtracted. We don't know if they're selling lots on the side, what happened. But they did not own those lots as of the date of the May 2011.*"⁵⁴⁹ (emphasis added)
642. Mr Hart's reference to areas in red was a reference to the map on page 14 of his PowerPoint presentation at the hearing, on which a number of lots – 77 to be precise – are coloured in red. This map comes from Exhibit 6 to Mr Hart's Supplemental Report, which in turn is said to be based on Section A of Annex II to the Respondent's Rejoinder. Section A of Annex II to the Rejoinder lists 28 properties in the Condominium Section and 42 properties in the Easement Section which the Respondent alleges have been "*wrongfully included as part of [the Claimants'] alleged investment*". Putting aside this latter statement, which has been addressed above, Mr Hart testified (as noted above) that: (i) there are more red coloured lots than Dr Abdala subtracted from his analysis;

⁵⁴⁸ English Transcript, 2254:8-11.

⁵⁴⁹ English Transcript, 2251:1-10.

and (ii) the Claimants did not own any of the red coloured lots as at the date of valuation – May 2011.

643. The first of these statements seriously misrepresents Dr Abdala’s testimony. On page 7 of his PowerPoint presentation at the hearing, Dr Abdala explained that he had deducted 26 lots from his analysis as having been sold prior to May 2011.⁵⁵⁰ He deducted a further 51 lots, which were sold after May 2011, from his residual valuation of the land (i.e. its value today, with the effect of the Respondent’s measures still in place).
644. The key point is Mr Hart’s evidence that all 77 of his red lots were sold before May 2011. The simple fact is that they were not: Annex II to the Rejoinder, on which Mr Hart relies for his map, includes the date of inscription of the sales. On the basis of the data in Annex II, only 22 lots were sold before May 2011 (analysed by the date of inscription, which is the only form of date provided in Annex II). As noted in the footnote to the preceding paragraph, Dr Abdala treats 26 lots as having been sold before May 2011 rather than 22 because some sales agreements were made before May 2011, but the inscription was only registered after May 2011. All the others lots coloured red on Mr Hart’s map were sold after May 2011. This is evident from the dates of inscription in Annex II on which he relies. For Mr Hart to argue that Dr Abdala’s analysis “*does not comport with the facts*” is plainly wrong. In fact, it is, frankly, unbelievable that a quantum expert seeking to present a credible opinion to the Tribunal could assert that properties which are quite clearly listed as having been sold after May 2011 were, in fact, sold before that date. This is not a simple error of miscounting: by colouring all of these lots the same colour in his Exhibit 6, Mr Hart has deliberately sought to convey the false impression that all of these lots were sold in the same timeframe: pre-May 2011.

⁵⁵⁰ English Transcript, 2134:10-2136:8. Dr Abdala uses the date of the relevant reservation/sales agreement as the date of sale, where that information is available or, if not, the date of inscription in the registry. In slide 27 of Dr Abdala’s presentation at the hearing, there are four lots with a date of inscription after May 2011 (No. FFPI 167, FFPI 154, 47, and FFPI 137) but which were included by Dr Abdala as sales prior to May 2011 because the reservation/sales agreement date was prior to May 2011.

645. Worse still, this is not an isolated example. As noted above, Mr Hart repeatedly argues that damages are overstated by 22%, and that “*just on - - on square meters, it’s 22 percent overstated in terms of what the - - you know, the land they have to sell from, you know, 2011 forward.*”⁵⁵¹ As Dr Abdala explained on pages 6 and 9 of his PowerPoint presentation,⁵⁵² Mr Hart’s 22% figure is the sum of all of the various coloured areas on Mr Hart’s Exhibit 6: all of the lots listed in Annex II to the Rejoinder as having been sold (sections A, B and E of Annex II), including the hotel site and the adjacent commercial/tourist site, equates to 16% of the total site area. The concession, over which the Respondent now disputes ownership, accounts for a further 6%.
646. Yet, Annex II to the Rejoinder makes it abundantly clear, as just noted, that only 22 (or 26 as adjusted) lots were sold before May 2011. The rest of the lots listed in Annex II (and the hotel site and commercial/tourist site) were sold after May 2011. Again, therefore, Mr Hart’s accusation that 22% of the land was not available for sale in 2011 is simply wrong, on his own side’s data.
647. Damages, in this exercise, are calculated as at May 2011. Post-May 2011 sales therefore have no relevance whatsoever to the valuation of the Las Olas Project in this arbitration. The only relevance these sales have to damages is that the residual value of the land is reduced to account for the fact that the Claimants no longer own certain lots, and the sales themselves have generated some (very small) revenue in mitigation of the damage suffered by the Claimants, which is to be deducted from the damages figure. Dr Abdala explained in his opening presentation that he has done just that.⁵⁵³ As explained above, a further adjustment has now been made to account for the fact that the Claimants have (subject to the payments being made) sold the remaining project land.
648. Putting aside Mr Hart’s false assertions as regards the date of sales, the position in respect of ownership of the physical land is very simple:

⁵⁵¹ English Transcript, 2251:18-21.

⁵⁵² English Transcript, 2139:8 – 2143:2.

⁵⁵³ English Transcript, 2139:8 – 2143:2.

- a. As discussed above, the Claimants' investment is much wider than just the physical land purchased in 2002. It is not the case that the sale of a lot means that that lot is somehow not part of the Claimants' protected investment.
- b. As a result, there is no distinction to be drawn between areas of land which were sold before the Notice of Arbitration, and those that were sold after the Notice: in both cases the lots remain part of the Claimants' investment for the purposes of this arbitration.
- c. Like Los Sueños, or any other resort development, the purpose of the Las Olas Project was not simply to sell plots of land, but to achieve revenue from those lots even once they had been sold to purchasers. So, it is not the case that once a lot is sold, it is irrelevant for valuation purposes: there was still a lot of revenue to be gained by the Project from that lot (see Dr Abdala's explanation).⁵⁵⁴
- d. Any sales after May 2011 are not relevant to considering the value of the Las Olas Project as at May 2011, for the self-evident reason that in May 2011 they remained available for sale.
- e. Any sales of lots pre-May 2011 do reduce the number of lots available to be sold as at May 2011, and therefore must be removed from the lot sales element of the valuation model. Dr Abdala does this (and has done this since his first Expert Report).
- f. All lots sold pre-May 2011 remain, however, part of the valuation of the other revenue streams for the Las Olas Project (house building, rentals, etc).
- g. Sales post-May 2011 were made in a distressed situation, with the prohibition on construction work in place and the dispute with Costa

⁵⁵⁴ English Transcript, 2140:5-14.

