

**IN AN ARBITRATION UNDER CHAPTER TEN OF THE DR-CAFTA AND THE
UNCITRAL ARBITRATION RULES (2010)**

between

DAVID AVEN ET AL.

Claimants

and

THE REPUBLIC OF COSTA RICA

Respondent

Case No. UNCT/15/3

FINAL AWARD

Members of the Tribunal

Eduardo Siqueiros T., Presiding Arbitrator
C. Mark Baker, Arbitrator
Pedro Nikken, Arbitrator

Secretary of the Tribunal

Francisco Grob, ICSID

Place of Arbitration: London, United Kingdom
Date of dispatch to the Parties: September 18, 2018

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LIST OF DEFINED TERMS

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| 2008 Environmental Viability Permit | SETENA Environmental Viability for Condominium Section (Resolution No. 1597-2008-SETENA) |
| 2008 SINAC Report | Report issued after an inspection to the Condo Section of the Las Olas project on September 30, 2008, identifying the existence of possible wetlands |
| 2011 Injunction | Injunction issued on November 30, 2011 by the Criminal Court at Parrita against continuance of works, and ordered the Municipality to stop any construction permit on designated lots |
| ACOPAC | <i>Area de Conservación Pacífico Central</i> – a regional branch of SINAC |
| Biodiversity Convention | Convention on Biological Diversity, signed by 150 government leaders at the 1992 Rio Earth Summit, dedicated to the promotion of sustainable development |
| BIT | Bilateral Investment Treaty |
| Claimants or Investors | Mr. David Richard Aven, Mr. Samuel Donald Aven, Ms. Carolyn Jean Park, Mr. Eric Allan Park, Mr. Jeffrey Scott Shioleno, Mr. David Alan Janney, and Mr. Roger Raguso |
| Claimants’ Post-Hearing Brief | Claimants’ Post-Hearing Brief dated March 13, 2017 |
| COMEX | Ministry of Foreign Trade of the Republic of Costa Rica |
| Concession | The right to use the beach area in front of the property owned by La Canícula, S.A., approved by the Costa Rica Ministry of Tourism |
| Concession Site | The land that formed part of the maritime zone and that was the subject of the Concession, where the beach club would be located, with direct access to the ocean and luxury hotel rooms and common area facilities to which all residents of Las Olas would have access |
| Condo Section | The main part of the Las Olas Project that would comprise 288 individual lots on which condominiums would be built |

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| Costa Rica or the Respondent | The Republic of Costa Rica |
| Respondent's Counter-Memorial | Respondent's Counter-Memorial on the Merits dated April 8, 2016 |
| D1 Application | An application to secure an Environmental Viability to be filled-out by a person interested in developing a real estate project with the characteristics of the development. |
| DCF | Discounted Cash Flow |
| December Hearing | Hearing on Jurisdiction and the Merits held from December 5-12, 2016 |
| DEPPAT | DEPPAT, S.A. a Costa Rican private environmental consultancy company |
| DR-CAFTA or the Treaty | Dominican Republic-Central America Free Trade Agreement which entered into force in 2006 for the United States and in 2009 for the Republic of Costa Rica |
| Easements Section | Land on the western side of the Las Olas Project, to which access would be gained via nine easements that would run into the site from the main road to the west of the property, containing a total of 72 residential lots |
| Enterprises | Las Olas Lapas Uno, S.R.L.; Mis Mejores Años Vividos, S.A. (formerly Caminos de Esterillos, S.A., Amaneceres de Esterillos, S.A., Noches de Esterillos, S.A., Lomas de Esterillos, S.A., Atardeceres Cálidos de Esterillos Oeste, S.A., Jardines de Esterillos, S.A., Paisajes de Esterillos, S.A. and Altos de Esterillos, S.A.); La Estación de Esterillos, S.A. (formerly Iguanas de Esterillos, S.A.); Bosques Lindos de Esterillos Oeste, S.A.; Montes Development Group, S.A.; Cerros de Esterillos del Oeste, S.A.; Inversiones Cotsco C & T, S.A.; and Trio International Inc. |
| Environmental Organic Law (Law 7554) | Ley Orgánica del Ambiente – Ley No. 7554 |
| Environmental Regent | The professional tasked with ensuring that the works undertaken by a developer do not impact the environment. This position is contemplated and mandated under the Environmental Organic Law |

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| Environmental Viability Permit or “EV” or “EV Permit” | A permit issued by SETENA that examines and approves the feasibility of undertaking a project after having examined the environmental impact assessment based on information incorporated into an application, and several support documents that include an engineering survey, an archeological survey, a geological survey and a biological survey |
| February Hearing | Hearing to examine the Expert Witnesses on Damages held on February 7, 2017 |
| FET | Fair and Equitable Treatment |
| FMV | Fair Market Value |
| Forestry Law (Law 7575) | Ley Forestal – Ley No. 7575 |
| Forged Document | A document purportedly issued by SINAC dated March 27, 2008 under number "SINAC 67389RNVS-2008" with the forged signatures of Gabriel Quesada Avendaño, a biologist from SINAC and Ronald Vargas, the Director of SINAC that certified that the Las Olas Project was “not a threat to biodiversity in the area”. |
| Geoambiente | Geoambiente, S.A., a private consulting firm established in Costa Rica, which prepared an environmental management plan (<i>plan de gestión ambiental</i>) for the Condo Section. |
| Geoambiente Report | The environmental management plan (<i>plan de gestión ambiental</i>) commissioned from Geoambiente, S.A., a private consulting firm established in Costa Rica, by Mussio Madrigal to be submitted as part of the D1 Application for the Condo Section. |
| Geotest | Geotest, Geólogos Consultores, the firm entrusted by Tecnocontrol, S.A. with the preparation of a geological and hydrogeological study for the Condo Section |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| INGEOFOR | INGEOFOR Ingeniería y Ambiente, S.A., a Costa Rican environmental consulting company |

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| INTA | The National Institute for Agricultural Innovation and Technology Transfer of Costa Rica (<i>Instituto Nacional de Innovación y Transferencia de Tecnología Agropecuaria</i>) |
| INTERPOL Red Notice | An INTERPOL Red Notice is a request to locate and provisionally arrest an individual pending extradition. It is issued by the General Secretariat of the International Criminal Police Organization at the request of a member country or an international tribunal based on a valid national arrest warrant. This is the request that was made by the government of Costa Rica to locate and provisionally arrest Mr. Aven. |
| Inversiones Cotsco | Inversiones Cotsco C&T, S.A., one of the enterprises used by Claimants in which responsibility for development of the villa component had been placed |
| January 2011 SINAC Report | The Report (ACOPAC-CP-003-11) dated January 3, 2011 issued by SINAC |
| KECE | Kevin Erwin Consulting Ecologist, Inc., an environmental consulting firm located in Florida, United States of America |
| La Canícula | La Canícula S.A., one of the enterprises used by Claimants in which responsibility for development of the Concession area, including hotel, had been placed |
| Claimants' Memorial | Claimants' Memorial on the Merits dated November 27, 2015 |
| MINAE (MINAET after 2008) | Ministry of the Environment, Energy, Mines and Telecommunications (<i>Ministerio del Ambiente, Energía, Minas y Telecomunicaciones</i>) |
| MIRENEM | Ministry of Natural Resources, Energy and Mines (<i>Ministerio de Industria, Energía y Minas en Ministerio de Recursos Naturales, Energía y Minas</i>) |
| Mr. Arce | Mr. Minor Arce Solano, a private forestry consultant |
| Mr. Aven | Mr. David Richard Aven |
| Mr. Briceño | Mr. Jorge Antonio Briceño Vega, Internal Auditor, Municipality of Parrita |

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| Mr. Bucelato | Mr. Steve Allen Bucelato, a neighbor of Las Olas, who filed several complaints regarding the Project |
| Mr. Damjanac | Mr. Jovan Damjanac, Sales and Marketing Director for Las Olas |
| Mr. Garro | Mr. Freddy Garro Arias, Mayor of the Municipality of Parrita during the time many of the actions relating to the Las Olas Project occurred. |
| Mr. Martínez | Mr. Luis Gerardo Martínez Zúñiga, Criminal Prosecutor, at the Deputy Environmental Agrarian Prosecutor's Office of Costa Rica |
| Mr. Morera | Mr. Néstor Morera Vazquez, a criminal attorney retained by Claimants |
| Mr. Mussio | Mr. Mauricio Martin Mussio Vargas, an architect at the firm Mussio Madrigal in Costa Rica |
| Mr. Pérez-Porras | Mr. Gavridge Pérez Porras, an attorney retained by Claimants |
| Mr. Picado | Mr. Luis Picado Cubillo, Control and Protection Coordinator of the Sub-regional Office for SINAC at Aguirre and Parrita |
| Mr. Ventura | Mr. Manuel Enrique Ventura Rodriguez, an attorney retained by Claimants |
| Ms. Díaz | Ms. Hazel Diaz, Special Advocate at <i>Defensoría de Los Habitantes</i> (Office of the Ombudsman) |
| Ms. Murillo | Ms. Paula Murillo, the personal assistant to Mr. Richard Aven in Costa Rica |
| Ms. Priscilla Vargas | Ms. Priscilla Vargas, author of the Siel Report, and examined as an expert witness on "Environmental Impact Assesment Issues for the Las Olas Project". |
| Ms. Vargas | Ms. Mónica Vargas Quesada, the Environmental Officer at the Municipality of Parrita |
| MTZ Law | Maritime Terrestrial Zone Law |
| Municipality Shutdown Notice | Order issued by the Municipality of Parrita dated May 11, 2011, ordering the cessation of future works in the |

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| | Las Olas Project site. |
| Mussio Madrigal | An architectural and engineering firm in Costa Rica engaged by Claimants in April 2007 to prepare a master site plan for the entire Las Olas Project and apply for the Environmental Viability and construction permits for the Condo Section. |
| NAFTA | North America Free Trade Agreement |
| Notice of Arbitration | Notice of Arbitration and Statement of Claim dated June 10, 2013 |
| PNH | National Wetlands Program (<i>Programa Nacional de Humedales</i>) |
| Protti Report | Geological Hydrogeological study prepared by Mr. Roberto Protti, Geotest, S.A., Geólogos Consultores, at the request of one of the firms engaged by Claimants to prepare the D1 Application for the Condo Section. The report noted and mapped the existence of a central zone in the property that presented “swamp-type flooded areas” (<i>areas anegadas de tipo pantanoso</i>) with poor draining. |
| Ramsar Convention or the Convention on Wetlands | Intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources |
| Respondent’s Rejoinder Memorial | Respondent’s Rejoinder on the Merits dated October 28, 2016 |
| Claimants’ Reply Memorial | Claimants’ Reply on the Merits dated August 5, 2016 |
| Respondent or Costa Rica | The Republic of Costa Rica |
| Respondent’s Post-Hearing Brief | Respondent’s Post-Hearing Brief dated March 13, 2017 |
| SETENA | National Technical Environmental Secretariat (<i>Secretaría Técnica Nacional Ambiental</i>), an agency of MINAET |
| SETENA April 2011 Injunction | Injunction on further work on Las Olas Project site (Resolution 839-2011-SETENA) issued by SETENA dated April 13, 2011. |

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| Siel Report | Report issued by issued by Ms. Priscilla Vargas of Siel, environmental consultants, of October 28, 2016, which is an Appendix to the Second KECE (Kevin Erwin Consulting Ecologist, Inc.) Report |
| SINAC | The National System of Conservation Areas (<i>Sistema Nacional de Áreas de Conservación</i>), an agency of MINAET |
| SINAC Injunction | Resolution number ACOPAC-CP-032-11 dated February 14, 2011 containing an injunction (<i>medida cautelar administrativa</i>) suspending all works in the Condo Section |
| SINAC January 2011 Report | Report dated January 3, 2011 (ACOPAC-CP-003-11) on the conclusions and recommendations resulting from a visit to the site on December 2010. The report concluded that the Las Olas Project site included bodies of water, that “there may be” wetlands in the Condo Section, the felling of trees, the construction of a drainage channel, and also mentioned the Forged Document. |
| SINAC May 2011 Report | Report dated May 18, 2011 (SINAC-GASP 143-11) addressed to the Prosecutor based on a site visit on May 13, 2011, concluding that a wetland area of approximately 1.35 hectares existed on the Las Olas Project; that the site’s topography had been directly affected by a drainage channel and sewage system; and that the palustrine wetland had been completely refilled by Claimants. |
| SINAC October 2011 Report | Report dated October 3, 2011 (ACOPAC-CP-129-2011-DEN) addressed to the Environmental Prosecutor whereby SINAC confirmed environmental damages and the cutting of trees |
| TAA | The Environmental Administrative Court (<i>Tribunal Ambiental Administrativo</i>), an agency of MINAET |
| TAA Injunction | The injunction issued through Resolution 421-11-TAA on April 13, 2011 whereby all works in the Condo Section that could cause any environmental damage to the alleged wetland, the felling of trees or the construction of roads were suspended. |
| Tribunal | Arbitral Tribunal constituted on August 4, 2015, |

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| | composed by Mr. Eduardo Siqueiros, Mr. C. Mark Baker and Professor Pedro Nikken |
| UNCITRAL Arbitration Rules or the Arbitration Rules | UNCITRAL Arbitration Rules, as revised in 2010 |
| United States non-disputing Party Submission | The written submission filed on December 2, 2016 by the United States of America pursuant to Article 10.20.2 of the DR-CAFTA. |
| VCLT | Vienna Convention on the Law of Treaties |
| WACC | Weighted Average Cost of Capital |
| Wildlife Protected Area or “WPA” | The areas (<i>Área Silvestre Protegida</i>) classified by Article 32 of the Environmental Organic Law, Law 7554. Their relevance is that continental and marine wetlands must be classified to be part of a WPA. |
| ZMT Law | Maritime Terrestrial Zone Law (<i>Ley sobre la Zona Marítimo Terrestre</i> or Law 6043) |

I. INTRODUCTION

A. The Parties

1. The Claimants in this arbitration are Mr. David Richard Aven, Mr. Samuel Donald Aven, Ms. Carolyn Jean Park, Mr. Eric Allan Park, Mr. Jeffrey Scott Shioleno, Mr. David Alan Janney, and Mr. Roger Raguso. Evidence was provided of the U.S. nationality of each of the Claimants (the “**Claimants**”)¹.
2. The Claimants have made claims on their own behalf and on behalf of the following enterprises incorporated in the Republic of Costa Rica: Las Olas Lapas Uno, S.R.L.; Mis Mejores Años Vividos, S.A. (formerly Caminos de Esterillos, S.A., Amaneceres de Esterillos, S.A., Noches de Esterillos, S.A., Lomas de Esterillos, S.A., Atardeceres Cálidos de Esterillos Oeste, S.A., Jardines de Esterillos, S.A., Paisajes de Esterillos, S.A. and Altos de Esterillos, S.A.); La Estación de Esterillos, S.A. (formerly Iguanas de Esterillos, S.A.); Bosques Lindos de Esterillos Oeste, S.A.; Montes Development Group, S.A.; Cerros de Esterillos del Oeste, S.A.; Inversiones Cotsco C & T, S.A.; and Trio International Inc (the “**Enterprises**”).
3. The Respondent is the Republic of Costa Rica (“**Costa Rica**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).

B. Overview

5. The Claimants have submitted this dispute to arbitration pursuant to Chapter Ten of the Dominican Republic-Central America Free Trade Agreement (“**DR-CAFTA**”), which became effective in 2006 for the United States and in 2009 for the Republic of Costa Rica, and the UNCITRAL Arbitration Rules, as revised in 2010 (the “**UNCITRAL Arbitration Rules**” or the “**Arbitration Rules**”). As agreed by the Parties, the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) serves as the administering authority for this proceeding.

¹ Mr. Giacomo Anthony Buscemi was one of the originally named claimants in the Notice of Arbitration. By agreement dated August 3, 2014, he transferred his interest in the Las Olas Project to Mr. David Aven. As of that date, he is no longer a claimant in this arbitration (Exhibit C-168).

6. This dispute arises from an investment made by the Claimants through several commercial entities established in accordance with the laws of Costa Rica which own (or owned at the time of the submission of claims) several parcels of land comprising approximately 37 hectares on the Central Pacific Coast, as well as a concession site, that integrate a tourism project that they intended to develop to be known as “**Las Olas Project**”. Claimants have alleged that they received in due course all requisite municipal and national government permits and approvals, including environmental viability and construction permits, and thus commenced the development of the project, as well as sales and marketing activities. Claimants then allege, completely and unexpectedly, and on the basis of unsupported complaints by neighbors to the site, that the Costa Rican authorities began new inspections and identified alleged wetlands and forest grounds within the project site; issued administrative and judicial actions that shut down the project, thereby breaching Costa Rica’s obligations under the DR-CAFTA and resulting in the complete destruction of the Claimants’ investment.
7. One of the Claimants, Mr. David R. Aven, has also claimed that he was unjustly subjected to prosecution by unfounded claims that he violated the environmental laws of Costa Rica, and was further wrongfully made the subject of an INTERPOL Red Notice that has seriously affected his reputation and standing in the community.
8. The Respondent has argued that the protection of the environment is a key governmental policy, which has been acknowledged under DR-CAFTA, and that the rights of investment protection granted to investors under the Treaty may be subordinated to the protection of the environment. Additionally, the Respondent argues that all of its actions taken in respect to the Las Olas Project are entirely supported under applicable local laws. Finally, Respondent has challenged the right of the Investors to bring the claim based on jurisdictional grounds, alleging issues of nationality of the key Investor, lack of ownership and illegal ownership of properties by the Claimants.

II. JURISDICTION: CONSENT OF THE PARTIES TO ARBITRATION

A. Jurisdiction *Ratione Voluntatis*

9. By submitting their claims to arbitration, and waiving their rights to seek compensation for the alleged DR-CAFTA breaches in other *fora*, the Claimants have consented to arbitration. Respondent's consent, on the other hand, is provided in DR-CAFTA Article 10.17. Accordingly, jurisdiction *ratione voluntatis* exists².