Rican agencies already crystallized. They are therefore not relevant to the valuation exercise, save that the value of the Claimants' land today is reduced to account for the fact that the Claimants no longer own these parts of the property, and there is a corresponding decrease in damages, as credit is given for the residual value of these sold lots.

- h. The position in respect of the Concession area is a legal question to be resolved by the Tribunal, not one for the quantum experts to determine. Quite properly, Dr Abdala based his assessment of value on the documentary evidence that all profits deriving from the Concession area were to be for the account of the Claimants⁵⁵⁵.

649. The Claimants append to this Post-Hearing Brief a table which, in accordance with question 7 of the Tribunal's Closing Questions, sets out the ownership of the various parts of the Project Site as at the date of the Notice of Arbitration (see Annex B). However, as is clear from the above discussion, on the Claimants' case the Notice of Arbitration is an irrelevant date, since all parts of the property remain part of the Claimants' protected investment for the purposes of this arbitration, whenever they were sold.

650. The only date relevant to lot sales is May 2011, being the date of valuation. Slides 27 to 29 from Dr Abdala's presentation at the February Hearing show which lots were sold before May 2011, and which were sold after May 2011. The Claimants have prepared colour-coded versions of the Master Site Plan, in order to show to the Tribunal the ownership of the various parts of the Las Olas site. These represent the position as at May 2011, and as at the date of the Notice of Arbitration (see Annex D).

⁵⁵⁵ See Exhibit C-65.

N. Valuation Methodology

1. Dr Abdala's valuation methodology is appropriate and sound

651. As noted briefly above, Dr Abdala's methodology is rooted in sound economic theory. In cross-examination, the Respondent attempted to suggest that Dr Abdala's evidence was that: (i) the Las Olas Project was a going concern as at May 2011 (*"So, the resort wasn't open for business, there were no completed roads, there's no flowing water, there's no electricity, there's no people, there's no resort; and, yet, your opinion is that this is a going concern, is that right?"*⁵⁵⁶); and (ii) the fact there is a risk of the project not being completed means that Dr Abdala's approach involves speculation⁵⁵⁷.
652. Dr Abdala's responses were clear. First, his methodology quite clearly does not say that the Las Olas Project was a going concern:

20 | A. No. No. You're mistaken. I mean, I always
21 | characterized this as a preoperational asset, so it's
22 | not--as of May 2011, it's not an ongoing concern
1 | because it's not fully yet developed. It's at a
2 | preoperational stage.
3 | What the discounted cash flow method analysis
4 | is, recognized that if it continues, it will become a
5 | fully developed resort. And so, you attach certain
6 | probability that that happens. If it doesn't
7 | continue, as it states, as is, then it has to be sold
8 | with a state of partial urbanization and with the
9 | value of the land as appraised by Mr. Calderón at that
10 | stage.

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653. Second, Dr Abdala explained why this approach involves no speculation:

⁵⁵⁶ English Transcript, 2210:17-21.

⁵⁵⁷ English Transcript, 2213:21 – 2214:4.

⁵⁵⁸ English Transcript, 2203 :20-2204 :10.

21 | A. Okay. It's very simple. Preoperational stage
22 | means that you are still on the phase of developing.

1 | You're still investing. You have not finished
2 | investing before you can start selling and producing
3 | most of the revenues. And assets get transacted at
4 | those stages all the time, not just in real estate,
5 | but in any other businesses--in mining, in crude oil.

6 | I mean, you are at exploration stage, and then
7 | you move on to the next stage. And so, you have
8 | transactions at preoperational stage all the time, and
9 | real estate development is one of them.

10 | Q. And in that case, sir--

11 | A. So, the value that you add to the land is the
12 | permitting, the zoning, the infrastructure works, and
13 | the offerings that you plan to do in the future.

14 | So, there is no speculative element. The only
15 | risk is of completion and, in time, completion of what
16 | comes next.

559

654. The Respondent's objection to Dr Abdala's analysis confuses risk with speculation – that there is a risk of an event occurring does not make that event speculative. Risk is inherent, and adjusted and accounted for, in every single transaction that takes place. As Dr Abdala explained:

18 | Q. But you said there's no speculation, sir. You
19 | said there's no risk with the--the market is telling
20 | you what the prices are. From your assessment, it
21 | seems to be that all you do is plug in time, and time
22 | will tell you to project your cash flow to a certain

⁵⁵⁹ English Transcript, 2204:21.

1 level.
2 A. No. You're confusing speculation with risk.
3 I mean, all assets have a value. They can be
4 transacted at any time, regardless of whether you are
5 completed or not completed in your stage of
6 development. It's just a matter of putting a
7 transaction price.
8 And the valuation expert is able to put that
9 measuring risk, either through the discount rate or,
10 as I've done in my analysis, via the expected value,
11 taking into account the probabilities that things go
12 sour, and then you cannot complete the development.
13 And so, you account for that risk.

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655. This is a fundamental misunderstanding on the part of the Respondent. Risk is absolutely not the same as speculation, particularly in an economic or accounting sense. As Dr Abdala pointed out in his evidence, “*all investments, obviously, are speculative, because you are expecting a payoff in the future. But that doesn't mean that you cannot assess value, and transactions every day take place on investments that have this risk of success or failure.*”⁵⁶¹
656. These were the only methodological topics explored with Dr Abdala in cross-examination, and it is clear why the Respondent did not attempt to engage Dr Abdala on methodology. Notwithstanding Mr Hart's repeated, unsubstantiated, statement that Dr Abdala's approach is not appropriate, neither Mr Hart nor the Respondent can argue with the fact that Dr Abdala's approach is confirmed by eminent economic theory. They cannot point to any opinion, writings, or evidence that challenges the approach developed by Professor Damodaran and used by Dr Abdala in this case.
657. When challenged to do so in the hearing, Mr Hart admitted he did not contest the validity of Professor Damodaran's approach, and that he could not put forward anything which would argue against that approach. Instead, he says he

⁵⁶⁰ English Transcript, 2206 :18-2207:13.

⁵⁶¹ English Transcript, 2137:5-10.

criticizes the application of “*this one single paper*”⁵⁶². Yet, as Dr Abdala showed in his Expert Reports,⁵⁶³ the economic justification for this method is not limited to the single Damodaran paper. In any event, the point is simple: Mr Hart cannot, and does not, demonstrate that the approach is wrong and that it cannot be used in the valuation of preoperational assets.