B. Jurisdiction *Ratione Personae*

10. Claimants have alleged that jurisdiction *ratione personae* exists because all Claimants are nationals of the United States of America, thereby qualifying as "investors of a Party," as defined in DR-CAFTA Article 10.28³. Respondent, on the other hand, has challenged the standing of Mr. Aven to bring the claim because it claims that he should be deemed to be a national of Italy.

C. Jurisdiction *Ratione Materiae*

11. Claimants argue that each Claimant indirectly owns assets, in the form of property rights in land, towards which he or she has committed capital with an expectation of gain, consistent with the subparagraph (g) definition of "investment" under DR-CAFTA Article 10.28(h). The governmental measures taken and which are described relate directly to these investments, consistent with the terms of Article 10.1 of the DR-CAFTA. Accordingly, the Tribunal possesses jurisdiction *ratione materiae* to adjudicate the Claimants' claims⁴.

D. Jurisdiction *Ratione Temporis*

12. As between U.S. investors and Costa Rica, the DR-CAFTA came into force on January 1, 2009. DR-CAFTA Chapter 10 applies to measures adopted or maintained in relation to all "covered investments." The only temporal limitation on covered investments is that they must have existed on or after the date upon which the Agreement came into force.

² Consistent with the terms of Articles 10.16 and 10.18, the Claimants provided written consent to the arbitration on or about January 24, 2014, with submission of the Notice of Arbitration, along with the submission of waivers executed by the Claimants and by the enterprises they owned and/or controlled.

³ Claimants' Memorial, ¶ 261, page 82.

⁴ *Id.*, ¶ 262, page 82.

Claimants have stated that all investments claimed in the arbitration satisfy this requirement. In addition, all of the measures at issue were adopted or maintained after January 1, 1999⁵.

13. Further, arbitration was commenced within three years of the date upon which the Claimants acquired, or should have acquired, knowledge of the breaches alleged herein, and the losses flowing therefrom, consistent with the terms of DR-CAFTA Article 10.16(3)⁶.
14. Finally, Claimants have identified that arbitration was not commenced until more than six months had passed, since the events giving rise to their claims, consistent with the terms of DR-CAFTA Article 10.16(3). In addition, this arbitration was commenced more than ninety days after the Claimants had submitted their Notice of Intent, on September 17, 2013, consistent with the terms of DR-CAFTA Article 10.16(2).
15. Respondent initially challenged the jurisdiction of the Tribunal on the basis of (i) the effective and dominant citizenship of Mr. David R. Aven and (ii) the misconduct of Claimants with respect to their investment, barring Claimants from any protection under DR-CAFTA⁷. Subsequently, the position of Respondent has evolved to also include a lack of jurisdiction over (iii) properties that Claimants do not own in the Las Olas Project, (iv) over the Concession site, and re-characterized the misconduct as an issue of inadmissibility of the claims based on: (a) the unlawful and illegal conduct in the operation of their investment, and (b) the fact that Claimants have not put forward a claim for full protection and security, while further arguing that Claimants have brought claims that are not supported under Article 10.5 of DR-CAFTA⁸.
16. Respondent has not challenged the other tests of jurisdiction *Ratione Voluntatis*, *Ratione Personae* (in respect of the Claimants other than Mr. Aven), *Ratione Materiae* or *Ratione Temporis*.
17. The challenges to the jurisdiction of the Tribunal shall be examined by the Tribunal in Section VIII below.

⁵ Id., ¶ 263, page 82.

⁶ Id., ¶ 264, page 82.

⁷ Respondent's Counter-Memorial, ¶ 256-432, pages 65-107.

⁸ Respondent's Post-Hearing Brief, ¶ 595-760, pages 121-156.

III. LAW APPLICABLE TO THE ARBITRATION

18. The Claimants submitted their claim pursuant to Article 10.16.1(a)(i)(A) DR-CAFTA, which provides that the claimant, as a disputing party, on its own behalf, may submit to arbitration a claim that the respondent has breached an obligation under Section A of Chapter Ten, provided that the Claimant “has incurred loss or damage by reason of, or arising out of, that breach”. Although Article 10.16.3 allows the claimant to bring the claim under the ICSID Convention, the ICSID Additional Facility Rules (depending on whether or not the respondent or the country of which the claimant is a national are Parties to the ICSID Convention) or under the UNCITRAL Rules of Arbitration of 1976, Claimants elected to submit their claim under the latter. Thus, when Procedural Order No. 1 was issued, the Parties and the Arbitral Tribunal agreed to have the proceedings conducted in accordance with the UNCITRAL Rules of Arbitration, as revised in 2010, except as those may be modified by Section B of Chapter 10 of the DR-CAFTA.
19. In this respect, the Tribunal is bound by the terms of Article 35(1) of the UNCITRAL Rules of Arbitration, which provides that the Tribunal “...shall apply the law designated by the Parties as applicable to the substance of the dispute.” and Article 10.22(1) DR-CAFTA which provides: “... the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”
20. The claim has been submitted by Claimants under Article 10.5 (*Minimum Standard of Treatment*) and Article 10.7 (*Expropriation*), both of which provide:

Article 10.5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 10.7: Expropriation and Compensation

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and

(d) in accordance with due process of law and Article 10.5.

2. Compensation shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of

expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Fifteen (Intellectual Property Rights).

It is relevant to note that the Parties to the Treaty agreed that Article 10.5 “shall be interpreted in accordance with Annex 10-B”, and that Article 10.7 “shall be interpreted in accordance with Annexes 10-B and 10-C”, both of which provide:

Annex 10-B

Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex 10-C

Expropriation

The Parties confirm their shared understanding that:

- 1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
- 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
- 3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors;

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

21. Thus, the Parties to DR-CAFTA contemplated that claims to be brought by investors before an arbitral tribunal under Chapter Ten should be settled by applying the terms of the Treaty itself, and “applicable rules of international law”. In dealing with the minimum standard of protection under Article 10.5, the DR-CAFTA Parties clearly established that the protection should be “... in accordance with customary international law, including fair and equitable treatment and full protection and security” but made subsequent reference to Annex 10-B transcribed above for how customary international law should be interpreted, i.e., that which “... results from a general and consistent practice of States that they follow from a sense of legal obligation ...”. And in respect to the minimum standard of treatment of aliens under Article 10.5, then customary international law “... refers to all customary international law principles that protect the economic rights and interests of aliens”.

IV. PROCEDURAL HISTORY

22. On September 17, 2013, the Claimants delivered a “Notice of Intent to Submit a Claim to Arbitration” to the Respondent.
23. On January 24, 2014, the Claimants commenced this arbitration by submitting a “Notice of Arbitration” to the Respondent.
24. On February 24, 2014, Costa Rica responded to the Notice of Arbitration.
25. Pursuant to DR-CAFTA Article 10.19, the Claimants appointed Mr. C. Mark Baker, a national of the United States as arbitrator, and Respondent appointed Prof. Pedro Nikken, a national of the Bolivarian Republic of Venezuela.
26. On June 10, 2015, the Parties informed the Centre that they had agreed to refer the appointment of the third, presiding arbitrator, to the Secretary-General of ICSID subject to a strike-and-rank list procedure.
27. By letter dated June 16, 2015, the Secretary-General accepted this request and asked the Parties for confirmation of some procedural aspects of their agreement. The Respondent provided such confirmation on June 17, 2015, while the Claimants did so on June 19, 2015.
28. On June 26, 2015, the Secretary-General provided the Parties with a list of ten candidates in accordance with their agreed method for constitution of the Tribunal. As scheduled, each party submitted its ranking of candidates to the Secretary-General on July 8, 2015.
29. On the same date, the Centre informed the Parties that, pursuant to their agreement, the overall most preferred candidate was Mr. Eduardo Siqueiros T., a national of the United Mexican States, and invited the Parties to liaise with Mr. Siqueiros to discuss the terms of his appointment.
30. On July 17, 2015, Mr. Siqueiros informed the Parties that he had no conflict of interest and was available to preside over the Tribunal.
31. On August 4, 2015, the Parties sent a joint letter to Mr. Siqueiros confirming his appointment as presiding arbitrator. They also agreed that the Tribunal was constituted as of that date.

32. On August 11, 2015, Mr. Siqueiros sent a letter to the Parties on behalf of the Arbitral Tribunal to discuss certain preliminary issues relating to the organization of the proceedings, including the possibility of having an arbitral institution administer the case.
33. By a joint communication of August 26, 2015, the Parties informed the Tribunal that they agreed to designate ICSID as the administrating authority for the proceedings subject to the Tribunal's approval.
34. On August 26, 2015, the Tribunal informed the Parties that it welcomed their decision.
35. By a joint letter dated August 28, 2015, the Parties informed the Secretary-General of ICSID that they had agreed to ICSID administration and asked the Centre to provide full administrative services in relation to this case. On the same day, the Secretary-General confirmed that ICSID would provide such services and sent the terms thereof.
36. By communications on August 31, 2015, the Parties confirmed their agreement to the terms of ICSID's letter of August 28, 2015.
37. On September 1, 2015, the Centre sent a letter to the Parties proposing the designation of Mr. Francisco Grob, ICSID Legal Counsel, to serve as the Secretary of the Tribunal, along with a short description of his background.
38. On September 2, 2015, the Parties confirmed that they had no objection to the designation of Mr. Grob as Secretary of the Tribunal.
39. On September 3, 2015, the Tribunal held a procedural hearing with the Parties at the seat of the Centre in Washington, D.C. Participating in this hearing were:

Tribunal:

Lic. Eduardo Siqueiros T.
Mr. C. Mark Baker
Prof. Pedro Nikken

President
Arbitrator
Arbitrator

ICSID Secretariat:

Mr. Francisco Grob

Secretary of the Tribunal

For the Claimants:

Mr. George Burn
Mr. Peter Danysh
Dr. Todd Weiler

Vinson & Elkins RLLP
Vinson & Elkins RLLP
N/A

For the Respondent:

Mr. Christian Leathley
Ms. Amal Bouchenaki
Mr. José Carlos Quirce

Herbert Smith Freehills LLP
Herbert Smith Freehills LLP
COMEX

Joining by phone:

Ms. Florencia Villaggi
Ms. Adriana Gonzalez
Ms. Karima Sauma
Mr. Julian Aguilar
Ms. Arianna Arce

Herbert Smith Freehills LLP
COMEX
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COMEX

40. Following the hearing, the Tribunal issued Procedural Order No. 1, dated September 10, 2015. This order embodied the agreements of the Parties and the decisions of the Tribunal on the issues with respect to which there was no agreement. Issues agreed upon by the Parties included, *inter alia*, the applicable arbitration rules (i.e. 2010 UNCITRAL Arbitration Rules) and the place of arbitration, which was set in London, England. The Parties also confirmed that the Tribunal had been properly constituted and that neither party had an objection to the appointment of any of its members or the Tribunal's Secretary.
41. On November 27, 2015, the Claimants filed a Memorial on the Merits (the "**Claimants' Memorial**").
42. As scheduled in Procedural Order No. 1, the Respondent notified the Tribunal on December 18, 2015, that it would not seek to file preliminary objections on jurisdiction and admissibility separately, but alongside its counter-memorial on the merits. Nevertheless, it proposed the bifurcation of the liability and damages phases.

43. The Tribunal invited the Claimants to respond, and the Claimants did so on December 22, 2015, opposing to the proposed bifurcation.
44. By letter of December 24, 2015, the Respondent contested the Claimants' response, asking the Tribunal to order that the questions of jurisdiction and liability run in tandem while holding the assessment of quantum to a later phase.
45. On January 15, 2016, the Claimants filed observations on the Respondent's bifurcation request, which were followed by a reply from the Respondent on January 19, 2016, and a rejoinder by the Claimants on January 25, 2016.
46. On February 4, 2016, the Tribunal issued Procedural Order No. 2, rejecting Respondent's bifurcation request and ordering the continuation of the proceedings as set out in Procedural Order No. 1.
47. By letter of February 10, 2016, the Parties jointly requested the Tribunal to revise the procedural calendar in order to grant the Respondent a two-week extension to file its Counter-Memorial on the Merits. The Tribunal agreed to the proposed amendment to the procedural calendar by a letter sent to the Parties on February 11, 2016.
48. On March 1, 2016, the Tribunal proposed to the Parties that case-related documents referred to in Article 10.21.1 of the DR-CAFTA be posted on the ICSID's website.
49. On March 7, 2016, the Respondent accepted the Tribunal's proposal but requested the redaction of the name of the individuals against whom Claimants allege misconduct and/or acts of corruption.
50. On March 9, 2016, the Claimants responded to the Tribunal's proposal and to the Respondent's comments agreeing to the publication of the aforementioned documents and objecting to the Respondent's request for redaction. The Respondent replied on March 16, 2016, while the Claimants provided additional comments on March 30, 2016.
51. On April 5, 2016, the Tribunal issued Procedural Order No. 3 concerning publication of case documents. Among other things, the Tribunal rejected Respondent's request for redaction.

52. On April 9, 2016, the Respondent filed a Counter-Memorial on the Merits dated April 8, 2016 (“**Respondent’s Counter-Memorial**”).
53. On June 17, 2016, the Parties filed simultaneous requests for the Tribunal to decide on production of documents.
54. On July 1, 2016, the Tribunal issued Procedural Order No. 4 deciding on the Parties’ outstanding document production requests. The Parties agreed that the Redfern schedules annexed to this order need not be translated into the other procedural language.
55. On July 23, 2016, the Claimants proposed to hold a separate one-day hearing for the examination of the quantum experts. The Respondent accepted this proposal by letter dated July 27, 2016, and this second hearing was set, as agreed upon by the Parties, for February 7, 2017.
56. On August 5, 2016, the Claimants filed their Reply Memorial on the Merits (“**Claimants’ Reply Memorial**”).
57. On October 29, 2016, the Respondent filed its Rejoinder on the Merits (the “**Respondent’s Rejoinder Memorial**”), dated October 28.
58. On November 3, 2016, the Tribunal sent to the Parties a draft procedural order concerning the organization of the hearings. The Parties were directed to confer on the suggestions made in this draft and advise the Tribunal of any agreement.
59. After consulting the Parties, on November 16, 2016, the Tribunal sent a letter to the DR-CAFTA non-disputing Parties, asking whether they wished to make any submission pursuant to Article 10.20.2 of the DR-CAFTA.
60. Following exchanges by the Parties, on November 17, 2016, the Tribunal decided that pre-hearing briefs would not be scheduled. It also ruled upon additional evidentiary issues in preparation for the hearing.
61. On November 21, 2016, the United States of America asked for an extension until December 1, 2016 to reply to the DR-CAFTA non-disputing Parties communication. It also requested an opportunity to attend the hearing, urging the Tribunal to set aside some time in case the United States decided to make an oral submission.

62. The same day, on November 21, 2016, the Parties submitted a revised version of the draft procedural order circulated on November 3, reflecting their agreements, the issues on which they could not agree, and asking for Tribunal’s directions.
63. The Tribunal held a pre-hearing telephone conference with the Parties on November 22, 2016, to discuss these and other procedural matters in preparation for the hearing. The Parties confirmed, *inter alia*, that they had no objection to the requests made by the United States.
64. On November 25, 2016, the Tribunal issued Procedural Order No. 5 (“**PO5**”) concerning the organization of the hearings.
65. On December 2, 2016, the United States filed a written submission pursuant to Article 10.20.2 of the DR-CAFTA (the “**United States non-disputing Party Submission**”). This submission is discussed where applicable in the sections below.
66. A hearing on Jurisdiction and the Merits was held at the World Bank Headquarters in Washington, D.C. from December 5 to December 12, 2016 (the “**December Hearing**”). As agreed by the Parties, it was also live streamed through ICSID’s Website. The following individuals were present in the hearing room:

Tribunal:

| | |
|---------------------------|------------|
| Lic. Eduardo Siqueiros T. | President |
| Mr. C. Mark Baker | Arbitrator |
| Prof. Pedro Nikken | Arbitrator |

ICSID Secretariat:

| | |
|--------------------|---------------------------|
| Mr. Francisco Grob | Secretary of the Tribunal |
|--------------------|---------------------------|

For the Claimants:

| | |
|------------------------------|----------------------|
| Mr. George Burn | Vinson & Elkins RLLP |
| Mr. Peter Danysh | Vinson & Elkins RLLP |
| Mr. Jerome Hoyle | Vinson & Elkins RLLP |
| Mr. Robert Landicho | Vinson & Elkins RLLP |
| Ms. Louise Woods | Vinson & Elkins RLLP |
| Ms. Carolina Albreo-Carrillo | Vinson & Elkins RLLP |
| Dr. Todd Weiler | N/A |
| Mr. Esteban De La Cruz | Batalla |
| Mr. Herman Duarte | Batalla |
| Mr. Raul Guevara | Batalla |
| Mr. Roger Guevara | Batalla |

| | |
|-----------------------|----------------------|
| Mr. Manuel Ventura | Facio Abogados |
| Mr. David Aven | Claimant |
| Mr. Samuel Aven | Claimant |
| Mr. David Janney | Claimant |
| Ms. Carol Park | Claimant |
| Mr. Eric Park | Claimant |
| Mr. Roger Raguso | Claimant |
| Mr. Jeffrey Shioleno | Claimant |
| Mr. Don Aven | Family of Claimant |
| Mr. Jeff Aven | Family of Claimant |
| Mr. Minor Arce Solano | Witness |
| Mr. Esteban Bermudez | Witness |
| Mr. Jovan Damjanac | Witness |
| Mr. Nestor Morera | Witness |
| Mr. Mauricio Mussio | Witness |
| Mr. Edgardo Madrigal | Colleague of witness |
| Mr. Ian Baillie | Expert |
| Mr. Gerardo Barboza | Expert |
| Dr. Robert Langstroth | Expert |
| Dr. Ricardo Calvo | Expert |
| Mr. Luis Ortiz | Expert |
| Ms. Nancy Muller | Language Assistant |

For the Respondent:

| | |
|----------------------------------|-----------------------------|
| Mr. Christian Leathley | Herbert Smith Freehills LLP |
| Ms. Amal Bouchenaki | Herbert Smith Freehills LLP |
| Ms. Daniela Paez | Herbert Smith Freehills LLP |
| Ms. Lucila Marchini | Herbert Smith Freehills LLP |
| Ms. Elena Ponte | Herbert Smith Freehills LLP |
| Mr. Michael Kerns | Herbert Smith Freehills LLP |
| Mrs. Adriana González | COMEX |
| Ms. Arianna Arce | COMEX |
| Mr. José Carlos Quirce | COMEX |
| Ms. Marisol Montero | COMEX |
| Ms. Francinie Obando | COMEX |
| Mr. Julio Jurado Fernández | Witness |
| Mr. Luis Gerardo Martínez Zúñiga | Witness |
| Mr. Hazel Díaz Melendez | Witness |
| Ms. Priscilla Vargas | Witness |
| Ms. Mónica Vargas Quesada | Witness |
| Dr. Timothy Hart | Credibility International |
| Mrs. Rebecca Velez | Credibility International |
| Mr. Kevin Erwin | Kevin Erwin Consulting |
| Dr. Johan S. Perret | Expert |
| Dr. B.K. Singh | Expert |
| Ms. Rosaura Chinchilla Calderón | Expert |

Non-disputing Party:

Mr. Patrick W. Pearsall
Ms. Nicole C. Thornton

U.S. Department of State
U.S. Department of State

67. On December 12, 2016, the United States submitted a chart detailing the non-disputing Party submissions it has made pursuant to DR-CAFTA Article 10.20.2 in response to a question posed by the president of the Tribunal during the first day of hearing, on December 5, 2016.
68. On December 12, 2016, the Claimants sought permission to submit additional evidence to the record.
69. Following exchanges of correspondence by the Parties, the Tribunal rejected this application by a letter dated January 18, 2017.
70. As scheduled, a one-day hearing was held at the World Bank Headquarters in Washington, D.C. on February 7, 2017 (the “**February Hearing**”). As agreed by the Parties, the hearing was live streamed through ICSID’s Website. The following persons were present in the hearing room:

Tribunal:

Lic. Eduardo Siqueiros T.
Mr. C. Mark Baker
Prof. Pedro Nikken

President
Arbitrator
Arbitrator

ICSID Secretariat:

Mr. Francisco Grob

Secretary of the Tribunal

For the Claimants:

Mr. George Burn
Mr. Alexander Slade
Mr. Robert Landicho
Ms. Carolina Abreo-Carrillo
Dr. Todd Weiler
Mr. Roger Guevara
Mr. Esteban de la Cruz
Mr. David Aven
Mr. Jorge Briceño
Mr. Manuel Abdala
Ms. Daniela Bambaci
Mr. Charles Rice

Vinson & Elkins RLLP
Vinson & Elkins RLLP
Vinson & Elkins RLLP
Vinson & Elkins RLLP
N/A
Batalla Salto Luna
Batalla Salto Luna
Claimant
Witness
Compass Lexecon
Compass Lexecon
Compass Lexecon

For the Respondent:

| | |
|------------------------|-----------------------------|
| Mr. Christian Leathley | Herbert Smith Freehills LLP |
| Ms. Daniela Paez | Herbert Smith Freehills LLP |
| Ms. Lucila Marchini | Herbert Smith Freehills LLP |
| Mr. Michael Kerns | Herbert Smith Freehills LLP |
| Mrs. Adriana González | COMEX |
| Ms. Arianna Arce | COMEX |
| Mr. Tim Hart | Credibility International |
| Ms. Rebecca Velez | Credibility International |
| Mr. Keith Constance | Credibility International |

Non-disputing Party:

| | |
|--------------------------|--------------------------|
| Mr. Patrick W. Pearsall | U.S. Department of State |
| Ms. Nicole C. Thornton | U.S. Department of State |
| Ms. Terra Gearhart-Serna | U.S. Department of State |

71. By letter of February 13, 2017, the Tribunal sent to the Parties a list of questions to consider in their respective post-hearing briefs.
72. As scheduled, the Parties filed simultaneous post-hearing briefs on March 13, 2017.
73. By means of two separate communications of the same date, March 13, the Respondent informed the Tribunal of certain developments on the Las Olas Project Site and submitted its views on a document prepared by the Claimants' counsel in response to a question posed during the December Hearing concerning US non-disputing Party submissions in other DR-CAFTA cases.
74. At the Tribunal's invitation, the Claimants commented on the Respondent's allegations concerning developments on the site in a letter dated March 24, 2017. With the Tribunal's approval, the Respondent responded to this letter on April 17, 2017 and the Claimants replied on April 17, 2017.
75. The proceeding was closed on March 1, 2018.
76. The Parties filed their submissions on costs on March 15, 2018.

V. SUBMISSION OF THE UNITED STATES OF AMERICA PURSUANT TO DR-CAFTA ARTICLE 10.20.2

77. On November 16, 2016, the Tribunal invited the DR-CAFTA Parties to make a non-disputing Party submission in accordance with the terms of Article 10.20.2., and also invited them to participate at the December Hearing. Only the United States of America accepted.
78. On December 2, 2016, the United States of America made its submission on questions of interpretation of the DR-CAFTA, pursuant to Article 10.20.2⁹. In its submission, the U.S. addressed the four issues relating to questions of interpretation: (i) Article 10.5; (ii) 10.7; along with Annex 10-C which it believes must be interpreted in accordance with; (iii) Article 10.11 in connection with the ability of governments under DR-CAFTA to take measures otherwise consistent with Chapter 10; and (iv) the relationship among Chapters 10 and 17. The United States' Submission cautioned that it did not take any position on how its interpretation applied to the facts of this case, and that no inference should be drawn from the absence of comment on any issue not addressed.
79. On the issue of the United States' interpretation of DR-CAFTA Article 10.5, rather than expressing a position, the United States stated that its views were already reflected in paragraphs 11-24 of the non-disputing Party submission of April 17, 2015 in the DR-CAFTA Chapter 10 case *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* which it attached.
80. The United States' position with respect to Article 10.5 was essentially the following ¹⁰:
- (i). In citing the text of Articles 10.5.1 and 10.5.2, it confirmed that such provisions demonstrate the States who are Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in DR-CAFTA Article 10.5, and that the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has

⁹ United States non-disputing Party Submission, dated December 12, 2016, signed by Lisa J. Grosh, Assistant Legal Advisor, Patrick W. Pearshall, Chief of Investment Arbitration and Nichole C. Thornton, Attorney-Advisor of the Office of International Claims and Investment Disputes, of the United States Department of State.

¹⁰ The United States Submission in the *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* can be located at <https://www.state.gov/documents/organization/242886.pdf>.

crystallized into customary international law¹¹, and establishes a minimum “floor below which treatment of foreign investors must not fall”¹²;

(ii). That customary international law has currently crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 10.5, concerns the obligation to provide “fair and equitable treatment” which includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. A denial of justice arises, for example, when a State’s judiciary administers justice to aliens in a “notoriously unjust” or “egregious” manner “which offends a sense of judicial propriety”;

(iii). That DR-CAFTA Annex 10-B addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the treaty Parties’ “shared understanding that ‘customary international law’ generally and as specifically referenced in Article [] 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation.” The United States adds that this two-element approach – State practice and *opinio juris* – is “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice”. Relevant State practice must be widespread and consistent and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation. Moreover, the twin requirements of State practice and *opinio juris* “must both be identified ... to support a finding that a relevant rule of customary international law has emerged” The annex provides important guidance for assessing whether an alleged norm has been sufficiently demonstrated to be an element of customary international law.

(iv). That neither the concepts of “good faith” nor “legitimate expectations” are component elements of “fair and equitable treatment” under customary international law that give rise to an independent host State obligation. Although an investor may develop its own expectations about the legal regime governing its investment, those expectations impose no obligations on the State under the minimum standard of treatment. The United States mentioned that it is aware of no general and consistent State practice and *opinio juris* establishing an

¹¹ As a means of describing the United States position, it cited *Methanex v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006) (“U.S. Counter-Memorial, *Glamis*”); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008) (“U.S. Counter-Memorial, *Grand River*”). *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* submission, page 4 (CLA-196).

¹² In expressing these positions, it cited *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”) (RLA-38).

obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required than the mere interference with those expectations. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector;

(v). Further that, 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 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;

(vi). Thus, the DR-CAFTA Parties expressly intended Article 10.5 to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law. To do so, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*; and

(vii). Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule.

81. On the subject of the United States' interpretation of Article 10.7 and Annex 10-C, the United States likewise referred to its position expressed in the *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* case (adding that Article 10.7 must be interpreted in accordance with said Annex 10-C), which is essentially the following:

(i). It confirms that any expropriation that does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), constitutes a breach of Article 10.7, and requires compensation in accordance with Article 10.7.2;

(ii). Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory, and DR-CAFTA Annex 10-C, paragraph 4, provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation;

(iii). That determining whether an indirect expropriation has occurred “requires a case-by-case, fact based inquiry” that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action, and then briefly addresses each;

(iv). With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.” It is a fundamental principle of international law that, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner”;

(v). The second factor requires an objective inquiry of the reasonableness of the claimant’s expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made. For example, where a sector is “already highly regulated, reasonable extensions of those regulations are foreseeable”;

(vi). The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether “it arises from some public program adjusting the benefits and burdens of economic life to promote the common good”); and

(vii). Finally, it recalled that Annex 10-C, paragraph 4(b), further provides that “[e]xcept in rare circumstances, nondiscriminatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” This paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

82. Regarding Article 10.11 DR-CAFTA, the United States points out that the provision “informs the interpretation of other provisions of Chapter Ten, including Articles 10.5 and 10.7, and shows that Chapter Ten was not intended to undermine the ability of governments to take measures otherwise consistent with the Chapter, including measures based upon environmental concerns, even when those measures may affect the value of an investment”¹³.

83. The United States Submission then considered the relationship between Chapters Ten and Seventeen of DR-CAFTA. After citing the text, it recognized that Article 10.2

¹³ United States non-disputing Party Submission, ¶ 5, page 2.

subordinates the provisions of Chapter 10 to the provisions in all other Chapters of the DR-CAFTA, in cases where there is an inconsistency with another Chapter. Although it stated that “... the jurisdiction of a Chapter Ten tribunal is limited, according to Article 10.16(1), to claims that a respondent Party breached an obligation of Chapter Ten (Section A), an investment authorization, or an investment agreement”, it then goes on to conclude that “The provisions of Chapter Seventeen, together with the Preamble and Article 10.11, serve to inform the interpretation of other provisions of Chapter 10. Specifically, these provisions demonstrate the Parties’ commitment to preserving policy discretion in the adoption, application and enforcement of domestic laws aimed at achieving a high level of environmental protection, provided that doing so is not otherwise inconsistent with the express provisions of Chapter 10¹⁴.”

A. The Parties’ Positions regarding the United States Submission

84. At the end of the December Hearing, the Tribunal invited the Parties to comment on the United States non-disputing Party Submission in accordance with the terms of Article 10.22.2. Both agreed to provide, and although they initially attempted to submit a common position document, they failed to reach a common ground, and instead, each elected to comment in their Post-Hearing Briefs.
85. Claimants have argued that the interpretation of the relevant provisions of DR-CAFTA must be examined in light not only of the position that the United States of America has supported in the past in respect to DR-CAFTA itself, but also in light of NAFTA (the “**North American Free Trade Agreement**”), and also in light of how other tribunals have interpreted those textually similar provisions in the past.
86. Claimants elected to comment primarily on two issues where they find that the representatives for the United States have taken a restrictive position: first, on how customary international law should be proved, and second, rejection of what they refer to as “the firmly-rooted *jurisprudence constant*” on fair and equitable treatment concerning, for example, the prohibition against arbitrariness, the obligation to accord due process, or State responsibility arising from the frustration of legitimate expectations.

¹⁴ *Id.*, ¶¶ 6-8, pages 2-3.

87. Claimants rejected how the United States’ representatives interpret the “*customary international law*” reference argument in an Article 10.5 DR-CAFTA claim, which – they argue, states that the only way for a claimant-investor to succeed is to either establish that a denial of justice has occurred or prove the existence of a different customary international law norm¹⁵.
88. Secondly, on the subject of whether or not the Treaty supports a claim for frustration of legitimate expectations, Claimants first mentioned that Respondent initially accepted, in principle, the validity of Claimants’ claims, but then Respondent changed its stance, adopting the position of the United States after the latter introduced its submission.
89. Claimants deem that the position of the United States has been inconsistent on so-called “autonomous” versions of the “fair and equitable treatment” standard¹⁶. They allege that in those cases thus far submitted under Article 10.20(2), the United States holds that Article 10.5 embodies the customary international law minimum standard of treatment. Each submission also treats NAFTA Article 1105 as an analogous expression of the same standard; resulting in a very narrow and limited construction of Article 10.5. The argument, contend Claimants, has remained constant: 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; instead¹⁷ Claimants contrast this view with that of publicists they cite to, who were members of the tribunals in the *Mondev v. U.S.A.*, or the *Railroad Development Corporation v. Guatemala* cases¹⁸.
90. Respondent, on the other hand, supports the views of the United States of America on certain issues. For example, in its Post-Hearing Brief Respondent agrees with the position that Chapter 17 provides relevant context for purposes of interpretation of Chapter 10¹⁹, and how the Treaty should be read taking into account its preamble to “... demonstrate the Parties’ commitment to preserving policy discretion in the adoption, application and

¹⁵ Claimants’ Post-Hearing Brief, ¶ 116, page 54.

¹⁶ *Id.*, ¶ 121, page 56.

¹⁷ *Id.*, ¶ 123, page 57.

¹⁸ *Mondev Int’l Ltd. v. U.S.A.*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 110-125 (CLA-50); *Railroad Development Corporation v. Guatemala*, Award, ICSID Case No. ARB/07/23, IIC 553 (2012), June 29, 2012, ¶¶ 212-216 (CLA-193).

¹⁹ Respondent’s Post-Hearing Brief, ¶ 490, page 97.

enforcement of domestic laws aimed at achieving a high level of environmental protection”²⁰.

91. On the subject of customary international law’s minimum standard of treatment, Respondent supports the position of the United States, in the sense that this is a minimum, “...a floor below which treatment of foreign investors must not fall”²¹.

B. The Tribunal’s View

92. The Tribunal notes that while this classic academic divide between Investors and States continues to be a part of so many investor-State arbitrations, the facts of this particular dispute do not require the Tribunal to spend time analyzing the issue as will be detailed below in the relevant sections.

VI. FACTUAL BACKGROUND

93. In 2001 and 2002 Mr. Aven—one of the Claimants—decided to explore investment opportunities in Costa Rica, and identified a 37-hectare plot, composed of five parcels, in Esterillos Oeste, on the Pacific Coast of Costa Rica. He believed the site was well served by public roads, had a topography suited to development, excellent ocean views, and access to the beach.
94. The five parcels were to comprise the Las Olas Project, which was to be divided into areas reflecting the different uses to which the land would be put²². Although there were four sections identified, importantly the Claimants always viewed the project as a whole. This issue is relevant to the case, as will be examined below. The four sections were:

(a). The Concession Site, i.e., land that formed part of the maritime zone and was the subject of the Concession, where the beach club would be located, with direct access to the ocean and luxury hotel rooms and common area facilities to which all residents of Las Olas would have access;

(b). The Easements, i.e., land on the western side of the property, to which access would be gained via nine easements that would run into the Las Olas site from the main road to the west of the property, also containing a total of 72 residential lots;

²⁰ *Id.*, ¶¶ 498-499, page 98, citing the United States Submission, ¶ 7.

²¹ *Id.*, ¶ 734, page 151, citing the United States Submission attaching its own submission in *Spence v. Costa Rica*, ¶ 12.

²² Claimants’ Memorial, ¶ 50, page 14.

(c). Commercial and Condominium Area, mostly in the northwest and northeast corners of the site, earmarked for commercial establishments, such as supermarkets, restaurants, and possibly a gasoline station for the benefit of the Las Olas residents; and

(d). Condominium or “Condo” Section, i.e., the main part of the site that would comprise individual lots on which condominiums would be built. Under an original plan, there was originally a smaller number of lots contemplated, but under a plan revised in 2008 the number increased to 288.