658. The only criticism that Mr Hart levels at Professor Damodaran’s valuation methodology is that Professor Damodaran himself describes the approach as “*painting with a broad brush*”.⁵⁶⁴ He goes on to say that Dr Abdala ignores this “*caveat*” to Professor Damodaran’s analysis, and that therefore Dr Abdala is wrong to say that his methodology is “*consistent with financial literature*”.⁵⁶⁵ In cross-examination, Mr Hart confirmed that it was his testimony that this “*caveat*” applies to the overall use of the methodology proposed by Professor Damodaran – in other words, in his opinion the entire exercise proposed by Professor Damodaran is, in the Professor’s own opinion, “*painting with a broad brush*”:

11	Q. But that caveat doesn't say what you say it	
12	says, does it? Doesn't have anything to do with the	
13	overall use of the methodology that Damodaran suggests	
14	as being appropriate, does it?	
15	A. I think it does.	566

659. Even a cursory review of Professor Damodaran’s paper,⁵⁶⁷ and in particular the phrase quoted by Mr Hart in his report (found at page 42 of the paper), shows this to be entirely wrong. The “*caveat*” is not a caveat as to the overall use of the methodology at all, and there is no other “*caveat*” to its use to be found in Professor Damodaran’s paper.

⁵⁶² English Transcript, 2300:8-9.

⁵⁶³ See Manuel Abdala Second Expert Report, sections II.1.1 and II.1.2 and the financial literature cited therein.

⁵⁶⁴ See Timothy Hart Second Expert Report, para. 104.

⁵⁶⁵ See Manuel Abdala Second Expert Report, Section II.1.1.

⁵⁶⁶ English Transcript, 2301:11-15.

⁵⁶⁷ See CLEX-041.

660. Rather, the “*caveat*” is quite clearly related solely to one of three possible ways, enumerated by Professor Damodaran, of assessing the probability of success. Mr Hart tries to persuade this Tribunal that Professor Damodaran was cautioning a caveat against the use of his methodology in the first place. In fact, he was merely noting that in assessing one element of the methodology (the probability of success), there are a number of approaches which could be used and that one of them might turn out to be rather broad brush.

661. When pressed in cross-examination, Mr Hart readily acknowledged that this was all Professor Damodaran was saying:

3 So, I put it to you that what Professor
4 Damodaran is saying is not that generally there is a
5 danger of using a broad brush, but there is a danger
6 in relation to the assumed survival of a company.

7 A. Well, that's exactly what we're talking about
8 here. The 68 percent chance of survival is what he's
9 put forward, and that's the broad brush he's painting
10 with. He's saying from U.S. data with the real estate
11 sector, 68 percent chance of survival, then applied to
12 this particular point in time, to this Greenfield
13 resort development in Costa Rica; that is the ultimate
14 broad brush.

[...]

21 Q. So it's--you would accept it's just one
22 element of the Damodaran thesis that's--to which the

1 description "using a broad brush" relates. It's not
2 the entire description, the entire thesis that he puts
3 forward.

4 A. It's an element, but an awful critical

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662. This frank admission by Mr Hart directly contradicted the testimony he gave two pages previously in the transcript, in which he said the “*caveat*” related to

⁵⁶⁸ English Transcript, 2303:3-2304:4.

the overall use of the Damodaran methodology (as quoted above). It also directly contradicts his expert reports, in which he seeks to make this “*caveat*” apply to the overall use of the methodology.⁵⁶⁹

663. In respect of the “*caveat*” itself – Mr Hart’s sole criticism of the Damodaran methodology – Dr Abdala acknowledged in his first report that the use of U.S. data on survival rates was not ideal, but noted that this was the best available data (no such data being available for Costa Rica). Dr Abdala noted in his oral testimony⁵⁷⁰ that ultimately the probability of success is a matter for the Tribunal to determine, and can be easily adjusted by the Tribunal if it considers that the U.S. data relied upon as the best available (a proposition with which Mr Hart does not disagree, and indeed he proposes no alternative data as being better) should be adjusted.
664. As Mr Hart accepted, Dr Abdala’s methodology accounts for the possibility of failure of the project by his 68% probability of success, albeit Mr Hart disagrees with the data Dr Abdala uses to reach that figure.⁵⁷¹ As was pointed out to him in cross-examination, the success of nearby resort projects corroborates the assumption that the Las Olas Project had at least a 68% chance of success (in reality, the success of neighboring projects suggests the figure should be higher than 68%).⁵⁷²
665. Mr Hart attempted to argue away from that conclusion by saying “*who’s to know how many tracts of land have been bought over time and someone had a dream to develop it into a resort and that dream failed? There’s lots of big*

⁵⁶⁹ See Timothy Hart Second Expert Report, para. 104, in which Mr Hart accuses Dr Abdala of cherry-picking and misrepresenting the intent of his source material by saying that his methodology is consistent with Professor Damodaran’s literature because Dr Abdala fails to account for these so-call “caveats”. Again, Mr Hart’s accusations of Dr Abdala are unprofessional and grossly misrepresent the position, as was confirmed in cross-examination.

⁵⁷⁰ English Transcript, 2131:2-10.

⁵⁷¹ English Transcript, 2313:6-12.

⁵⁷² English Transcript, 2313:13-18.

*tracts of land for sale that people have bought and thought about that and failed.”*⁵⁷³

666. This extremely general statement bears no real scrutiny:
- a. Mr Hart has absolutely no evidence for this proposition. He cannot point to any neighboring project which has been purchased, taken through permitting and planning, and on which infrastructure work has been started and lot sales commenced, but which has then failed. Such examples, if they existed, would have been easy for Mr Hart to find: there would be sites near to Las Olas with derelict, half-completed infrastructure work and abandoned lots. Mr Hart’s suggestion should be dismissed outright: it is not a statement of expert opinion but an assertion of fact for which he has provided no evidence whatsoever.
 - b. It is not acceptable for Mr Hart simply to say “*who’s to know*” – he has had over a year to investigate the facts to support his opinions, and has found nothing to substantiate his claim. Mr Hart has had full access to the Government of Costa Rica throughout this time, who could have provided him any information he wanted on any such failed projects. It is not acceptable for an independent expert who considers an issue to be relevant to his opinion, simply to fail to investigate that issue and then make a general assertion, supported by no evidence. The answer to the rhetorical question is Mr Hart – he is the one who should know, as he should have investigated the issue and shown the Tribunal the failed projects which counter Dr Abdala’s examples of successful developments.
 - c. Mr Hart severely mischaracterizes the Las Olas Project in comparing it to a tract of land purchased “*with a dream to develop it into a resort*”. This was not a dream: the Claimants purchased the land, developed a site layout and business plan, obtained construction permits for that layout, commenced selling lots to purchasers and started infrastructure work on

⁵⁷³ English Transcript, 2313:21 – 2314:3.

the basis of the construction permits received. In other words this was a reality, not a dream. The Respondent shut down that reality by stopping work on the Project, only a few months after the construction permits had been issued.