95. The Parties to this dispute agree on the main facts surrounding the claims since these are reflected in applications and permits issued by various State and municipal authorities of the Republic of Costa Rica. However, there are significant disagreements on the competence of various authorities to issue the relevant permits; the burden on the applicant and the State with respect to the issuance of permits; the implications of a permit; and the findings, determinations and scope of their respective conclusions. From the Parties’ submissions and the hearing testimony of the various witnesses, it is clear that there are many inconsistencies in documents and contradictions among various governmental authorities during the period comprised between the dates Claimants decided to make the investment and the time at which injunctions were issued and criminal charges brought against Mr. Aven and the Sales and Marketing Director of the Las Olas Project, Mr. Jovan Damjanac.
96. To address this highly complex factual background, the Tribunal invited the Parties on November 17, 2016, to submit an agreed chronology, along with a *dramatis personae* and list of issues in the arbitration. This invitation was confirmed in Procedural Order No. 5. However, although the parties agreed and submitted on December 1, 2016, a joint *dramatis personae*, the Parties advised on such date that they were not able to agree on either a chronology or a list of issues. This failure was a severe burden on the Tribunal as it was required to reconstruct the background through the Parties’ shifting allegations and late introduction of evidence throughout this case.
97. Despite the absence of an agreed chronology, the Tribunal has prepared a chronology of material events, which is found below. A description of the most relevant of such events is examined in the body of this award.

| Date | Event |
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| 2002 | |
| 02/06/02 | An Option Agreement entered into among Mr. Aven and companies to acquire properties (contingent on permits to develop). |
| 03/05/02 | The Costa Rica Institute of Tourism approves grant of Concession to La Canícula. |
| 03/06/02 | The Municipality of Parrita grants the Concession to La Canícula. |
| 04/01/02 | The Agreement for Purchase the shares of La Canícula and Inversiones Cotsco is executed. |
| 04/30/02 | Termination of Trust Agreement for La Canícula shares. |
| 04/30/02 | New Trust Agreement to transfer 100% shares of La Canícula by Mr. Aven as trustor to Banco Cuscatlán de Costa Rica, S.A. until ownership complied with CR law. |
| 09/30/02 | The first D-1 Application is filed at SETENA to receive an EV for Condo Section. |
| 11/22/02 | SETENA responds and requests an environmental impact study to continue with the process to obtain an EV for the Hotel section (Resolution 1119-2002-SETENA). |
| 2004 | |
| 11/23/04 | SETENA grants first EV for Villas La Canícula section, valid for a one-year term (Resolution 2164-2004-SETENA). |
| 10/04/04 | Letter from Mr. Aven to the other Claimants describing ownership of shares structure in companies owning properties: Sam Aven 44%, David Aven 25%, Carol Park 10%, Eric Park 10%, Roger Raguso 5%, Jack Bucemi 3%, Jeff Shiolenno 2% and David Janney 1%. |
| 2005 | |
| 01/26/05 | La Canícula submits D-1 Application to receive an EV for Concession Site. |
| 03/08/05 | Mr. Aven transfers 51% of the shares of La Canícula to Paula Murillo to comply with Costa Rica ZMT law. |
| 09/16/05 | Consolidation of properties into one parcel (Property P-142646) (Survey 1021869-05). |
| 2006 | |
| 01/20/06 | SINAC issues Resolution that Concession Site is not within WPA. |

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| 03/01/06 | Claimants appoint DEPPAT as Environmental Regent for Villas La Canícula. |
| 03/17/06 | SETENA issues EV for Concession Site (Resolution No. 543-2006-SETENA). |
| 2007 | |
| 02/27/07 | SETENA extends for one year the EV for Villas La Canícula section (Resolution 375-2007-SETENA). |
| 04/25/07 | Architectural firm of Mussio Madrigal is hired to prepare D-1 Application to receive an EV for the Condo Section. |
| 07/07 | Geotest/Geoambiente geological and hydrogeological study for the Condo Section (the "Protti Report") is issued for Condo Section. |
| 08/13/07 | The Municipality of Parrita issues permits for construction of cabin on easement site (Permit 154-07). |
| 11/08/07 | Mr. Aven submits D-1 Application relying on the Geotest / Geoambiente Report for Condo Section. |
| 2008 | |
| 01/10/08 | SETENA visits Las Olas Project site on account of filing of the D-1 application. |
| 02/13/08 | SETENA requests information on account of filing of the D-1 application (SGP-DG-098-2008). |
| 03/14/08 | Mussio Madrigal firm confirms there are no forests on the Las Olas Project site (P-1244761-2007). |
| 03/27/08 | The alleged Forged Document is presented to SETENA. |
| 04/02/08 | SINAC issues new resolutions stating that the Condo Section is not within a WPA (ACOPAC-OSRAP-00282-08) (P-1244761-2007). |
| 04/17/08 | SETENA extends for one year the EV for the Hotel section (Resolution 884-2008-SETENA). |
| 05/27/08 | SETENA issues EV for Condo Section (Resolution No. DGI-878-2008-SETENA), subject to certain covenants. |
| 06/02/08 | SETENA issues EV for Condo Section (Resolution No. 1597-2008-SETENA). |
| 08/29/08 | Construction permits for hotel, cabins & pool at Concession Site (Permit 165-08). |
| 09/30/08 | SINAC inspects because of neighbors' complaints. |
| 10/01/08 | SINAC issues report and identifies two sites of possible wetlands (ACOPAC-SD-087-08). |
| 10/07/08 | Director of ACOPAC reports to SINAC that irregularities exist at the Las Olas Project site which may affect the environment (ACOPAC-D-1063-08). |

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| 10/22/08 | Ownership of Property P-142646 (condominium) transferred to Trio International Inc. |
| 10/22/08 | Trio International Inc. segregates “condominium section” to create 288 lots. |
| 2009 | |
| 03/00/09 | Neighbors file before the Municipality of Parrita complaint on account of alleged harm to the environment (filling of wetlands). |
| 03/30/09 | SINAC internal report stating legal issues on false signatures and documents in the file (SINAC-SE-GASP-070). |
| 04/3/09 | DEPPAT resigns as Environmental Regent. |
| 04/26/09 | Ms. Vargas (Municipality) visits Las Olas Project site and confirms possible wetlands and felling of trees, and suggests investigation (DeGA-049.2009). |
| 2010 | |
| 01/20/10 | Ms. Vargas (Environmental Officer at the Municipality of Parrita) makes a second inspection visit and confirms roads, evidence of wetlands and felling of trees. |
| 05/05/10 | Claimants request SINAC an extension to the 2008 EV, and confirm no works have been undertaken at the site. |
| 05/20/10 | Ms. Vargas makes a third inspection visit and requests permits for work being done. |
| 05/20/10 | New Letter-Agreement with Paula Murillo to again transfer 51% of La Canícula to comply with ZMT Law. |
| 05/31/10 | Ms. Vargas from the Municipality identifies further complaints by neighbors and requests Municipality of Parrita information on the Project (DeGA-090-2010), and signage (DeGA-092-2010). |
| 06/01/10 | Claimants (La Canícula, S.A.) file a request to SETENA to replace DEPPAT as Environmental Regent for various breaches to applicable law. |
| 06/02/10 | EV scheduled to lapse for Condo Section. |
| 06/14/10 | Claimants notify SETENA (through DEPPAT) of start of works at Condo Section on June 1, 2010. |
| 06/14/10 | DEPPAT informs SETENA of its acceptance as Environmental Regent for the Condo Section. |
| 06/14/10 | The Municipal Engineering department informs Ms. Vargas that construction permits have expired because works were not completed and roads will be closed for lacking permits (OIM-113-2010). |
| 06/14/10 | The Municipal Engineering department informs Mr. Aven that construction works lack permits, and these should be applied for (OIM-114-2010). |

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| 07/16/10 | Inspection report by SINAC concludes that it is not able to confirm existence of wetland (provides requirements), but finds fell of trees (ACOPAC-OSRAP-371-2010). |
| 07/16/10 | Municipality of Parrita issues Construction permits (7) for residences in easement section (Permits 090-10 to 096-10). |
| 07/5/10 | Neighbors file a new complaint alleging the existence of wetlands. |
| 07/16/10 | The Municipality of Parrita advises Claimants that in order to issue construction permits for a condo at property (P-1244761-2007), they must submit several documents including an extension to the EV (OIM-133-2010). |
| 07/22/10 | DEPPAT submits land movement plan and intended works in easement. |
| 07/20/10 | Neighbors file a new complaint against the Las Olas Project. |
| 07/20/10 | Mr. Bucelato files complaint against the Las Olas Project before Defensoría de los Habitantes. |
| 07/23/10 | Defensoría de los Habitantes acknowledges Mr. Bucelato complaint (08441-2010-DHR). |
| 08/07/10 | Mr. Manfredi (ACOPAC-OSRAP) reports of his visit to the Las Olas Project site and advises that there are no wetlands on the site (ACOPAC-OSRAP-371-2010). |
| 08/17/10 | SETENA visits the Condo Section site on account of Mr. Bucelato complaint. |
| 08/19/10 | SETENA confirms there are no wetlands on condominium site (ASA-1216-2010-SETENA). |
| 08/07/10 | Defensoría de los Habitantes requests information from Municipality (08947-2010-DHR), SINAC (08948-2010-DHR), SETENA (08949-2010-DHR) and Administrative Tribunal (08952-2010-DHR) in connection with neighbors' complaint. |
| 08/18/10 | Municipality of Parrita responds to Defensoría de los Habitantes request, and advised on multiple visits to the Las Olas Project site by MINAET, yet without issuance of reports on whether wetlands exist (DeGA-200-2010). |
| 08/19/10 | SETENA internal document rejects complaint from Mr. Bucelato and confirms there is no evidence of wetlands in Condo site. |
| 08/27/10 | Bogantes responds to Defensoría and confirms that based on SINAC Report of July 2010 there are no wetlands |
| 08/28-29/10 | Mr. Bogantes allegedly solicits bribe from Mr. Aven. |
| 09/01/10 | SETENA rejects complaint from Bucelato and finds there is no evidence of wetlands) in Condo (Resolution No. 2086-2010-SETENA). |
| 09/7/10 | Municipality of Parrita notes that the property (P-1244761-2007), is located within an area of hills (Lomas y Colinas) and is subject to the relevant zoning. |
| 09/7/10 | Municipality of Parrita issues construction permit for works. |
| 09/9/10 | Municipality of Parrita notes in an internal report that documents required to secure construction permits for condominium site are missing (ADU-012-10). |
| 09/13/10 | Municipality of Parrita advises Claimants documents required to secure construction |

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| | permits for condominium site are missing (ADU-013-10). |
| 09/13/10 | Claimants submit an update of the Environmental Management Plan for the Las Olas Project, advising of changes introduced since 2008. |
| 11/18/10 | Neighbors to the Las Olas Project file a new complaint before SINAC regarding the Forged Document. |
| 11/23/10 | Defensoría de los Habitantes advises SINAC that neighbors have filed a complaint regarding the Alleged Forged document. |
| 11/25/10 | SINAC confirms the Forged Document is indeed forged. |
| 11/25/10 | SINAC requests Luis Picado (ACOPAC) to make another visit to site in light of the new complaints (ACOPAC-D-1519-10). |
| 11/30/10 | SINAC requests SETENA to suspend EV for Condo Section. |
| 12/09/10 | Defensoría de los Habitantes requests a report from ACOPAC on alleged damages to the environment (13835-2010-DHR). |
| 12/06-21/10 | SINAC officials carry out site visits on December 6, 10, 17, and 21, 2010, and report is submitted (ACOPAC-CP-003-11). |
| 2011 | |
| 01/11/11 | Claimants request inspection visit from SINAC to the property to verify no harm to the environment. |
| 01/03/11 | SETENA approves the update of the environmental management plan submitted by DEPPAT (SG-ASA-04-2011). |
| 01/03/11 | SINAC issues report on conclusions and recommendations on site visit: (ACOPAC-CP-003-11). <u>Concludes:</u> There are bodies of water that may be wetlands, the felling of trees, and the Forged Document <u>Recommends:</u> Site inspection by PNH, a soil study by INTA, investigation by ACOPAC on the origin of the Forged Document, issue an injunction to stop future works, and commence criminal complaint for harm to forest. |
| 01/28/11 | SINAC Police report relating to the alleged Forged Document, the felling of trees and the possible harm to wetland. (ACOPAC-CP-015-11-DEN). |
| 02/04/11 | SINAC instructs ACOPAC (Mr. Cubillo) to file criminal charges as recommended in its January 3, 2011 report (ACOPAC-D-82-11). |
| 02/04/11 | SINAC requests PNH (ACOPAC-D-80-11) and INTA (ACOPAC-D-81-11) an inspection to confirm whether or not wetlands exist in the property. |
| 02/08/11 | Environmental Prosecutor requests SINAC whether wetlands exist in the Las Olas Project (35-FAA-11). |

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| 02/11/11 | SINAC reports to the Environmental Prosecutor (ACOPAC-D-114-11) and Defensoría de los Habitantes (ACOPAC-D-115-11) that it has requested PNH to report on the existence of wetlands exist in the Las Olas Project. |
| 02/14/11 | SINAC issues an injunction suspending all works until such time as there is evidence of permits, the legitimacy of the Forged Document and whether or not wetlands exist (ACOPAC-CP-032-11) (“ <u>SINAC Injunction</u> ”). |
| 02/23/11 | Claimants file before SINAC an Appeal and request for annulment of the SINAC Injunction. |
| 02/25/11 | SINAC confirms the SINAC Injunction (ACOPAC-CP-049-11). |
| 02/25/11 | Claimants file before SINAC ACOPAC a request for annulment of the SINAC resolution of February 25, 2011. |
| 02/25/11 | Commence criminal complaint for Forged Document. |
| 02/28/11 | Defensoría de los Habitantes advises Mr. Bucelato that his procedure is suspended until another complaint before the Environmental Prosecutor is resolved (02282-2011-DHR). |
| 03/01/11 | SINAC Police report addressed to the TAA confirming the Forged Document, the felling of trees and the possible harm to wetland, and requests PNH determination (ACOPAC-CP-052-11-DEN). |
| 03/07/11 | The Department of Maritime Terrestrial Zone reports to the Municipal Council that complaints have been received, and submits document suggesting wetlands may exist (DZMT-026-2011). |
| 03/08/11 | Municipal Council Resolution to request Mayor to issue injunction in light of the Forged Document and neighbors’ complaints (SM-2011-0172). |
| 03/18/11 | SINAC issues a site inspection report and identifies that construction works have affected a palustrine wetland, suggesting injunction (SINAC-GASP-093-11). |
| 03/18/11 | SINAC issues a new site inspection report and confirms that the palustrine wetland has been filled, and requests correction measures (SINAC-GASP-143-11). |
| 03/22/11 | DEPPAT submits report to SINAC – ACOPAC and comments of site inspection reports. |
| 03/30/11 | Petition by neighbors to MINAET to stop construction works on the Las Olas Project in light of refilling of wetlands Forged Document. |
| 03/30/11 | SETENA issues an injunction on any further works in the Condo Section (ASA-590-2011-SETENA). |
| 04/05/11 | The Mayor of Parrita requests MINAE, ACOPAC and SINAC to submit reports on actions taken because a decision has been taken to suspend all permits relating to Las Olas Project. |
| 04/05/11 | SINAC issues internal report on site visit carried out on February 16, 2011, concluding that there was no sign of refilled wetlands (ACOPAC-OSRAP-0233-11). |
| 04/05/11 | SINAC reports to Parrita Mayor that actions have been taken and a report from PNH is pending on the existence of wetlands (ACOPAC-DP-308-11). |

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| 05/00/11 | DEPPAT submits bi-monthly report (No. 6, 3-2011) to SETENA. |
| 04/13/11 | SETENA issues injunction on further work on Las Olas Project site (839-2011-SETENA). |
| 04/13/11 | TAA Injunction issued based on December 2010 inspection visits to the site, which Claimants indicate they never received. |
| 05/01/11 | SINAC (Mr. Cubero) prepares report and concludes there are no wetlands. |
| 05/05/11 | INTA issues a report per SINAC's 02/04/11 request concludes that soil did not support a wetland (DE-INTA-255-2011). |
| 05/06/11 | Mr. Aven appears before Environmental Prosecutors office and renders a statement, agreeing not to continue construction works, but requests an inspection to verify existence and delimit wetlands. |
| 05/9/11 | The Municipality of Parrita issues internal request to enforce the injunction issued by SETENA – (DeGA-064-2011). |
| 05/11/11 | The Municipality of Parrita notifies Claimants of an injunction (the Municipality Shutdown Notice) based on the injunction issued previously by SETENA (839-2011-SETENA) – (OIM-119-2011). |
| 05/12/11 | SETENA issues an internal report informing that works at the Las Olas Project site continue despite the injunction issued in April 2011 (DeGa-072-2011), and establishes an injunction ordering no further works be conducted at the Condo Section at the Las Olas Project. |
| 05/14/11 | Mr. Aven makes statements as an accused party before the Environmental Prosecutor. |
| 05/16/11 | SINAC issues photography report ACOPAC-CP-081-11 on the existence of wetlands based on visits carried out. |
| 05/18/11 | SINAC issued a report (SINAC-GASP 143-11) addressed to the Prosecutor (Mr. Martinez) based on a site visit on May 13, 2011, concluding that a wetland area of approximately 1.35 hectares existed on the Las Olas Project which had been damaged by construction works undertaken. |
| 05/18/11 | Internal report within the Municipality of Parrita informing that no construction permits have been issued, and that Claimants had been given notice of the SETENA 2011 injunction (OIM-137-2011). |
| 05/20/11 | Federal Prosecutor requests SINAC ACOPAC to delimit wetlands and forests (143-FAA-2011). |
| 05/25/11 | Claimants submit a plan for reparation of damages, without acknowledging any liability, and offer planting of trees and a park for the community. |
| 05/31/11 | SETENA resolves to maintain injunction and orders Claimants to submit a mitigation program to avoid erosion (1190-2011.SETENA) |
| 06/10/11 | The Municipality of Parrita issues an internal report regarding works being carried out in |

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| | the Las Olas Project site. |
| 06/23/11 | Inspection visit by TAA where construction works are identified, and the possible existence of wetlands. |
| 06/27/11 | Inspection visit by Parrita police where construction works are identified, later reported to SETENA on June 28, 2011. |
| 06/28/11 | SINAC requests Parrita to monitor alleged works which have continued despite SETENA injunction (ACOPAC-CP-097-11). |
| 07/07/11 | SINAC issues report to Environmental Prosecutor regarding a site visit to the Las Olas Project on July 4, 2011, confirming the existence of a forest under the terms of the Forestry Law (ACOPAC-CP-099-11). |
| 07/08/11 | The Municipality of Parrita notified Claimants of an inspection made on account of neighbor complaints, and identified works carried out (OIM-244-2011). |
| 07/11/11 | The Municipality issues internal report on the unsuccessful attempt to deliver a notice to Claimants, which Mr. Damjanac had refused to receive (DI-025-2011). |
| 09/13/11 | SETENA notified Claimants that a surety bond was released, and Mr. Aven equally released of liability in connection with the “Villas La Canícula” project, which no longer to be developed (2185-2011-SETENA). |
| 09/00/11 | DEPPAT submits bi-monthly report (No. 8, August-September 2011) to SETENA. |
| 09/16/11 | Mr. Aven files criminal charges before the prosecutor’s office at Parrita against Mr. Bogantes for alleged request of bribe in August 2010. |
| 10/01/11 | SINAC visits Las Olas Project site. |
| 10/03/11 | SINAC reports to Environmental Prosecutor of environmental damages & men cutting trees (ACOPAC-CP-129-2011-DEN). |
| 10/03/11 | Environmental Prosecutor (Mr. Martinez) requests the Judge in Parrita to issue injunction order restricting construction on the site and files criminal charges against Mr. Aven and Mr. Damjanac on allegations of drainage and refilling of wetlands. |
| 10/21/11 | Environmental Prosecutor (Mr. Martinez) requests that criminal charges against Mr. Aven are dropped because there is no evidence the SETENA injunction was served on him. |
| 11/00/11 | DEPPAT submits bi-monthly report (No. 9, October-November 2011) to SETENA. |
| 11/07/11 | SINAC submits report on site visit to the Las Olas Project site on October 25, 2011, with recommendations to protect the site and verify protection of the possible wetland on site (ACOPAC-OSRAP-784-2011). |
| 11/10/11 | Mr. Aven files request to suspend any criminal proceedings until the administrative courts rule on whether environmental harm has been caused. |
| 11/15/11 | SETENA revokes injunction of 04/13/11 because it finds no reason to question the validity of EV for Condo Section (Resolution 2850-2011-SETENA) |
| 11/17/11 | The Prosecutor files a civil action to recover damages caused to the environment in the Las Olas Project site. |

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| 11/30/11 | Criminal Court at Parrita issues injunction against continuance of works in the investigation being carried out against Mr. Aven and Mr. Damjanac, and orders the Municipality to stop any construction permit on designated lots. |
| 12/02/11 | The Municipality of Parrita delivers to Claimants inspection reports prepared and previously submitted to SETENA (OIM-456-2011). |
| 12/00/11 | INGEOFOR consultant finds there is no forest which may be classified under the Forestry Law. |
| 2012 | |
| 01/00/12 | DEPPAT submits bi-monthly report (No. 10, December 2011-January 2012) to SETENA. |
| 01/26/12 | The Criminal Court in Parrita orders the Mayor of Parrita to suspend any construction permits in certain zones of the Las Olas Project site. |
| 03/00/12 | DEPPAT submits bi-monthly report (No. 11, February-March 2012) to SETENA. |
| 05/00/12 | DEPPAT submits bi-monthly report (No. 12, April-May 2012) to SETENA. |
| 06/08/12 | DEPPAT issues statement in respect to alleged existence of wetlands and forest in the Las Olas Project site. |
| 07/00/12 | DEPPAT submits bi-monthly report (No. 13, June-July 2012) to SETENA. |
| 06/20/12 | Preliminary hearing at the Parrita court in criminal case against Mr. Aven and Mr. Damjanac. |
| 06/14/12 | TAA determines that based on the site visits carried out on June 4-8, 2012, evidence exists to deem that wetlands were refilled (TAA-DT-129). |
| 06/20/12 | Preliminary hearing at the Parrita court in criminal case against Mr. Aven and Mr. Damjanac. |
| 07/17/12 | The TAA resolves to merge cases of complaints filed by SINAC and Mr. Bucelato (695-12-TAA). |
| 07/24/12 | SINAC report of the site inspections carried out during 2011 and the resolutions adopted by several agencies on the Las Olas Project (ACOPAC-CP-064-12). |
| 10/10/12 | Internal report in the Municipality addressed to the Environmental Commission describing the different resolutions issued between 2009 and 2012 regarding the Las Olas Project by SETENA, INTA, TAA, ACOPAC and wetlands identified. |
| 10/17/12 | Request by several Municipality officials of the Environmental Commission to ACOPAC to determine whether a palustrine wetland exists and to delimit same. |
| 10/30/12 | ACOPAC responds to the Environmental Commission and informs that it is not within its powers to carry out the request made on October 17, 2012 (ACOPAC-D-736-2012). |
| 11/05/12 | The Municipal Council adopts a resolution lifting the injunction and to permit the continuation of works at the Las Olas Project site, which is communicated to the Mayor and Mr. Aven through letter of November 6, 2012 (SM-2012-802). |

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| 11/19/12 | Ms. Vargas the Environmental Manager of the Municipality submits ample report to the Mayor of Parrita on the Las Olas Project status (DeGS-359-2012). |
| 12/04/12 | The Municipality of Parrita informs of the construction permits issued for the Condo Section of the Las Olas Project (OIM-863-2012) (OIM-864-2012). |
| 12/04/12 | The Mayor of Parrita informs Mr. Aven that the Municipality has not commented any legal action relating to the Las Olas Project as of such date (OAM-721-2012). |
| 12/05/12 | Criminal case commenced against Mr. Aven and Mr. Damjanac. |
| 12/07/12 | Mr. Aven send letter to SETENA Technical Director restating the terms of a meeting held on November 21, 2012. |
| 2013 | |
| 01/29/13 | The Criminal Judge in Parrita annuls the proceedings given that the sitting judge had been ill January 24-31, 2013. |
| 01/29/13 | An habeas corpus petition is filed before criminal court requesting to issue an injunction in light of breaches to the constitutional rights of Mr. Aven in light of suspensions in the case. |
| 02/02/13 | Mr. Aven receives alleged threatening email. |
| 04/15/13 | Mr. Aven files a police report on account of event where the car was shot while driving in a Costa Rica highway (Report 000-13-008096). |
| 04/22/13 | Mr. Aven receives second alleged threatening email. |
| 05/00/13 | Mr. Aven leaves Costa Rica |
| 07/22/13 | Mr. Aven receives third alleged threatening email. |
| 09/30/13 | Mr. Aven receives fourth alleged threatening email. |
| 09/17/13 | Notice of Intent to Arbitrate is delivered. |
| 09/26/13 | The Criminal Court in Puntarenas extends the 2011 Injunction until the end of the criminal proceedings. |
| 12/20/13 | Mr. Morera (criminal counsel to Mr. Aven) advises the Puntarenas criminal court that Mr. Aven has received threats, has left Costa Rica and will not attend the hearing, but requests the possibility of doing so by video-conference. |
| 2014 | |
| 01/10/14 | Mr. Morera (criminal counsel to Mr. Aven) confirms the willingness of Mr. Aven to appear and render statements by videoconference. |
| 01/13/14 | The Puntarenas Criminal Court rejects petition and demands Mr. Aven appears in person for trial. |

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| 02/12/14 | After re-trial of Mr. Damjanac, the Puntarenas Criminal Court acquits. |
| 03/04/14 | The Attorney general of Costa Rica files appeal on the decision to acquit Mr. Damjanac. |
| 05/25/14 | Criminal court issues international arrest warrant against Mr. Aven (Interpol Red Notice). |
| 05/28/14 | TAA instructs the director of ACOPAC to submit an economic valuation report on damages caused to the environment (391-14-TAA). |
| 08/29/14 | Appeals Court of the Third Circuit annuls the acquittal judgment which released Mr. Damjanac. |
| 12/02/14 | TAA again instructs the director of ACOPAC to submit an economic valuation report on damages caused to the environment (1103-14-TAA). |
| 2015 | |
| 09/11/15 | Interpol issues a statement to the effect that Mr. Aven is not subject to an Interpol Red Notice). |
| 11/02/15 | Mr. Aven sends a letter to Mr. Martínez (Environmental Prosecutor) inquiring as to the status of the filing of charges against Mr. Bogantes in 2011. |

A. Acquisition of Properties

98. In acquiring the 37-hectare plot in Costa Rica, Mr. Aven purchased the properties through several commercial vehicles already established under the laws of Costa Rica, identified and defined as the Enterprises. The percentage of each Claimant investor differs among the Enterprises.
99. Specifically, on February 6, 2002, an option agreement to acquire the properties²³ was executed between Mr. Aven and Mr. Carlos Alberto Monge Rojas— the primary shareholder in the Enterprises that owned the various properties. The option agreement was contingent on Mr. Aven’s receipt of the permits required to develop the land as a project. Even though Mr. Aven was acting under his own name, he has argued that he was acting on behalf of the other Claimant investors, and on October 4, 2004, a letter²⁴ was issued by Mr. Aven to the other Investors describing the structure of the ownership of the shares in the different companies that owned the properties.

²³ Exhibit C-27.

²⁴ Exhibit C-241.

100. An application was first submitted in 2002 on behalf of La Canícula, one of the Enterprises, to secure a concession over the maritime zone, i.e., the beach area adjoining the property. In March 2002, the Costa Rica Institute of Tourism approved the grant of the Concession²⁵, and a concession contract entered into with the Municipality of Parrita.
101. On April 30, 2002, once Claimants were satisfied that permits had been issued to develop the project²⁶, an agreement was executed among Mr. Aven and Mr. Carlos Alberto Monge Rojas to purchase the shares representing the capital stock of La Canícula and Inversiones Cotsco. However, considering that under the laws of Costa Rica foreign nationals could not own a majority of the stock in a commercial company that held a concession over the maritime zone contiguous to the beach, the shares of La Canícula were placed in trust on April 30, 2002 as per an agreement executed with Banco Cuscatlán de Costa Rica, S.A. showing transfer of the shares of La Canícula so that ownership complied with Costa Rican laws²⁷. Under its terms, this trust agreement was to be terminated a year later, but by reason of inaction the shares continued in the Banco Cuscatlán trust until actually terminated and the shares were transferred into another trust with Mr. Aven's lawyer, Juan Carlos Esquivel, as the beneficiary²⁸.
102. Then, on March 8, 2005, 51% of the shares of La Canícula were transferred to Ms. Paula Murillo, a national of Costa Rica that was Mr. Aven's long-term personal assistant in Costa Rica²⁹. A new transfer agreement was executed among Mr. Aven and Ms. Murillo on May 10, 2010 with the same purpose, i.e., transferring 51% of the stock of La Canícula³⁰ to Ms. Murillo.

²⁵ Exhibits C-28 and R-2.

²⁶ The dates on which this purchase agreement was executed have been the subject of debate. Although Mr. Aven testified in his Second Witness Statement (and the Claimants in their Reply Memorial) that the SPA was executed on April 1, 2002, Mr. Aven subsequently corrected this during his testimony at the December Hearing that the transfer occurred on April 30, 2002.

²⁷ Exhibit C-237. This trust agreement was submitted by Claimants after Respondent submitted evidence during the arbitral proceedings of the termination of the initial trust agreement. Both are dated April 30, 2002.

²⁸ Exhibit R-393.

²⁹ Exhibit C-242. Ms. Murillo also acted before Costa Rican agencies as the legal representative of the Enterprises in various administrative proceedings.

³⁰ Exhibit C-65. Claimants' Post-Hearing Brief, ¶ 537, page 251.

B. Claimants' Permit Applications

103. On September 23, 2002, Claimants submitted to SETENA their Preliminary Environmental Assessment Form for the “Hotel La Canícula Project”³¹ located on the Concession Site. Following an inspection conducted by SETENA on October 11, 2002, the agency concluded that “[g]iven that the project is located in the maritime terrestrial zone, the increase in the capacity of load of services, an [Environmental Impact Study] is required”³². SETENA required from Claimants the submission of an environmental impact study on November 22, 2002³³. Despite appointing Mr. Carlos Dengo Garron as the consultant in charge of submissions regarding this matter, Claimants never filed before SETENA any application to develop the hotel.
104. Then, in 2004, Mr. Aven commissioned a marketing and land planning study for the project to help produce a conceptual design³⁴. Following the design, an application was filed with SETENA to develop a condominium site referred to as “Villas La Canícula”. SETENA issued the first Environmental Viability Permit to the “Villas La Canícula” project³⁵ on November 23, 2004, which covered the area for both the Condo Section, as well as part of the Easements Section. No development was commenced but, on February 27, 2007, SETENA granted a one-year extension to this first Environmental Viability Permit in light of the fact that Claimants “were still in the process of obtaining the construction permits”³⁶. This original Environmental Viability Permit then lapsed one year later. Since the Villas La Canícula project was not developed within its term, SETENA closed its file on the project on September 13, 2011, returning the environmental guarantee that had been deposited by Claimants when they applied for the Environmental Viability Permit³⁷.
105. Contemporaneously in the month of January 2005 La Canícula had applied for an Environmental Viability permit for the “Hotel Colinas del Mar” projects on the

³¹ Exhibit R-3.

³² Exhibit R-4.

³³ Exhibit R-5.

³⁴ Exhibit C-30.

³⁵ Resolution File No. 2164-2004-SETENA, Exhibit R-9.

³⁶ Resolution No. 375-2007 SETENA, Exhibit R-12.

³⁷ Exhibit R-112.

Concession Site³⁸, for which a permit was issued by SETENA on March 17, 2006³⁹. Pursuant to SETENA's requirements for the permit application, the Claimants obtained confirmation from SINAC that the Concession Site was not within a Wetlands Protected Area (“WPA”) as per *communiqué* dated January 21, 2006⁴⁰.

106. In order to consolidate the ownership of different plots into one single parcel, Mr. Aven subsequently applied to consolidate properties, securing approval to consolidate various properties into one (Property P-142646) in September 2005⁴¹. Title to this merged property was subsequently transferred, in October 2008⁴², to Trio International Inc., a company owned by the Claimants, and 288 lots comprising the Condo Section of the Las Olas Project were created.
107. In March of 2006, Claimants appointed DEPPAT, S.A. as the “Environmental Regent” for the Villas La Canícula Project⁴³. An environmental regent is the professional tasked with ensuring that the works undertaken by a developer do not impact the environment. DEPPAT resigned from the position in April 2009 and notified SETENA of its withdrawal due to Claimants’ failure to indicate a start date for the Villas La Canícula project. DEPPAT nonetheless continued to be retained by Claimants for the remaining projects in Las Olas.
108. In a major step towards the development of the Las Olas Project, the Claimants hired the architectural and engineering firm of Mussio Madrigal in April 2007 to prepare a master site plan for the entire project and apply for the Environmental Viability and construction permits for the Condo Section⁴⁴.
109. Mr. Edgardo Madrigal Mora, one of the partners in the firm, was in charge of the “**D1 Application**” process to secure the Environmental Viability for the Condo Section. As part of the elements to accompany to the application, the Claimants were to provide to SETENA an environmental management plan, a geotechnical survey, a physical

³⁸ Exhibit R-10.

³⁹ Resolution No. 543-2006-SETENA, Exhibit C-36.

⁴⁰ Exhibit C-223.

⁴¹ Exhibit C-242.

⁴² Exhibit C-4.

⁴³ Exhibit R-10.

⁴⁴ Exhibit C-43.

environmental protocol, an archaeological survey, and an anthropic risk certification. The firm of Mussio Madrigal then commissioned these studies and reports from required third parties.

110. In July 2007, Mussio Madrigal engaged another firm, Tecnocontrol, S.A., to undertake several of the studies, among them a hydrogeological study⁴⁵. Tecnocontrol, S.A. in turn requested the study from Geotest, S.A. Geólogos Consultores. This study was undertaken, and a report prepared by Mr. Roberto Protti⁴⁶ (the “**Protti Report**”). For reasons that are in dispute in this arbitration, the Protti report was not considered for the environmental viability application, nor attached to the D1 Application subsequently submitted. However, the Protti Report was later filed with SINAC in 2011, three years after the Claimants obtained the EV for the Condo Site. Respondent has placed much relevance on this fact because it says the Protti Report noted and mapped the existence of a central zone in the property that presented “swamp-type flooded areas” (*areas anegadas de tipo pantanoso*) with poor draining. Had SETENA been informed of the findings in the Protti Report, Respondent adds, Claimants would have been required to go through a much more demanding environmental impact process to obtain the necessary permits for the development and would have been required to make extensive arrangements to protect the ecosystems in the Project Site.
111. A month later, in August 2007, Mussio Madrigal commissioned an environmental management plan (*plan de gestión ambiental*) for the Condo Section from Geoambiente, S.A., a private consulting firm established in Costa Rica, which issued the relevant report⁴⁷ (the “**Geoambiente Report**”).
112. On November 8, 2007, the D1 Application was submitted by Claimants⁴⁸ to SETENA to secure the Environmental Viability in respect of the Condo Section⁴⁹, relying on the Geoambiente Report for the Environmental Management Plan, among other documents that included a Geotechnical Survey performed by Tecnocontrol S.A. (which also included a hydrogeological study); a Physical Environmental Protocol prepared by Mr.

⁴⁵ Claimants’ Reply Memorial, ¶ 245, page 84.

⁴⁶ Exhibit R-11.

⁴⁷ Exhibit R-1.

⁴⁸ Mr. Aven signed on behalf of Inversiones Cotsco C&T, S.A.

⁴⁹ Exhibit R-13.

Eduardo Hernandez García; an Archeological Survey prepared by Ms. Tatiana Hidalgo that concluded there was no archeological evidence on site; and an Anthropic Risk Certification from Mr. Edgardo Madrigal Mora that certified that there were no sources of anthropic risk within the site⁵⁰.