- d. As Dr Abdala pointed out: *“the Tribunal may have to assess on its own what is - - whether the 68 percent number that I offer is a number that you would like to see. But the proof - - the additional evidence that I have shown you is that all of the resorts that have been similar or comparable to Las Olas have been successful in the area. And Mr. Hart has not been able to point out to any one in particular that might have failed in that area. So, that area is obviously very attractive. And this type of development, such as Noches Los Sueños, West Costa del Sol, Madrigal, Místico, and six others that are shown in the Norton Consulting report have been all developed.”*⁵⁷⁴

667. Shortly after this statement from Mr Hart, it was put to him that the nearby Malaga development had succeeded in selling properties in a development of over 400 homes contained within a smaller area than Las Olas. Mr Hart’s response was that he did not know the layout of that site.⁵⁷⁵

668. This is disingenuous, at best, and at worst entirely false. First, Mr Damjanac’s Second Witness Statement describes the Malaga development in detail, including the density of the housing, and even contains pictures of the development.⁵⁷⁶ Even if, in error, Mr Hart chose not to review Mr Damjanac’s Second Witness Statement, Mr Hart has himself clearly spent a considerable amount of time investigating the Malaga development website: he exhibited

⁵⁷⁴ English Transcript, 2137:11 – 2138:2.

⁵⁷⁵ English Transcript, 2316:7-14.

⁵⁷⁶ See Jovan Damjanac Second Witness Statement , para. 61 to 70.

four separate website printouts relating to the development⁵⁷⁷, including two separate printouts from the developer's website.⁵⁷⁸

669. Exhibit CRED-55 is the front page for the relevant Malaga development – the Playa Punta Bejuco development (found at www.rc.cr/projects.php?id=5). The second thumbnail from the left on the print-out of this page demonstrates the density of the development, and the extent (virtually non-existent) of communal green space on the development. Moreover, Mr Hart did not see fit to exhibit the full webpage in his Exhibit CRED-55. He has artificially cut off the page immediately after the button labelled (in his English translation of the webpage) “*view site design*”. In fact, the webpage extends further below that button, giving floor plans for the four house models available and further information (including a Google maps link to the location of the development). In addition, the “*view site design*” button does not link to a different webpage, but merely expands a plan of the Project Site which is already embedded in the webpage Mr Hart partially printed out.
670. This selective cropping of the webpage by Mr Hart therefore acts to exclude the site plan for the development. Therefore either Mr Hart did not fully read the webpage he (partially) exhibited to his report, or his assertion in cross-examination that he did not know the layout of the site was false. The site plan taken from that webpage appears below: it is clear that the Malaga development was, in fact, more densely constructed than the Las Olas Project would have been.

⁵⁷⁷ Exhibits CRED-55 to 58 inclusive.

⁵⁷⁸ Exhibits CRED-55 and 58.



671. In summary, therefore, the Respondent has no basis on which to challenge the methodology used by Dr Abdala. It is not an exotic methodology: it simply applies two conventional valuation approaches (an income approach and an asset approach), and then assesses where between those two values the fair market valuation falls, accounting for the risk attached to the preoperational nature of the Project.

2. Mr Hart's methodology is inappropriate and does not assess the fair market value of the Project

672. Having simply stated, with no support, that he does not think Dr Abdala's methodology is appropriate, Mr Hart goes on to propose a different methodology: an analysis of what he calculates to be the sums spent by the Claimants on the Project. His justification for this approach has no basis in economic theory, or in common sense.

673. Mr Hart's argument has several major flaws, which will be developed further below.

- a. His version of what constitutes a "*cost*" approach is at odds with the financial literature, which has a very different formulation of what constitutes a "*cost*" approach.
- b. His version of a "*cost*" approach does not provide a fair market valuation of an asset, such that a willing seller and willing buyer would transact at that price, and therefore does not perform the quantum exercise he admits he is supposed to have performed.
- c. His only attempt at providing support for the use of the "*cost*" approach is based on the HVS report, which actually uses an income approach to value the asset, not a cost approach (but Mr Hart's selective quotations from the HVS report in his Supplemental Report disguise this fact).

- d. In any event, the cost approach considered in the HVS report is an entirely different exercise from Mr Hart's "*cost*" approach, further demonstrating the flaws in his analysis.
 - e. Clearly, the most appropriate asset valuation of a real-estate project must have, as its basis, a recent appraisal of the property, by a qualified appraiser (to which further value may then be added).
674. Mr Hart argues that his "*cost*" approach is a derivation of the asset approach to valuation, saying that it is "*commonly used for real estate valuations*".⁵⁷⁹ As he frankly admitted in cross-examination, he has no evidence or support for this proposition, which must therefore be discounted by the Tribunal.⁵⁸⁰
675. Mr Hart's attempts to justify his use of the cost approach by citing the Litigation Services Handbook definition of "*cost approach*". He correctly quotes the definition: "*a general way of determining a value indication of an individual asset by quantifying the amount of money required to replace the future service capability of that asset.*"⁵⁸¹ Having correctly identified the definition, however, Mr Hart then proceeds to perform a completely different exercise. Instead of assessing the amount of money required to replace the future service capability of the Las Olas Project in May 2011, he simply adds up the sums spent by the Claimants on the Project (and even this figure he, with no justification, arbitrarily reduces to around US\$3.5 million from the US\$8.7 million actually spent).
676. This is simply not the appropriate methodology: it is quite clear that the historic sums spent do not necessarily bear any relation to the sums required to replace the future service capability of the asset as at May 2011. For a start, it is clear that the cost to purchase the physical land, with construction permits and partial infrastructure works in May 2011 would not be the sum paid for the

⁵⁷⁹ See Timothy Hart Second Expert Report, para. 217.

⁵⁸⁰ English Transcript 2324:12.

⁵⁸¹ See Exhibit CRED-13.

bare land in 2002 plus costs (which is what Mr Hart's methodology supposes). Rather, as Dr Abdala noted, in a real estate context, for a true cost valuation the value of the land must be assessed at its highest and best use. In this case, the highest and best use is the successful operation of the Las Olas Project. It is therefore quite obvious that a market appraisal would be required to assess the market value of the Project:

2 implementation is completely off. He defines the cost
3 approach as the actual amount spent on the project to
4 date. And those are completely two different
5 concepts.

6 What I have shown you here in the left-hand is
7 the definition that Shannon Pratt gives, which is
8 exactly the same concept as the Litigation Service
9 Handbook. It's a replacement value of the asset. And
10 in particular, when you're dealing with land, you have
11 to be aware that the value of the land is to be
12 assessed at its highest and best use, and it's to be
13 added to the replacement cost of the improvements.

14 None of this is present in Mr. Hart's
15 so-called cost base approach. If he had really
16 followed the cost base approach, he would have had to
17 use the value of the land based on comparable market
18 prices plus the replacement value of the improvements,
19 which is basically what Mr. Calderón has done. But
20 none of that is present in his valuation.

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677. This is confirmed by Dr Shannon Pratt, when he notes that “*in fact, accounting book value is not a business valuation method at all. The values presented on the cost-based balance sheet are usually not representative of a current economic value for business purposes.*”⁵⁸³

⁵⁸² English Transcript, 2132:2-20.

⁵⁸³ See Exhibit CLEX-093, page 352, cited in Abdala 2, para. 109.

678. In fact, Mr Hart later admitted this in cross-examination, making the point that a comparable-based approach would be the better approach in a real-estate context.⁵⁸⁴ When it was pointed out to Mr Hart that Mr Calderon had indeed prepared a comparables-based valuation of the project,⁵⁸⁵ Mr Hart tried to argue that this valuation was invalid because, although Mr Calderon had looked at comparables, “*he applies [the comparables] to the property as designed by Claimants.*”
679. Mr Hart’s complaint is that Mr Calderon’s appraisal was tied into the Claimants’ Business Plan of December 2010. However, as was clear from the cross-examination, this is simply not the case. In fact, the only reference to the Claimants’ overall plans which has any relevance to Mr Calderon’s appraisal is the 2008 master site plan; the appraisal does not rely in any way on the 2010 Business Plan. This is amply illustrated by the fact that Mr Calderon’s appraisal pre-dates the December 2010 Business Plan by over a year. Mr Hart attempted to sidestep this point by saying that the appraisal is tied to the site plan, and the site plan underlies the Business Plan. Of course, this is not the same thing at all, and demonstrates again Mr Hart’s misleading evidence to the Tribunal.
680. It is abundantly clear that a historic costs valuation can never arrive at a “*fair market value*” for a project such as the Las Olas Project. By definition, such a valuation does not even look at the market for the asset in question, or what price a willing buyer and willing seller would agree.
681. Mr Hart attempted to ameliorate the lack of evidence supporting the use of his “*cost*” approach by claiming that the HVS hotel valuation exhibited by Dr Abdala supported the use of a cost approach.⁵⁸⁶ Mr Hart quotes the HVS report as saying that a cost estimate “*is considered applicable to our appraisal*

⁵⁸⁴ English Transcript, 2328:9-18.

⁵⁸⁵ See Exhibit CLEX-70, page 32 of 53; and English Transcript 2330:18 – 2333:11.

⁵⁸⁶ English Transcript 2336:3-8.

analysis”⁵⁸⁷ which is an accurate quote. However, two pages later, HVS confirms that it has actually applied the income approach to this pre-operational asset, not the cost approach: “*Careful consideration has been given to the strengths and weaknesses of the three approaches to value discussed above. In recognition of the purpose of this appraisal, we have given primary weight to the value indicated by the income capitalization approach.*”⁵⁸⁸

682. Incredibly, when it was put to him that in circumstances where the authors of the HVS report found that both income and cost approaches could apply, but that they preferred the income approach, claiming that this report endorses the cost approach “*is being selective, at best*”, Mr Hart merely said “*I don’t think so.*”⁵⁸⁹

683. In fact, the HVS report goes further and concludes that the income approach is the approach real-world buyers use (bear in mind the HVS report is a valuation of a pre-operational hotel which had not yet been built): “*our nationwide experience indicates that the procedures used in estimating market value by the income capitalization approach are comparable to those employed by the hotel investors who constitute the market place. For this reason, we believe that the income capitalization approach produces the most supportable value estimate, and it is given the greatest weight in our final estimate of the subject property’s market value.*”⁵⁹⁰

684. Indeed, when the HVS report refers to the “*cost approach*”, it is not the same cost approach for which Mr Hart advocates in this case. The HVS report defines the cost approach as “*a set of procedures through which a value indication is derived for the fee simple interest in a property by estimating the current cost to construct a reproduction of, or replacement for, the existing structure; deducting accrued depreciation from the reproduction or replacement cost; and adding the estimated land value plus an entrepreneurial*

⁵⁸⁷ See Timothy Hart Second Expert Report, para. 225; and CLEX-069, page 129.

⁵⁸⁸ See CLEX-069, page 131.

⁵⁸⁹ English Transcript, 2338:16-22.

⁵⁹⁰ See CLEX-069, page 130.

profit. Adjustments may then be made to the indicated fee simple value of the subject property to reflect the value of the property interest being appraised.” (emphasis added). This is a world away from Mr Hart’s approach which is to add up historic sums spent.

3. Mr Hart’s criticisms of Dr Abdala’s assumptions are baseless

685. A pervasive theme in Mr Hart’s oral testimony was the argument that the market in May 2011 was “*dead*”, that Mr Aven’s letter of 12 December 2010 confirmed this and that the Project was a “*failure*” because it was unable to generate any sales of lots before the Respondent shut down the project in May 2011. These characterizations by Mr Hart have no basis in reality.
686. Far from being an acknowledgement that the Project could not sell lots, and that the market was “*dead*”, Mr Aven’s December 2010 letter⁵⁹¹ in fact says the opposite, and notes the significant number of potential sales which were lined up at that stage. Mr Hart’s propensity for selective quotations again results in a characterization of the situation which is completely at odds with the documentary record.
687. The Claimants invite the Tribunal to read the entirety of Mr Aven’s letter carefully. In summary, he describes the position as follows:
- a. The market in Costa Rica had been difficult in 2010, but that Las Olas sales had been good because Las Olas was one of the only projects active at that time and therefore had an inherent headstart on any competition. Mr Aven noted that the market was looking very promising for 2011 and demand was high:

Real Estate sales experts, representatives from international sales organizations, and local brokers are starting to appear here at our offices too, and are telling us what they can do for us now since they see we are progressing nicely while other deals are at a standstill. If we are approached by a major real-estate marketing

⁵⁹¹ See Exhibit C-98.

firm and they want to sell our lots and homes for us for a commission, GREAT we'll be glad to work with them. The thing is this, as the development continues to increase so will the interest of buyers who see things are happening and will want to come onboard. At that point we will start increasing the price on our lot and home packages incrementally as inventory depletes. We anticipate to be sold out by 2013 of our lot and home packages.⁵⁹²

- b. All buyers up to this point had been, effectively, buyers of raw land because the construction permits were not obtained until September 2010, shortly before Mr Aven's letter. Rather than, as Mr Hart alleged, acknowledging that the project was still raw land and should be treated as such, Mr Aven was noting that the fact development had now been able to commence (with infrastructure works going in and the first house being built) meant that demand and sales would only increase:

The buyers that have the vision and have stepped up to the plate and bought while it was raw land did so because they had faith in the developers and the development. Now people are seeing the infrastructure going in, the main roads being cut out in the development, storm drains being put in, easements being put in, a house under construction and more and more momentum. The buyers who bought one lot before are now buying another since they are getting more and more excited about the development coming into fruition. With each additional improvement the property's perceived viability is increased exponentially in our buyers' minds, and to potential buyers who are constantly stopping in at our sales office. So 2011 sales will be much greater than 2010.⁵⁹³

- c. There was a significant number of interested prospective purchasers even in December 2010:

There are also a number of very hot buyer prospects which I believe will turn into sales in the next 30 to 60 days. These are prospects which I have been talking to over the last year, on the phone and in emails, who are coming down to see our project and look to buy a lot and home package this high season 2011. There are at least 15 of these. Also, our buyers are sending us prospects, and the latest buyer Terry Phillips who is a builder from Victoria

⁵⁹² See Exhibit C-98, page 3.