113. As part of the ordinary process of the D1 Application, SETENA made an inspection visit to the Condo Section of the Las Olas project on January 10, 2008⁵¹. SETENA then requested in February 2008 follow-up information from Mr. Aven regarding the D1 Application including: (i) a vegetation coverage map, (ii) the property's registration certificate, (iii) a statement by ACOPAC-MINAE confirming the main use of the soil, (iv) confirmation as to the presence of forest areas, (v) a photographic record of the project area, and (vi) a sworn statement by the developer not to commence works without having received the Environmental Viability.
114. In response to the information request, and specifically in respect of (iv) of the prior paragraph, Mussio Madrigal declared in a letter dated March 14, 2008 that there were no forest areas at the Condo Section of the project despite the aerial photograph maps showing them in the records of SETENA⁵². The firm separately requested confirmation from SINAC that the site was not located within a Wildlife Protected Area (*área silvestre protegida*). On April 2, 2008, SINAC responded through a *communiqué* (ACOPAC-OSRAP-00282-08) to the effect that Condo Section was not within a WPA⁵³. The relevance of this determination is disputed among Claimants and Respondent.
115. Shortly after the expiration on March 17, 2008 of the Environmental Viability Permit issued two years earlier for the "Hotel Colinas del Mar" project at the Concession Site, Claimants submitted a request for an extension, and this was granted for an additional year on March 24, 2008.

⁵⁰ The Geotechnical Survey of Tecnocontrol S.A. attached to the D1 Application did not correspond to the Las Olas project, although neither Claimants nor Respondent realized this until the December Hearing. Claimants later acknowledged that the Tecnocontrol, S.A. report in the SETENA file was a mistake, but that it was not possible to determine whether this mistake was attributable Geoambiente or to SETENA.

⁵¹ Included as part of the file found in Exhibit C-222.

⁵² Exhibit R-16.

⁵³ Exhibit C-48.

116. On March 27, 2008, just days before the aforementioned SINAC *communiqué* was issued confirming that the Condo Section was not within a WPA, a SINAC Report No. 67389RNVS-2008 was submitted to SETENA as part of the Las Olas Project file⁵⁴ which has been referred to during the proceedings as the “Forged Document”. Both Claimants and Respondent have distanced themselves from its origin, and many discussions among themselves have arisen as to who had motivation to create and submit it, but it is still unclear to the Tribunal who actually produced it. This document, purportedly signed by Gabriel Quesada Avendaño (a biologist from SINAC) and Ronald Vargas (Director of SINAC) stating that the criteria followed by the Las Olas Project for environmental protection met SINAC’s requirements, concluded that the project “constituted no evident threat to the biological area of Esterillos Oeste, nor affects in any way the biodiversity in the Local National Wildlife Refuge”. This document was confirmed to be a forgery – but not until November 2010. In the meantime, it appears as though SETENA relied on the document.
117. On April 2, 2008, the Central Pacific Conservation Area of SINAC issued a confirmation letter to Mauricio Mussio, one of the principals at Claimants’ architectural firm, confirming that a certain property was not within a wildlife protected area (*area silvestre protegida*)⁵⁵. This letter identifies property number P-1244761-2007, but this does not appear to cover all of the properties, including the Easements Section of the Las Olas Project⁵⁶.
118. On April 3, 2008, Claimants made a second submission to SETENA with the information and documentation requested in SETENA’s February 2008 follow-up communication regarding the D1 Application for the Condo Section⁵⁷.
119. Finally, on June 2, 2008, SETENA issued the Environmental Viability Permit (Resolution No. 1597-2008-SETENA) for the Condo Section⁵⁸. Among the conditions established in the permit were (i) that in the event that the cutting of any tree was to

⁵⁴ Exhibit C-47.

⁵⁵ ACOPAC-OSRAP-00282-08, Exhibit C-48.

⁵⁶ This property is not listed as having been owned by Claimants, either in Annex A to Claimants’ Memorial, nor in Annex B to Claimants’ Post-Hearing Brief. However, it is a plot plan attached as Exhibit 6 to the Barboza Expert Report.

⁵⁷ Exhibit R-18.

⁵⁸ Exhibit C-52.

happen, a permit ought to be requested from the MINAE, and (ii) the need to notify SETENA one month in advance of the beginning of construction at the property.

120. After receiving the Environmental Viability Permit from SETENA for the Condo Section, Claimants applied for construction permits from the Municipality of Parrita. In the month of August 2008, the Municipality issued construction permits for a hotel, cabins and a pool at the Concession Site (Permit 165-08)⁵⁹. Although a construction permit was also applied for in respect of the Condo Section at a later date, the Municipality rejected the application on July 19, 2010 for several reasons; amongst them, the fact that the Environmental Viability Permit issued for the Condo Site in 2008 had lapsed⁶⁰. The municipal permit was finally granted on September 7, 2010.
121. SINAC (through the Central Pacific Conservation Area Parrita office) carried out an inspection of the Condo Section of the Las Olas Project on September 30, 2008, and issued a report (**ACOPAC-SD-087-08** or the “**2008 SINAC Report**”), identifying the existence of two (2) possible wetlands⁶¹. During this inspection, Mauricio Mussio of Mussio Madrigal joined the inspectors on their visit. There was no follow-up on this finding.

C. Concerns of Neighbors and Municipality Investigation

122. In March 2009, certain neighbors in the Esterillos Oeste community filed a formal complaint with the Municipality⁶², alleging that in the Las Olas Project site there had always been wetlands as evidenced by that area’s flooding during the rainy season and the existence of fauna typical of a wetland. The neighbors accused Claimants of filling in the lagoon, felling trees and building paved roads⁶³.
123. On April 26, 2009, Ms. Mónica Vargas-Quezada, Environmental Manager (*Gestora Ambiental*) from the Municipality of Parrita made a visit to the Condo Section and confirmed the felling of trees and the construction of roads⁶⁴. Based on additional neighbors’ complaints, on January 20, 2010, a second inspection visit was made by Ms.

⁵⁹ Exhibit C-40.

⁶⁰ Exhibit R-39.

⁶¹ Exhibit R-20.

⁶² Exhibit R-23.

⁶³ Exhibit R-26.

⁶⁴ *Id.*

Vargas, who again confirmed the construction of roads, evidence of wetlands, and felling of trees⁶⁵. A third inspection visit was made on May 21, 2010.

124. On May 31, 2010, Ms. Vargas prepared three internal reports to the Municipality after her last visit to the project site, (a) detailing the visits conducted and requesting that the relevant authorities undertake an official categorization of the area⁶⁶, (b) informing the Construction Department of the Municipality of a complaint regarding the existence of a wetland in the site and requesting information from the file⁶⁷, and (c) requesting information from the Department of Permits of the Municipality regarding the existence of permits at the Las Olas project⁶⁸.
125. The Urban and Social Development Department of the Municipality of Parrita responded to Ms. Vargas on June 14, 2010, and confirmed that the Las Olas Project did not hold any construction permits to undertake earth movements or build private roads with electrification⁶⁹.
126. On the same date, June 14, 2010, the Municipality attempted to serve Mr. Damjanac a *communiqué* advising of the complaints that works were being performed without the requisite construction permits⁷⁰. Claimants have insisted that the letter was never received by them. That same day, Claimants notified SETENA of the start of works in the Condo Section, through a letter dated June 1, 2010⁷¹. Respondent asserts that although the letter was dated June 1st, it was not submitted until June 14th. Respondent contends this is likely because the Environmental Viability Permit corresponding to such area was scheduled to lapse per its terms on June 2, 2010.
127. Then, Ms. Vargas filed a complaint on June 15, 2010, with the Environmental Administrative Court (*Tribunal Ambiental Administrativo* – “TAA”), a branch of the Ministry of the Environment, requesting that it conduct an investigation of the Las Olas

⁶⁵ Exhibit C-67.

⁶⁶ *Id.*

⁶⁷ Exhibit R-29.

⁶⁸ Exhibit R-30.

⁶⁹ Exhibit R-34.

⁷⁰ Exhibit R-35.

⁷¹ Exhibit R-31.

- Project in light of (i) concerns as to whether wetlands were being refilled; (ii) the construction of roads; and (iii) the fact that “vegetation” had been cut down and burned⁷².
128. The next day, on June 16, 2010, Ms. Vargas informed SINAC of her findings and prior reports issued regarding the Las Olas Project⁷³.
129. Curiously, on the same day that Ms. Vargas made her concerns public, the Municipality issued seven residential construction permits for the Easements Section of the Las Olas Project⁷⁴. A few days later, on June 22, 2010, DEPPAT—the Environmental Regent engaged by Mr. Aven—submitted a land movement plan and intended works program with respect to the Easement Section⁷⁵.
130. On July 8, 2010, Mr. Bogantes—Chief of SINAC’s Regional Office in Quepos—and Mr. Manfredi—also of SINAC—visited the Condo Section along with representatives from SETENA⁷⁶. SINAC (through the Central Pacific Conservation Area) issued a Report (ACOPAC-OSRAP-371-2010) on July 16, 2010 finding that it was not able to ascertain the existence of wetlands, but it confirmed the felling of trees⁷⁷. In this report, SINAC set forth the elements that it considered necessary to determine its existence of wetlands and concluded that it was not able to confirm these.
131. In the meantime, neighbors to the project continued to submit new complaints. On July 20, 2010, a complaint was submitted to the Municipality by Mr. Bucelato and others with respect to the existence of wetlands that were being refilled, and other concerns regarding environmental impact⁷⁸. The *Defensoría de los Habitantes* acknowledged and accepted for investigation the complaint on July 23, 2010⁷⁹.
132. As a consequence of the complaints from neighbors, on August 7, 2010, the *Defensoría de los Habitantes* informed SETENA of the complaints, and requested a report from SETENA as to whether it was aware of the complaint and whether the Las Olas Project

⁷² Exhibit C-69.

⁷³ Exhibit C-70.

⁷⁴ Exhibits C-14 and C-71.

⁷⁵ Exhibit R-42.

⁷⁶ Exhibits C-72 and C-78.

⁷⁷ Exhibit C-72.

⁷⁸ Exhibit R-40.

⁷⁹ Exhibit R-43.

had relevant EV Permits⁸⁰. On the same date the *Defensoría de los Habitantes* sent another letter to Mayor of Parrita alerting as to the complaints and also requested information from the Municipality in order to conduct an investigation⁸¹. The Municipality responded to this communication on August 18, 2010⁸², advising that an inspection had been carried out in 2009, and requested MINAET to conduct a study since the Municipality was not competent to determine the existence of wetlands. Within the list of documents supporting the project, the Municipality included reference to the Forged Document.

133. Based on the neighbors' complaints regarding the damage to Wetlands, and flooding, SETENA made another visit to the Las Olas Project on August 18, 2010 and issued an internal report, confirming that there was no evidence of "land movements" or "bodies of water (lakes)" in the Condo Section⁸³. Consequently, SETENA issued a report the following day (ASA-1216-2010-SETENA) recommending that the neighbors' complaints be rejected insofar as there were no wetlands or bodies of water (lakes) in the site⁸⁴.
134. SINAC then responded on August 27, 2010 through Mr. Christian Bogantes (head of the Subregional Office for Aguirre and Parrita) to the *Defensoría de los Habitantes* advising that, based on the different reports carried out, including the visit carried out by Mr. Rolando Manfredi on July 8, 2010, there were neither wetlands nor bodies of water (lakes) in the property⁸⁵.
135. On September 1, 2010 SETENA issued a Resolution (No. 2086-2010-SETENA) citing the inspections and reports mentioned in the preceding paragraphs, and determined that the complaints submitted by Mr. Bucelato should be rejected, insofar as there was no evidence of earth movements, bodies of water (lakes) or wetlands in the site⁸⁶. SETENA ordered Claimants to file within thirty business days an environmental management plan for the Condo Section of the Las Olas Project.

⁸⁰ Communication No. 08949-2010-DHR, Exhibit R-45.

⁸¹ Communication No. 08952-2010-DHR, Exhibit R-46.

⁸² Exhibit R-49.

⁸³ Exhibit C-78.

⁸⁴ Exhibit C-79.

⁸⁵ Exhibit C-80.

⁸⁶ Exhibit C-17.

136. On September 7, 2010 the Municipality of La Parrita issued Permit No. 130-10 to carry out constructions in an area comprising 3,573 mts. in the Condo Section⁸⁷. Earlier, in 2008—as previously described—and then in July 2010, the Municipality had issued several construction permits for the Easement Section⁸⁸. Despite granting these construction permits, the Municipality subsequently noted in a *communiqué* dated September 13, 2010 that some information was still missing for these to be lawfully issued⁸⁹.
137. Concerned over the constant allegations and complaints of Mr. Steve Bucelato, the most vocal and most opposed of the neighbors to the Las Olas Project, Mr. Aven filed a criminal complaint against him for defamation on October 20, 2010⁹⁰.
138. The neighbors to the Las Olas Project then identified the existence of the Forged Document⁹¹ allegedly issued by SINAC that had been submitted into the SETENA file back in 2008 and, in a new complaint dated November 18, 2010 — but submitted to SINAC on November 23, 2010 — these neighbors challenged the reliance by SETENA and other authorities on the Forged Document⁹². Immediately thereafter, the *Defensoría de los Habitantes* advised SINAC of the filing of this complaint⁹³. On November 25, 2010, SINAC issued an internal communication⁹⁴ requesting that the criminal charges filed by the Municipality, along with other information, be taken into account in the preparation of a report. On the same date, SINAC confirmed that the document was indeed a forgery⁹⁵. On January 17, 2011, SETENA requested⁹⁶ that Claimants present the original copy of the Forged Document or, in the alternative, a certified copy authenticated by public notary. Claimants replied to this request on February 9, 2011, denying any connection to the Forged Document and also denying having submitted it to SETENA. Claimants – through Mr. Aven—alleged that they would file another criminal complaint

⁸⁷ Exhibit C-14 and C-85.

⁸⁸ Exhibits C-14, C-40 and C-71.

⁸⁹ Exhibit R-57.

⁹⁰ Exhibit C-89.

⁹¹ Exhibit C-47.

⁹² *Communiqué* CV-0081-2010, Exhibit C-91.

⁹³ Exhibit C-91.

⁹⁴ *Communiqué* ACOPAC-D-1519-10, Exhibit R-60.

⁹⁵ *Communiqué* ACOPAC-D-1520-10, Exhibit C-92.

⁹⁶ Exhibit R-65.

against Mr. Bucelato, as he “had been seen with an original of the questionable document”⁹⁷. However, no such complaint was subsequently filed, nor was evidence submitted in this proceeding to support Mr. Bucelato’s possession of the original Forged Document.

139. Upon being informed of the Forged Document, SINAC immediately initiated other inspection visits to the Condo Section⁹⁸ and on November 30, 2010, requested that SETENA suspend the Environmental Viability Permit for the Condo Section based on the identification of the irregular document⁹⁹. Four additional inspections were carried out by SINAC Director, Mr. Picado Cubillo, in December 2010, the results of which were addressed in his January 3, 2011 report, described below.
140. On January 3, 2011, SINAC issued a report (ACOPAC-CP-003-11) (the “**SINAC January 2011 Report**”)¹⁰⁰ on the conclusions and recommendations resulting from the site visits. The report concluded that the Las Olas Project site included bodies of water, that “there may be” wetlands in the Condo Section, the felling of trees, the construction of a drainage channel, and also mentioned the Forged Document. SINAC later recommended that: (a) the agency *Programa Nacional de Humedales* (“**National Wetland Program**” or “**PNH**”) carry out an inspection¹⁰¹; (b) INTA carry out a soils study¹⁰²; (c) an injunction be issued on further construction; and (d) that criminal complaints be instigated with respect to the allegedly forged document, and damage caused to the forest in the Condo Section¹⁰³.
141. SINAC responded to the request from the *Defensoría de los Habitantes* on February 11, 2011, advising that criminal charges had been filed on account of the Forged Document and damages to a forest and possible filling of a wetland, and further advising that a

⁹⁷ Exhibit C-111.

⁹⁸ Exhibit R-60.

⁹⁹ Exhibit C-93.

¹⁰⁰ Exhibit C-101 and R-262.

¹⁰¹ *Communiqué* ACOPAC-D-80-11, Exhibit R-68.

¹⁰² *Communiqué* ACOPAC-D-81-11, Exhibit R-67.

¹⁰³ Exhibit C-122.

report had been requested from the PNH to determine whether wetlands existed on the property¹⁰⁴.

D. Injunctions Suspending Works, the Environmental Prosecutor's Investigation and Criminal Charges

142. Following the issuance of the SINAC January 2011 Report, SINAC requested the Environmental Prosecutor's Office in Aguirre on January 28, 2011, to make a site visit to verify the (i) refilling of wetlands, (ii) illegal felling of trees, and to issue an order to suspend all work that could affect the ecosystem until such time as it was confirmed whether Claimants had all permits and wetlands did not exist¹⁰⁵.
143. On February 3, 2011, Mr. Bucelato also filed a criminal complaint against Mr. Aven, with the TAA¹⁰⁶ on account of environmental damages (earth movement, the construction of roads, and the filling of wetlands), as well as the use of forged documents.
144. Then on February 4, 2011, per the instructions of the Environmental Prosecutor, SINAC requested from the PNH an official determination as to whether there were wetlands located at the Project Site¹⁰⁷, and also requested the National Institute for Agricultural Innovation and Technology Transfer¹⁰⁸ (*Instituto Nacional de Investigación e Innovación en Transferencia de Tecnología Agropecuaria* - "INTA"), an agency of the Ministry of Agriculture, perform a survey of the soil.
145. Shortly after SINAC made its request for an official determination of whether or not there were wetlands at the Las Olas Project site, it issued Resolution ACOPAC-CP-032-11 dated February 14, 2011¹⁰⁹, containing an injunction (*medida cautelar administrativa*) suspending all works and provided notice thereof to Mr. Aven on February 18, 2011. The SINAC Injunction ordered the immediate suspension of the project, as well as any other activity related to the clearance of minor and major vegetation, the opening of new roads, or other earth movements, until such time as could be determined whether the protected areas had been affected or invaded, and wetlands have been drained or filled. Although

¹⁰⁴ *Communiqué* ACOPAC-D-115-11, Exhibit R-72.

¹⁰⁵ Exhibit R-66.

¹⁰⁶ Exhibit C-110.

¹⁰⁷ Exhibit R-68.

¹⁰⁸ Exhibit R-67.

¹⁰⁹ Exhibit C-112.

Claimants initially challenged the SINAC injunction¹¹⁰, they later abandoned said challenge.

146. On March 2, 2011, SINAC filed a claim with the TAA against Mr. Aven, as legal representative of Inversiones Cotsco C&T, S.A., for damage to wetlands and illegal tree cutting¹¹¹. The claim marked the third complaint filed with the TAA concerning the Las Olas Project. A few months later, on July 27, 2012, the TAA would consolidate the complaints into one record given that the subject matter and the defendants were the same¹¹².
147. Mr. Bucelato then appeared before the Municipality on March 6, 2011, with an attorney, to present the SINAC January 2011, Report¹¹³ and requested that an injunction be issued to stop construction on the Las Olas Project. This complaint was memorialized by an internal report issued on March 7, 2011 by Mr. Marvin Mora Chinchilla, Head of the Terrestrial Maritime Zone of the Municipality of Parrita at the time, addressed to the Municipal Council¹¹⁴.
148. On March 8, and based on the above complaints, the Municipal Council issued a resolution urging the Mayor of Parrita to issue an injunction¹¹⁵- separate from that issued days earlier by SINAC. Thereafter, the Municipality of Parrita issued several letters to authorities on April 4, 2011, inquiring as to the status of the complaints since it had resolved to suspend any permits, and not to issue additional ones in respect to the project.
149. The PNH presented a wetlands study to SINAC on March 18, 2011, concluding, *inter alia*, that there was a wetland in the property; that there was machinery operating at the site moving land and installing sewage systems; and that a wetland had been adversely affected by the construction of roads and sewage¹¹⁶. The PNH concluded that the principle *in dubio pro natura* should be applied and immediate measures to prevent more harm should be taken, in accordance with the Biodiversity Law (Law No. 7788).

¹¹⁰ Exhibit C-146.

¹¹¹ Exhibit R-73.

¹¹² Exhibit R-121.

¹¹³ Exhibit C-101.

¹¹⁴ Exhibit R-74.

¹¹⁵ Municipal Council Accord No. AC-03-2362-2011, Exhibit R-75.

¹¹⁶ Exhibit R-76.

150. On April 13, 2011, a temporary injunction (Resolution No. 412-11-TAA) was issued by the TAA¹¹⁷, which was notified to Claimants on the same date¹¹⁸, and SETENA likewise issued an injunction¹¹⁹ (Resolution 839-2011-SETENA) prohibiting further works on the site under the 2008 Environmental Viability Permit, on the basis of an official communication from SINAC dated November 30, 2010, requesting suspension of the Environmental Viability permit in order to investigate allegations concerning the forged SINAC document. As a result, the Municipality of Parrita issued a report and resolution on May 12, 2011¹²⁰ advising that in light of the SETENA April 2011 Injunction, it would not issue any type of construction permit for the site. The Municipality was clear to identify in its resolution that it was not the issuer of the injunction, but was acting in conformity with the principle of administrative coordination. Despite such resolution issued by the Municipality, Respondent has claimed that Claimants continued working on the Condo Section. Several inspections were carried out in the following weeks, and it was confirmed that works continued¹²¹.
151. On April 29, 2011, Claimants appealed the SETENA April 2011 Injunction, and requested that it be declared null and void.
152. Just a couple of weeks after the SETENA April 2011 Injunction, however, conflicting decisions were issued by agencies of Costa Rica.
153. First, on May 5, 2011, INTA issued a report (DE-INTA-255-2011)¹²² - in response to SINAC's February 4, 2011 abovementioned request, concluding that despite the gley soils that were present, soil studies carried out did not support the existence of wetlands¹²³.

¹¹⁷ Exhibit C-121.

¹¹⁸ Exhibit R-78.

¹¹⁹ Exhibit C-122.

¹²⁰ Exhibit C-125.

¹²¹ As indicated by Ms. Vargas in a report (DeGA-0111-2011) to SETENA and to the Municipal Council of June 29, 2011 informing as to earth movement and construction activities being continued. (Exhibit C-133).

¹²² Exhibit C-124.

¹²³ One of the conclusions of the report states that "the anthropic affectation that has been given for decades to this sector (road infrastructure, deforestation, cattle raising) and the definition of Management Unit for ¶ 4 do not give rise [to conclude] that the soils on this site can be classified as typical of wetland ecosystems" (*La injerencia antropica que por varias décadas se ha dado en este sector (infraestructura vial, deforestación, ganadería) y la definición de Unidad de Manejo del punto 4 no dan pie a que los suelos de este sitio se cataloguen como típicos de ecosistemas de humedal*) (Exhibit C-124).

154. Then, on May 16, 2011 SINAC issued a photographic report (ACOPAC-CP-081-11)¹²⁴ addressed to the Prosecutor (Mr. Martinez) to which report was made after visits to the site on December 6 and December 21, 2010 identifying felled trees and construction works.
155. On May 18, 2011 SINAC issued another report (SINAC-GASP 143-11)¹²⁵ also addressed to the Prosecutor (the “**SINAC May 2011 Report**”) based on a site visit on May 13, 2011, concluding that a wetland area of approximately 1.35 hectares existed on the Las Olas Project; that the site’s topography had been directly affected by a drainage channel and sewage system; and that the palustrine wetland had been completely refilled by Claimants. Further, SINAC recommended requesting from Claimants a restoration plan in respect to the damage caused to the ecosystem¹²⁶.
156. SETENA subsequently upheld the injunction it had issued on April 13, 2011, through Resolution 1190-2011-SETENA of May 31, 2011¹²⁷, taking note that such injunction had not been complied with by Claimants. It also ordered Claimants to submit a mitigation plan to avoid erosion of land, and a notice was ordered to be given to the environmental prosecutor (*Fiscalía Agrario Ambiental*) in light of the fact that Mr. Aven was deemed to be in contempt of the earlier order.
157. Next, on July 7, 2011, SINAC submitted another report (ACOPAC-CP-099-11) to the Prosecutor which confirmed the existence of a forest and damages caused to the forest in the Las Olas Project Condo Section¹²⁸.
158. On June 8, 2011, SETENA issued a new resolution with respect to the Environmental Viability for the Concession Site (1309-2011-SETENA), reflecting the modified layout of the proposed project for the Concession Site, although the description of the project

¹²⁴ Exhibit C-126.

¹²⁵ Exhibit R-265. The date of the report wrongfully states as its date March 18, 2011 (18 de marzo de 2011) considering that the site visit was made on May 13, 2011.

¹²⁶ SINAC confirmed the geographic coordinates of the site visit carried out on May 13, 2011 in its report of May 23, 2011 (SINAC-GASP 154-11).

¹²⁷ Exhibit R-100.

¹²⁸ Exhibit C-134.

was modified at the request of Claimants by reason of errors in the prior resolution, by a subsequent SETENA resolution (2030-2011-SETENA) on August 23, 2011¹²⁹.

159. Four months later, on October 1, 2011, and as a consequence of another neighbor's complaint, Mr. Picado Cubillo from SINAC made a visit to inspect the Las Olas Project site, and issued a report to the Environmental Prosecutor (ACOPAC-CP-129-2011-DEN) on October 3, 2011 (the "**SINAC October 2011Report**")¹³⁰, whereby it confirmed environmental damages and the cutting of trees. Mr. Manfredi from SINAC made another visit on October 25, 2011, and issued another report confirming the above findings¹³¹.
160. Following these reports, the Environmental Prosecutor, Mr. Luis Gerardo Martínez, charged Mr. Aven on October 21, 2011, with the crimes of (i) ordering the draining and drying of wetlands in violation of Article 98 of the Wildlife Conservation Law, and (ii) invading a conservation area in violation of Article 58 of the Costa Rican Forestry Law. Mr. Damjanac was also charged but in this case with illegal exploitation of a forest in violation of Article 61 of the Costa Rican Forestry Law¹³².
161. Contemporaneously, on October 14, 2011, the Prosecutor requested¹³³ that the Criminal Court of Quepos, Costa Rica, issue a judicial injunction against the continuance of works at the Las Olas Project site. This injunction was granted on November 30, 2011,¹³⁴ ordering Claimants to stop all work where there may be a wetland or forest on the site, and to stop all water damage from the wetland, it also ordered both Mr. Aven and Mr. Damjanac to stop from taking any other works affecting the environment. The Municipality was ordered not to issue any construction permits on the lots identified in the order. This 2011 Injunction remains in effect to this date.
162. In a surprising turn of events, on November 15, 2011 SETENA issued Resolution 2850-2011-SETENA, whereby it "revoked the injunction that SETENA itself had issued on April 13, 2011, because it found "... no grounds or defects justifying annulment ..." of the Environmental Viability Permit for the Condo Section since there was insufficient

¹²⁹ Exhibit C-138.

¹³⁰ Exhibit C-141 and R-264.

¹³¹ Exhibit C-143.

¹³² Exhibit C-142.

¹³³ Exhibit R-114.

¹³⁴ Exhibit C-187.

evidence to prove that Claimants were responsible for the Forged Document¹³⁵. In essence, SETENA confirmed the Environmental Viability Permit for the Condominium Section.

163. The Attorney General's Office, on behalf of the Republic of Costa Rica, then filed a civil claim against Claimants on November 17, 2011, seeking damages for the environmental damage caused to the ecosystems¹³⁶.
164. On November 30, 2011, the Criminal Court of Quepos' accepted the petition from the Environmental Prosecutor, and issued an injunction and ordered Claimants to stop all works wherever there may be a wetland or forest as per the report issued by SINAC¹³⁷.
165. Despite SETENA's revocation of its own suspension order, by this time there were three separate injunctions issued against the continuance of works at the Las Olas Project site: (a) the SINAC Injunction of February 14, 2011¹³⁸; (b) the TAA Injunction of April 13, 2011¹³⁹; and (c) the Criminal Court of Quepos' injunction of November 30, 2011.
166. In December 2011, following Claimants' commissioning of a forestry report from INGEOFOR, a Costa Rican private environmental consulting company, a report was issued finding that the Las Olas site did not contain a forest, but largely consisted of cattle pasture. Specifically, the report found that the majority of the trees in the Condo Section did not require a tree felling permit and that nothing that would be considered a forest—within the definition established under the Forestry Law—was found¹⁴⁰.
167. One year later, as the criminal case was ongoing, the Municipality of Parrita requested its Environmental Commission on October 10, 2012, to prepare a report on the Las Olas Project and whether or not a palustrine wetland existed¹⁴¹. The Environmental Manager then submitted a report on November 19, 2012 (DeGA-359-2012), with a detailed narrative of the events taking place in respect to the Las Olas Project, the permits issued;

¹³⁵ Exhibit C-144.

¹³⁶ Exhibit R-200.

¹³⁷ Exhibit C-146.

¹³⁸ Exhibit C-112.

¹³⁹ Exhibit C-121.

¹⁴⁰ Exhibit C-148.

¹⁴¹ *Communiqué* DeGA-328-2012, Exhibit R-126.

the determinations as to the existence of wetlands and forest on site, and the injunctions issued.

168. While this report was in process, the Municipal Council issued on November 6, 2012, Resolution SM-2012-802¹⁴² addressed to the Mayor, approving the lifting of its own injunction issued as a consequence of SETENA's Resolution of April 13, 2011. This decision was based on the fact that SETENA had itself revoked such resolution. In accordance with the Municipal Council Resolution, the continuance of the Las Olas Project was approved, subject to compliance with applicable law.
169. There were contemporaneous internal investigations in the Municipality. The Internal Auditor of Parrita, Mr. Jorge Antonio Briceño Vega, issued two communications in October and November of 2012¹⁴³ - addressed to the TAA and the Municipal Council, and to the Major of Parrita, respectively, questioning whether the actions taken in the complaint before the TAA were properly motivated by Ms. Vargas as Environmental Manager of the Municipality; and whether the resolution issued by the Municipal Council suspending the Las Olas Project was appropriate in light of the information available. Mr. Briceño submitted recommendations.

E. The Complaints from Mr. Bucelato and Other Neighbors in Esterillos Oeste

170. Throughout their submissions, Claimants have expressed multiple references to complaints filed by Mr. Bucelato, whether these were filed by himself or jointly with other neighbors of Esterillos Oeste, during the period comprised between March 2009 and March 2011. Some of these complaints were submitted as evidence in the proceedings¹⁴⁴ by both Claimants and Respondent. According to Claimants, the meddling of Mr. Bucelato and "... his unsubstantiated, recycled and rejected complaints about alleged wetlands and an Allegedly Forged Document ... a disgruntled neighbor with a vendetta against the Project and Mr. Aven ... allowed investigations to spiral out of control without a shred of conclusive evidence and with no regard for the Claimants'

¹⁴² Exhibit R-129.

¹⁴³ DAMP-153-2012, dated October 16, 2012, addressed to the Administrative Environmental Court (Exhibit C-282); DAMP-154-2012, dated 29 October 2012, addressed to the Municipal Council and to Mr. Freddy Garro Arias, Municipal Mayor of Parrita (Exhibit C-283); and DAMP-159-2012/143, dated November 5, 2012, addressed to the Municipal Council (Exhibit C-284).

¹⁴⁴ Exhibits C-79, R-23, R-37, R-44, R-59, R-74.

due process rights, is outrageous and a clear breach of the Respondent's DR-CAFTA obligations vis-à-vis foreign investors"¹⁴⁵. This merited the preparation by Claimants of Annex "A" to their Post-Hearing Brief which maps the different complaints, separating them as regarding wetlands, the Forged Document, or a criminal complaint, and what they reveal to be a series of actions which they believe are unmerited, overlapping injunctions and Municipality Shutdown Notices.

171. The record shows that the complaints alleging the existence and damages to the wetlands were investigated by the proper Municipal authorities, which then triggered further investigations from SINAC, SETENA and the TAA. These have been commented above. Indeed, Ms. Mónica Vargas, who was the Environmental Manager at the Municipality, inspected the Las Olas Project site after the first complaint received relating to an alleged refilling of a wetland in March 2009, and subsequently in January and May 2010, producing reports¹⁴⁶ and filing of complaints to MINAE and the TAA¹⁴⁷. In turn, these reports and complaint provoked action on the part of *Defensoría de los Habitantes* directing the Municipality of Parrita, the Major, as well as the TAA and SETENA¹⁴⁸ to take action. When a complaint relating to the Forged Document was sent by Mr. Bucelato directly to *Defensoría de los Habitantes*, the latter passed on the complaint to SINAC which entrusted an inspection visit in December 2010, and thereafter issued its injunction in February 2011¹⁴⁹.
172. Further as has been identified above, after receiving Ms. Vargas' request for an investigation, Mr. Bucelato's complaint and SINAC's complaint, the TAA initiated an administrative process against the Las Olas Project and issued in April 2011 the TAA Injunction¹⁵⁰. Although the injunction is temporary in nature, during the process of investigation and until the TAA's final decision, respondent has complained of this action and has stated that "... due to the chilling effect of this arbitration, agencies like the TAA have held back from continuing with the proceedings in the fear of issuing a decision that

¹⁴⁵ Claimants' Post-Hearing Brief, ¶ 18, page 17.

¹⁴⁶ Exhibits R-29 and R-30.

¹⁴⁷ Exhibit C-67.

¹⁴⁸ Exhibits R-44, R-45, R-46, R-61, R-75, R-76 and R-77.

¹⁴⁹ Exhibit R-58.

¹⁵⁰ Exhibit C-121.

could be inconsistent with any findings from this tribunal or could have an adverse effect on Costa Rica's defense"¹⁵¹.

173. Mr. Bucelato also filed complaints regarding the [then allegedly] Forged Document, and filed also a criminal complaint against Mr. Aven in February 2011 in respect thereto. Claimants allege that the Prosecutor, Mr. Martínez also pursued without justification the complaint, but the record shows that the Prosecutor also acted on the basis of a complaint filed by SINAC.
174. It is evident to the Tribunal that serious animosity existed among Mr. Bucelato and Mr. Aven. Months before Mr. Bucelato filed the criminal complaint against Mr. Aven, Mr. Aven had already filed his complaint on defamation, but failed to pursue it when requested by the Prosecutor.

F. Criminal Trial of Messrs. Aven and Damjanac

175. The criminal court conducted a preliminary hearing in Mr. Aven's and Mr. Damjanac's cases on June 19, 2012, when it was determined that the Prosecutor had gathered sufficient evidence and the criminal charges should proceed to trial.
176. On December 5, 2012, the criminal trial commenced. However, following a suspension of the proceedings because of the December holidays in Costa Rica and the subsequent illness of the presiding judge, and the absence of an agreement among Mr. Aven and the prosecution to continue the case in light of a procedural rule found in the criminal procedure laws of Costa Rica, which shall be addressed in detail below in Section X, a mistrial was declared.
177. The new trial was set for December 2013, and counsel to Mr. Aven advised that his client would not be attending the hearing scheduled for December 20, 2013, because of fear for his life, and requested the possibility of conducting the trial through video conference¹⁵². Since the Costa Rican criminal system does not recognize judgments in the absence of the accused, the court rejected the petition and scheduled a trial hearing on January 13, 2014. Since Mr. Aven did not appear to face trial because he had left Costa Rica based on

¹⁵¹ Respondent's Post-Hearing Brief, ¶ 874, page 183.

¹⁵² Respondent's Counter-Memorial, ¶¶ 584, page 142. Exhibit R-144 contains the letter submitted by Mr. Morera to the criminal court.

the fact that he alleged to have received anonymous threatening emails and was the victim of a shooting incident while driving in a Costa Rican highway¹⁵³, the court then issued the so-called INTERPOL Red Notice.