⁵⁹³ See Exhibit C-98, page 3.

*has at least 2 other builder buddies he is turning on to our deal. He feels confident they will be buying from us.*⁵⁹⁴

*once the market sees houses going up there will be increased interest and sales velocity. (Some 50 of my buyer prospects who I am in touch with regularly tell me that this is all they are waiting for before they buy. They want to see construction progress. Then they will jump into the deal.*⁵⁹⁵

- d. Demand would further increase once the beach front construction began, which was expected to be in 2011: *“We have construction plans for the beach front and hope to have the SETENA Environmental permit in 2011 and look to start construction on the beach front units, which will increase project unit demand substantially.”*⁵⁹⁶
- e. The sales and marketing effort in 2010 had been minimal, as the first year of operations after the financial crisis (and in circumstances where no construction permits had yet been obtained) and was to be increased for 2011:

*The construction permits were issued in September of 2010 and the infrastructure work is under way. Jovan Damjanac, who is the sales and marketing director, is doing a great job and has a good momentum going and there is a lot of more interest now that people see we are working on the infrastructure. We look forward to a much bigger 2011 as we continue to build the Las Olas Development.*⁵⁹⁷

*So, as we see from the above figures, in about one year’s time, with no more than a one man effort, and with nothing built here yet, we have closed on \$875,000 in sales, and taken deposits on another \$387,000 in sales which should closed in the next few months. That is a total of \$1,262,000 in lot sales alone, and we are just getting started.*⁵⁹⁸

In closing, we have had a very good initial first year here at Las Olas in 2010 with a minimum of sales effort. That is, we only had

⁵⁹⁴ See Exhibit C-98, page 2.

⁵⁹⁵ See Exhibit C-98, page 2.

⁵⁹⁶ See Exhibit C-98, page 3.

⁵⁹⁷ See Exhibit C-98, page 1.

⁵⁹⁸ See Exhibit C-98, page 2.

*on sale person, Jovan Damjanac. We plan to increase the sales force as well as the sale and marketing budget.*⁵⁹⁹

688. It is simply not the case, as Mr Hart argues, that the Las Olas Project was unable to sell any lots. Construction permits were only issued in September 2010, and so construction had only just started by the date of valuation in May 2011. Whilst good progress had been made before the Respondent shut down the site, it is not surprising that potential purchasers would have wanted to wait until construction began to take shape before purchasing lots. From a standing start in January 2010, with no real construction having started, 23 lots had been sold or reserved by payment of a deposit in less than a year.⁶⁰⁰ It is clear from Mr Aven's letter that there was a significant number of purchasers lined up to increase sales in 2011, that real estate agents were interested in selling lots and homes from the Project, and that the sales force and budget was to be increased for the following year.
689. This, again, is a far cry from Mr Hart's assertion that the Project could not sell lots and that Mr Aven's letter proves the market was dead.
690. Linked to this issue is another theme in Mr Hart's testimony, which is the argument that the 2010 Business Plan is somehow defective, due to (he argues) the Claimants' lack of experience or expertise in resort development, and that it "*failed*" because the Claimants couldn't sell lots under that Business Plan.
691. First, it should be noted that the 2010 Business Plan was put together largely by Mr Damjanac, who has over 30 years of experience in "*residential, commercial, and resort real estate appraisal, development, and sales, as well as in business sales, retail sales, time-share sales and mortgage financing.*"⁶⁰¹ He described that experience and his expertise in detail in his witness

⁵⁹⁹ See Exhibit C-98, page 9.

⁶⁰⁰ See Exhibit C-98, pages 1 and 2.

⁶⁰¹ See Jovan Damjanac Witness Statement , para. 5.

statement,⁶⁰² and the Respondent did not challenge this expertise in its cross-examination of him.

692. Instead, the Respondent chose to put the false assertion to Dr Abdala in cross-examination that Mr Damjanac was “*someone with no experience of real estate development in Costa Rica?*”⁶⁰³ Dr Abdala disagreed, but the Respondent continued to ask questions trying to elicit the response from Dr Abdala that Mr Damjanac had no experience of Costa Rica real estate development.⁶⁰⁴ The evidence on the record, in paragraphs 5 to 37, is that Mr Damjanac does have significant experience of real estate development, including in Costa Rica (see, in particular, paragraphs 14 to 19, and 37). The Respondent had the opportunity to challenge Mr Damjanac’s evidence and chose not to do so. It is improper for the Respondent then to make assertions to Dr Abdala that assume Mr Damjanac’s evidence is false.

693. It is worth bearing in mind that Mr Damjanac is not a Claimant in this arbitration and has no interest in its outcome. His Witness Statements contain a great deal of detail about the nature and saleability of the Las Olas Project, which the Respondent has not challenged at all, and the Claimants would invite the Tribunal to review them carefully.

694. Second, as noted above, the layout and design of the site on which the 2010 Business Plan was based was the work of professional consultants, including Mussio Madrigal and Zurcher Architects, and was therefore the product of professional consideration and design.

695. Third, in paragraphs 53 to 67 of his First Witness Statement, Mr Damjanac describes in considerable detail the extensive research and investigation which lay behind the 2010 Business Plan. Again, this evidence was not challenged by

⁶⁰² See Jovan Damjanac Witness Statement , para. 5 – 21.

⁶⁰³ English Transcript, 2186:4-6.

⁶⁰⁴ English Transcript, 2168:21-2184 “*so you’re relying on a business plan written by someone who doesn’t know how to develop resorts, and that’s the basis for your calculations. And, in fact, the only experience that Mr. Damjanac refers to is relating to property in the United States, is that right?*”.

the Respondent. It is improper for the Respondent now to challenge that evidence by other means (including in its questioning of Dr Abdala).

696. In fact, throughout Dr Abdala's cross-examination, the Respondent asked numerous questions of fact which could only have been answered by Mr Damjanac or Mr Aven and so should have been put to them, not Dr Abdala. For example:

- a. The Respondent asked Dr Abdala when the 2010 Business Plan was prepared and completed. As Dr Abdala rightly pointed out, the fact the Business plan may have been printed on 20 December 2010 does not mean that is when it was prepared/completed. Only Mr Damjanac could have answered this point.⁶⁰⁵
- b. The Respondent suggested that no lot buyers could have known of the plans for the Project, other than three lot buyers who purchased after December 2010 and before May 2011. First, the Master Site Plan had been in existence since at least September 2008, so the layout of the site was well known well before December 2010. Second, Dr Abdala is, of course, in no position to know what Mr Damjanac and Mr Aven were saying to buyers about the plans for the Project. Mr Damjanac's unchallenged evidence, in his First Witness Statement, is that he and Mr Aven were discussing the plans for the project from as early as 2008. Naturally, Mr Damajanc and Mr Aven would have been also discussing these plans with potential purchasers, in order that those purchasers would know what the Project was to be. By way of example, Mr Aven's March 2008 investor summary refers to the plans for: lot sales, construction of homes, a mortgage company, re-sales, beach club membership, rentals, time share sales on the beach concession, a finance company, an HOA property management company, and a hotel on the 18,000 sq metre lot.⁶⁰⁶ These were not new concepts, pulled out of thin air in December 2010 and

⁶⁰⁵ English Transcript, 2194:14 – 2195:22.

⁶⁰⁶ See Exhibit C-46, pages 3, 6 and 8-10.

designed to “*bait and switch*” people who had already purchased properties as Mr Hart alleges.⁶⁰⁷ They had been around for years, and it is obvious that Mr Damjanac and Mr Aven must have described these to potential purchasers. If the Respondent wanted to raise questions on this matter, they ought to have put them to Mr Damjanac and Mr Aven, not made baseless assertions to Dr Abdala.⁶⁰⁸

- c. The Respondent asked Dr Abdala whether any potential purchaser had approached Mr Aven/the Las Olas Project, about the possibility of purchasing the Project.⁶⁰⁹ This was not a question put to Mr Damjanac or Mr Aven, the two people most likely to know the answer to that question of fact.

697. During his oral testimony, Mr Hart repeatedly criticized the comparables used by Mr Calderon in his appraisal and Dr Abdala when deriving lot, house and rental prices. The crux of his complaint appears to be that Mr Calderon and Dr Abdala used comparables from outside the Las Olas Project, while his view was that the relevant comparables are the Las Olas lots which had already sold: *“the comparable value, as has been established here, is what did the lot next door sell for? I mean, is someone really going to move in and say, great, I paid - - I paid three times - - or, you know - - what the guy next door paid for my lot? That’s not the - - I mean, real estate is very localized in terms of values in neighborhoods. So the fact that Las Olas was selling the - - the plots closest to the beach for \$93 on average per square meter in 2010 is much more telling than what was sold somewhere else with an actual real development with actual, probably real financing, and a real chance of survival.”*⁶¹⁰

698. This is patently absurd. If Dr Abdala had suggested using Las Olas as its own comparable, Mr Hart would have severely criticized that as not representing the market. The Las Olas lots were not competing with each other for buyers,

⁶⁰⁷ See Timothy Hart Second Expert Report, para. 39.

⁶⁰⁸ English Transcript, 21989:5-16.

⁶⁰⁹ English Transcript, 2179:12-19.

⁶¹⁰ English Transcript, 2307:15 – 2308:5.

but with other similar lots in similar locations. It is these other lots which provide the market for Las Olas lots, and it is exactly these lots that Dr Abdala and Mr Calderon analysed.

699. It is instructive to note, however, that adjusting the average lot sale to \$93 per square metre, as Mr Hart suggests,⁶¹¹ would in fact result in a valuation as at May 2011 of \$55 million – still a figure which is significantly higher than Mr Hart’s valuation.

O. Interest

700. The only dispute between the parties is in respect of the applicable interest rate. Mr Hart advocates for the “*risk free*” rate – 10-year U.S. Treasury bonds. The mere mention of the fact that such bonds are regularly used to determine the risk free rate for the purposes of the discount rate in a DCF calculation shows very clearly that it is not an appropriate interest rate to be applied to an award of damages. It is uncontroversial that an award of interest is designed to compensate a party from having been kept out of money to which it was entitled and has therefore been unable to use that money to generate income. Applying the risk free rate does not achieve that aim, since it awards essentially the lowest possible rate.

⁶¹¹ This, as Dr Abdala noted in response to a question from Mr Siqueiros, not an appropriate adjustment: “*No. Your observation is correct, but let’s distinguish the two periods: Pre-May and Post-May. I mean, all of the values that you see post-May are - - are really very low, but they are implicit that you cannot construct or you cannot develop because there’s already an order. So you should be disregarding those for market price purposes, and - - but if you look at the prices pre-May 2011, it’s true that on average, the per square meter is around 143, which is lower than the 186 that I find as of May 2011. And my understanding is that this is normal for presales, that you would be discounting in order to get attraction to the - - to the sales. [as is confirmed by Mr Aven’s testimony in this arbitration] So, you would be selling to those who are there to buy very early on, even before the permits are in place, so that they can have the - - some of the benefits of the uprise in prices in value once you’re completing the permitting process and once you start deploying the construction of the infrastructure. So, one of the uncertainties that those who buy very early on have is the timing as to when the project will really look like a resort development so that they can start constructing their houses or moving in with their condos. And that is the - - kind of the risk that you see in lower prices. I mean, in order for them to be attractive for early sales, you have to sell at relatively lower prices.*” English Transcript, 2239:15 – 2240:12.

701. The DR-CAFTA provides that in the case of a lawful expropriation, interest is to be paid at a “*commercially reasonable rate*”.⁶¹² Whilst this case is not concerned with a lawful expropriation, it should be uncontroversial that the interest paid in respect of unlawful breaches of the DR-CAFTA should not be any less than that to be paid in respect of a lawful expropriation. The risk-free rate, for the reasons set out above, simply is not a commercially reasonable rate, and so Mr Hart’s proposal does not accord with the requirements imposed by the DR-CAFTA.
702. Dr Abdala’s approach is to assess the interest rate which matches the characteristics of the asset the Claimants have lost as a result of Costa Rica’s actions. This is a commercially reasonable rate, because it is reasonable to assume that the Claimants, faced with the destruction of their investment, would have used funds paid out at that time to replicate (as far as possible) the investment they lost.

P. Moral damages

703. The issue of moral damages was also not addressed in much detail during the hearings, but it is an important part of the Claimants’ case. The Reply Memorial considered in detail the justifications for Mr Aven’s claim for moral damages, and the Claimants invite the Tribunal to re-read that section of the Reply carefully.⁶¹³ In short, Mr Aven has suffered enormously from the actions of the Costa Rican authorities. Mr Aven dreamt of building a life in Costa Rica, with a successful development at Las Olas. Instead, he has been extorted for bribes, prosecuted on the basis of incredibly flimsy evidence which is contradicted by reports from Government agencies, accused of forgery (which accusation was swiftly dropped when it came to court), received threatening emails, been shot at, been subjected to an artificially created mistrial, and finally been placed on the INTERPOL Red List.

⁶¹² DR-CAFTA, Article 10.7.3

⁶¹³ See Claimants’ Reply Memorial, Section IV.D(2).

704. This final move was clearly taken with no motive other than vindictively to increase the psychological pressure on Mr Aven. The INTERPOL system is not intended to be used for these types of crime. That the INTERPOL system was being abused by Costa Rica is clear from the fact that the entry was quietly removed in 2015 (but not before it had serious consequences from Mr Aven's future ability to carry on business, as described in the Memorial and Reply Memorial).
705. It is clear that the Costa Rican authorities have targeted and harassed Mr Aven, over and above their unlawful treatment of the Claimants' investment. He has borne the brunt of being the face of the Las Olas Project, and has suffered significantly as the certificates from his doctor, his witness statements and the unchallenged witness statement of Mr Valecourt prove. That damage is both general in nature and specific, in that the unchallenged evidence shows that Mr Aven lost, as a direct consequence of the INTERPOL Red Notice, a superb commercial opportunity with Google.
706. Mr Aven's treatment by the Costa Rican authorities, and the campaign of harassment against him, has been exhausting and debilitating for him. He has lost business opportunities, and will continue to do so as a result of the stain the Red Notice leaves permanently on his record. Costa Rica's Rejoinder Memorial argues, essentially, that Mr Aven brought his problems on himself by committing illegal acts. This argument is founded on the erroneous assumption and circular argument that Mr Aven did commit a crime, an assertion which has not been proved (clearly the presumption of innocence does not apply in Costa Rica, which explains the disproportionate and capricious attitude taken to Mr Aven and the Las Olas project by the Costa Rican authorities) but which is, as Mr Aven's aborted trial showed, clearly false. Moreover, however, it ignores the clear evidence of disproportionate and unreasonable actions taken by the Costa Rican authorities, at the behest of a unhappy neighbour, to destroy Mr Aven's life in the country, which culminated in the manipulation of his trial and the Red Notice.

707. Costa Rica's actions, as directed towards Mr Aven, go far beyond the actions necessary to protect the environment and are, under any definition, "*exceptional*". This is not simply a case of the authorities having targeted the Claimants' investment for unlawful treatment, and the financial repercussions for the Claimants, as serious as these issues may be. The Costa Rican authorities have also acted, and refrained from acting, in ways which have created an environment in which Mr Aven could be targeted with hate mail and by gunmen with impunity and be the victim of a coordinated attack by local Costa Rican agencies, working in concert with a disgruntled neighbour. He has been subject to baseless criminal proceedings, conducted unreasonably, vexatiously and completely disproportionately to the alleged environmental concerns at the time.
708. As a result, he now suffers medically, as attested to by his doctor, and in his business life since the Red Notice has affected his ability to take on new projects. He has seen his family's inheritance taken away by Costa Rica's actions, and has been reduced to selling off the Las Olas land at a fraction of its value in order to generate what little mitigation he can for him, his family and his friends. Since the shutdown of the project, Mr Aven has had to continue dealing with continuous problems with the Las Olas property, including the issue surrounding the squatters which was addressed in the Reply Memorial.⁶¹⁴ This was not a corporate investment, in respect of which the driving force, Mr Aven, had merely a financial interest. He invested his whole life in the project, moving to Costa Rica and hoping to enjoy the fruits of his hard work and dedication. Instead, he has been singled out and targeted by the Costa Rican authorities, who adopted measures against him personally in circumstances where they should have been targeting the permits granted by their own sister agencies.

⁶¹⁴ See Claimants' Reply Memorial, Section III.B.(2)(c).

709. In the circumstances, there is no doubt that Mr Aven meets the test for an award of moral damages, and he maintains his claim for US\$5,000,000 in that regard.
710. One issue which was not addressed in any real detail during the February Hearing is the question of pre-judgment interest. The Respondent does not dispute that, if the Claimants are awarded damages as of May 2011, the Respondent ought also to pay interest on those damages from May 2011 until payment of the Award.

Q. Consequential damages

711. It must be remembered that Mr Aven and the Las Olas Project sold lots to buyers on the basis that the Project would proceed. But for Costa Rica's shut down of the Project, these buyers would have gone on to own holiday, investment or retirement homes on the Costa Rican coastline. Now, as a direct result of Costa Rica's actions and through no fault of the Claimants, the purchasers have been left with worthless plots of land with no hope of the infrastructure, and the Project to which they signed up, being completed.
712. As Mr Aven confirmed in his evidence in the December hearing, these buyers have made claims against the Project, and the Project is liable to repay \$2.7 million to buyers and investors who purchased lots and options. These figures are set out in the table on page 10 of Mr Aven's First Witness Statement.
713. As a result, a damages award in this case must include a further sum of \$2.7 million, on top of the damages calculated by Dr Abdala, to compensate the Claimants for the money they will have to pay back to their buyers.

XII. CONCLUSION AND REQUEST FOR RELIEF

714. In summary, the Claimants refer to the requests for relief set out in the Memorial and the Reply Memorial, and repeat and maintain those requests for relief here save for the following adjustments:

- a. in respect of paragraph (5) of the request for relief contained in the Reply Memorial, the Claimants respectfully request that the Respondent be ordered to pay damages in the sum of US\$66,500,000, plus interest (and less sales revenue after May 2011) up to the date of the award calculated by Dr Abdala to make a total of US\$ 95,400,000 at February 7, 2017, or such other sum as the Tribunal may find owing in respect of the value of the Las Olas Project.

- b. in respect of paragraph (8) of the request for relief contained in the Reply Memorial, the Claimants note that the request for interest should (i) include a request for such interest from February 8, 2017 until the date of the Award; and (ii) be based on the combined land and WACC rate calculated by Dr Abdala, rather than simply the WACC.⁶¹⁵

Respectfully submitted on March 13, 2017



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⁶¹⁵ Paragraph (8) of the request for relief contained in the Reply Memorial requested interest at the WACC calculated by Dr Abdala. However, Dr Abdala’s Supplemental Report contained a modified interest calculation at a “combined land and WACC” rate (see paragraph 10 of Dr Abdala’s Supplemental Report). The Claimants update their request for relief to reflect Dr Abdala’s modified combined land and WACC rate.