178. On February 5, 2014, Mr. Damjanac was re-tried and subsequently acquitted of all charges, although the decision was appealed by the Attorney General Office and later reversed. Accordingly, a new trial against Mr. Damjanac is pending.
179. Contemporaneously with the criminal proceedings, Claimants allege inaction on the part of the authorities in Costa Rica in light of the threats received, and the murder attempt which Mr. Aven stated to have suffered. These allegations will be addressed in Section X below.
180. On January 24, 2014, Claimants filed their Notice of Arbitration with Respondent.
181. As is evident from the above description of events, a myriad of issues arise from the confused and complicated facts and what appears to be the contradictory and/or inconsistent reports, resolutions and actions taken by the Costa Rican authorities, which shall be addressed below by the Tribunal. Among other issues that need to be examined are: Were there wetlands and forests on the Las Olas Project site? Which is the agency that is entrusted with determining the existence of wetlands? Is the agency a different one for forests? Which is the agency that is responsible for issuing an environmental viability permit? What are the rights of the investor once such a permit is received? Who has the authority to revoke? Finally, what is the relationship among the municipal and the central government when it comes to issuing permits for the development of property?

¹⁵³ Claimants' Memorial, ¶¶ 206-211, pages 60-61.

VII. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

182. As expressed in their respective submissions the Parties seek the following relief:

A. Claimants

183. Claimants seek the following relief¹⁵⁴:

(1) A DECLARATION that the Tribunal has jurisdiction over the claims presented by the Claimants;

(2) A DECLARATION that the Respondent, for the reasons set out herein or any of them, breached Article 10.5 of the DR-CAFTA;

(3) A DECLARATION that the Respondent, for the reasons set out herein or any of them, breached Article 10.7 of the DR-CAFTA;

(4) A DECLARATION that the Respondent, by reason of any breach or breaches of Articles 10.5 and 10.7 of the DR-CAFTA found by the Tribunal, damaged the Claimants and caused them to suffer loss;

(5) AN ORDER that the Respondent pay to the Claimants damages in the sum of US\$ 69,100,000, plus interest up to the date of the award calculated by Dr. Abdala to make a total of US\$ 97,400,000 at today's date or, in the alternative, AN ORDER that the Respondent pay to the Claimants damages in the sum of US\$ 92,000,000 [as at the date of filing of their Reply Memorial], or such other sum as the Tribunal may find owing in respect of the value of the Las Olas project;

(6) AN ORDER that the Respondent pay to Mr. David Aven moral damages in the sum of US\$ 5,000,000, or such other sum as the Tribunal may find owing;

(7) AN ORDER that the Respondent shall immediately and permanently terminate, and forever desist from instituting in respect of the subject-matter of this dispute, any criminal proceedings against Mr. David Aven and steps aimed at his extradition to Costa Rica;

(8) AN ORDER that the Respondent pay interest on any and all sums awarded to the Claimants, at the WACC calculated by Dr. Abdala, from the date of any award until payment is received by the Claimants or, in the alternative, interest at such rate and compounded at such steps as the Tribunal may find to be appropriate;

(9) AN ORDER that the Respondent pay all of the Claimants' costs and expenses of this arbitration, including all expenses that the Claimants have incurred or shall incur in respect of the fees and expenses of the Tribunal, ICSID, legal counsel, expert witnesses and consultants; and

(10) Such other relief as the Tribunal may consider appropriate.

¹⁵⁴ Claimants' Reply Memorial, page 148.

184. In their Post-Hearing Brief¹⁵⁵, the Claimants adjusted the following paragraphs:

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.

B. Respondent

185. Respondent, on the other hand, seeks the following relief¹⁵⁶:

1. Declare that Mr. Aven's lack of standing on the grounds of nationality precludes the Tribunal from seizing jurisdiction of this arbitration vis-à-vis Mr. Aven and thereby prevent Mr. Aven from seeking redress under the Treaty;

2. Declare that the Tribunal lacks jurisdiction to hear any claims relating to Mr. Raguso and Mr. Shioleno on the grounds that they do not hold a covered investment under DR-CAFTA;

3. Declare that the Tribunal has no jurisdiction over the properties that Claimants do not own on the basis that they do not qualify as a covered investment under DR-CAFTA;

4. Declare that the Tribunal has no jurisdiction over the Concession or the Concession site and any claims relating to La Canícula;

5. Declare that the Tribunal has no jurisdiction to hear any late submitted claims regarding the purported violation of the full protection and security standard contained in Article 10.5(2)(b), due to Claimants' failure to seek leave to amend its claim;

6. Declare that Claimants' claims are inadmissible on the basis of the illegalities enunciated herein and thereby prevents Claimants from seeking redress under the Treaty;

In the alternative,

7. Dismiss all the claims in their entirety and declare that there is no basis of liability accruing to Respondent as a result of: 5.1. Any claim of violation by Costa Rica of DR-CAFTA Articles 10.5 and 10.7; 5.2. Any claim that Claimants

¹⁵⁵ Claimants' Post-Hearing Brief, ¶ 714, page 322.

¹⁵⁶ Respondent's Post-Hearing Brief, ¶ 1131, page 251.

suffered losses for which Costa Rica could be liable; or 5.3. Any claim for the Tribunal's interference with Mr. Aven's ongoing criminal trial before the courts in Costa Rica;

8. Furthermore, declare that Claimants have caused environmental harm to Costa Rica;

9. Order Claimants to pay Respondent damages in lieu of the reparation of the environmental damage Claimants caused to the Las Olas Ecosystem;

10. Order that Claimants pay Respondent all costs associated with these proceedings, including arbitration costs and all professional fees and disbursements, as well as the fees of the arbitral tribunal; and

In the alternative, and where appropriate,

11. Reject as inflated and unsupported, Claimants' valuation of their alleged losses, as well as Claimants' methodology as to the interest rate that would apply to any monetary award that might be issued by this Tribunal; and

12. Grant such relief that the Tribunal may deem just and appropriate.

186. The Arbitral Tribunal shall address the petitions, as required, and first examine those relating to the challenges to jurisdiction raised by Respondent. Once the jurisdiction of the Tribunal has been confirmed, the issues on the merits of the case can thereafter be addressed. If there are breaches found to the obligations of Respondent under DR-CAFTA then the Tribunal will examine whether damages have been caused to Claimants and the amount thereto.

VIII. JURISDICTION

187. As identified in Section VI above, Claimants stated in their Memorial of Claims that the Tribunal has jurisdiction on the basis of four tests: (a) their consent to submit to arbitration under DR-CAFTA, with their submission on or about January 24 of the Notice of Arbitration and their waivers to seek compensation for the alleged breaches in other *fora*, including the submission of waivers executed by the Claimants and by the Enterprises owned and/or controlled in the terms of Articles 10.16 and 10.18 DR-CAFTA (*Jurisdiction Ratione Voluntatis*); (b) of the nationality of Claimants in accordance with Article 10.28 DR-CAFTA (*Jurisdiction Ratione Personae*); (c) on the nature of the investment in real property made in Costa Rica pursuant to Article 10.1 of the DR-

CAFTA (*Jurisdiction Ratione Materiae*); and (d) the timely filing of the claim in accordance with Article 10.16(3) DR-CAFTA (*Jurisdiction Ratione Temporis*).

188. At the time Respondent submitted its Counter Memorial, it challenged the jurisdiction of the Tribunal on the basis of two tests: (i) that the effective and dominant citizenship of Mr. Aven is not that of the United States of America; and (ii) the fact that the misconduct of Claimants in respect to their investment bars them from any protection under DR-CAFTA¹⁵⁷. Respondent did not challenge the other tests of jurisdiction *Ratione Voluntatis*, *Ratione Personae* (with respect to the other seven Claimants), *Ratione Materiae* or *Ratione Temporis*.
189. However, in its Rejoinder, and based on the information gathered in the document production stage, Respondent also argued that the Tribunal lacked jurisdiction over: (i) certain properties that Claimants did not own in the Las Olas Project; and (ii) the Concession Site.
190. Subsequently, Respondent re-characterized in its Post-Hearing Brief the misconduct of Claimants' investment as an issue of "inadmissibility of the claims" based on: (a) the unlawful and illegal conduct in the operation of their investment, and (b) the fact that Claimants have not put forward a claim for full protection and security, while further arguing that Claimants have brought claims that are not supported under Article 10.5 of DR-CAFTA¹⁵⁸.
191. Thus, Respondent's position in respect to the Tribunal's jurisdiction is to challenge it based on: (A) Mr. Aven not being a protected investor under DR-CAFTA (*Ratione Personae*); (B) Mr. Shiolen and Mr. Raguso's failure to make an investment; (C) the properties that Claimants do not own; and (D) the Concession Site (the last three, *Ratione Materiae*). The Tribunal proceeds to examine the four challenges.

¹⁵⁷ Respondent's Counter-Memorial, ¶ 256-432, pages 65 -107.

¹⁵⁸ Respondent's Post-Hearing Brief, ¶ 718-726, pages 147-149.

A. Nationality of Mr. Aven

1. The Parties' Positions

192. Respondent has claimed that Mr. Aven is a dual citizen of the United States of America and Italy, and that he appeared as an Italian national during his residency in Costa Rica and in his making of the investment, having expressly acknowledged this fact¹⁵⁹. Respondent submitted evidence to the effect that during the application process undertaken by Mr. Aven to seek residency in Costa Rica, he identified himself as an Italian national, and his residency immigration card issued by the relevant office stated his nationality as Italian¹⁶⁰. Respondent further argues that Mr. Aven also took other actions related to his investment identifying himself as a national of Italy; for example, in the filing of a criminal complaint against Mr. Steve Bucelato, a neighbor in the area of the Las Olas project, and before Christian Bogantes, a SINAC inspector; in applying for inspections to the property; and even upon submitting his sworn declaration before the Prosecutor's Office when the criminal charges were brought against him and Mr. Damjanac¹⁶¹.
193. At the time of their Reply Memorial, Claimants did not dispute the fact that Mr. Aven conducted himself as an Italian national in respect of some of his dealings, but added that, he had done so because of a perceived "bias against Americans"¹⁶². They also stressed that the dual nationality of Mr. Aven did not preclude him from the protection of DR-CAFTA¹⁶³.
194. Claimants agree with Respondent that the use of the expression "dominant and effective nationality" by the DR-CAFTA Parties in the Article 10.28 definition of "investor of a Party", intends to incorporate by reference the applicable standards of customary international law for the treatment of multiple nationality in diplomatic protection cases, but alleged that Respondent failed to express the customary international law rules governing allegations of multiple nationality in diplomatic protection practice. Claimants

¹⁵⁹ Respondent points out to the acknowledgement found in the Second Witness Statement of David Aven, ¶ 22.

¹⁶⁰ Respondent's Counter-Memorial, ¶ 264, page 68.

¹⁶¹ *Id.*, ¶¶ 266-432, pages 68-69.

¹⁶² Second Witness Statement of David Aven, ¶ 22.

¹⁶³ Claimants' Reply Memorial, ¶¶ 27 – 37, pages 9-12.

argue that the International Law Commission has given serious consideration to the treatment of nationality in the field of diplomatic protection and, as such, its Draft Articles on Diplomatic Protection are arguably the only reasonable source from which to commence an analysis in a nationality dispute under DR-CAFTA Article 10.28. In this regard, Article 6 of the ILC's mentioned Draft Articles provides: "[a]ny State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national." Claimants allege that the restrictions found under Article 10.28 would prevent a claim when the "dominant and effective" nationality was that of the country against which a claim is to be brought, i.e., Costa Rica in the case at bar¹⁶⁴.

195. In response, Respondent made reference to the terms of Article 17 of the 2006 ILC's Draft Articles, which provide that: "The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments" and that the issue of dual nationality is already expressly addressed under DR-CAFTA¹⁶⁵.
196. Respondent also interprets Article 10.28 differently. First, it states that there is no need to enter into an unnecessary discussion on the customary law of nationality because DR-CAFTA already expressly provides the solution to cases of dual nationality. Respondent has indicated that the "well defined test" under DR-CAFTA is that a natural person who is a dual national (like Mr. Aven) shall be considered exclusively a national of the State of his or her "dominant and effective nationality", and that qualification as "Investor of a Party" is not restricted to scenarios where the dominant and effective nationality is one of the contracting states, but also a third State¹⁶⁶. In Respondent's view, the provision was designed to limit the protection of Chapter 10 to "real investors" and, in the context of a multilateral agreement such as DR-CAFTA, to have treaty protection granted only to nationals of States which are Parties to such treaty¹⁶⁷.

¹⁶⁴ *Id.*, ¶¶ 35-39, pages 11-12.

¹⁶⁵ Respondent's Rejoinder Memorial, ¶¶ 141-143, page 39.

¹⁶⁶ Respondent's Rejoinder Memorial, ¶¶ 122-123, page 35.

¹⁶⁷ *Id.*, ¶ 127, page 36.

197. In other words, Respondent argued that the definition of an “Investor of a Party” in the DR-CAFTA is limited to the confirmation of a “dominant and effective nationality” to avoid problems of “treaty shopping” by foreign investors¹⁶⁸.
198. Respondent alleges that Mr. Aven is a national of Italy, a State that is not a party to the Treaty, and therefore that the Tribunal lacks jurisdiction over him and his investments. Further, that Mr. Aven’s claims as a U.S. national constitute an exercise of treaty shopping, the consequence of which should deny him the protection of DR-CAFTA.
199. For these reasons, Respondent insisted in its Rejoinder that since Mr. Aven acted in the context of the investment as an Italian national, his investment claim should therefore be barred from protection under DR-CAFTA.
200. In their Post-Hearing Brief, Claimants concentrated on the fact that Mr. Aven’s “dominant and effective” nationality was that of the United States of America, and addressed how, in his examination during the hearing, Mr. Aven had expressed that he had visited Italy only a handful of times in his entire life; had no attachments; no business; property; or bank accounts in Italy, nor had he ever lived in Italy. On the contrary, Mr. Aven testified he had lived all his life in the United States except for the time period he lived in Costa Rica¹⁶⁹.
201. In the analysis of Mr. Aven’s nationality, the Respondent’s position in its Post-Hearing Brief was to insist on the claims as to the “dominant and effective” nationality, and the fact that he sought treaty protection after the Government of Costa Rica commenced to take actions to protect the environment¹⁷⁰.

2. The Tribunal’s Analysis

202. Despite other arguments relating to nationality, it can be stated that both Claimants and Respondent agree that under the express language of DR-CAFTA, jurisdiction *ratione personae* is dependent upon the investor’s “dominant and effective nationality”, because a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

¹⁶⁸ *Id.*, ¶¶ 144- 156, pages 39-42.

¹⁶⁹ Claimants’ Post-Hearing Brief, ¶ 262, page 131.

¹⁷⁰ Respondent’s Post-Hearing Brief ¶¶ 596-599, page 121.

203. In Article 10.28, DR-CAFTA defines “Investor of a Party” as follows:

Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality¹⁷¹. (Emphasis added)

204. Accordingly, the Tribunal must verify (1) the effectiveness of Mr. Aven’s claimed U.S. nationality; and (2) Mr. Aven’s purposes for choosing to represent himself initially as an Italian national during the development process of the Las Olas Project.

205. Through inclusion of the expression “dominant and effective nationality” in Article 10.28 definition of “Investor of a Party,” the DR-CAFTA Parties intended to incorporate by reference the applicable standards of customary international law for the treatment of multiple nationalities in diplomatic protection cases, as reflected in the *Nottebohm* Case (*Liechtenstein v. Guatemala*)¹⁷².

206. In *Nottebohm*, the International Court of Justice established the “general link” theory as the standard to be applied in international law to determine the effective nationality of individuals. The Court defined nationality in the following terms:

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred...is in fact more closely connected with the population of the State conferring nationality than with that of any other State¹⁷³. (Emphasis added)

207. Pursuant to *Nottebohm*, then, the Tribunal should engage in an *ad hoc* factual inquiry to determine which country—the U.S. or Italy—should be deemed the dominant and effective nationality of Mr. Aven. The *Nottebohm* Court instructed:

Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his

¹⁷¹ Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Chapter 10 Article 10.28.

¹⁷² *Nottebohm Case (Lichtenstein v. Guatemala)*, Judgment, 1955 ICJ Reports 4, April 6, 1995, at page 24 (CLA-132).

¹⁷³ *Id.*, at page 23.

family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc¹⁷⁴.

208. No argument to the contrary exists among Claimants and Respondent. The Parties disagree, however, in their understanding of how “dominant and effective” should be interpreted under both customary international law and DR-CAFTA.
209. In its Counter Memorial, after acknowledging the *Nottebohm* standard, Respondent cited *Champion Trading v. Egypt* to assert that in the context of investment arbitration, the nationality used to establish an investment must be considered as a relevant factor in cases of dual nationality¹⁷⁵. In essence, Respondent relies on this case to impose another factor into the *Nottebohm* calculus. The Tribunal in *Champion Trading* stated:
- What is relevant for this Tribunal is that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their U.S. nationality...[This] clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention¹⁷⁶.
210. The tribunal reached this conclusion despite the fact that all three Claimants were born in the United States, had hardly any ties to Egypt, and only possessed Egyptian nationality by virtue of an Egyptian legal provision wherein the child of an Egyptian father automatically acquires at birth Egyptian nationality if at that time the father holds Egyptian nationality, regardless of the child’s country of birth¹⁷⁷.
211. Accordingly, Respondent reasons that because Mr. Aven, while possessing dual nationality, manifested himself as an Italian citizen throughout the documentation process to actualize the investment, he is effectively an Italian national for all effects and purposes with respect to this dispute. To support its reasoning, Respondent cited as mentioned above Mr. Aven’s use of his Italian—and not his U.S.—nationality in the conduct of business both outside of and in Costa Rica¹⁷⁸ as well as his almost exclusive use of his Italian citizenship in carrying out the Las Olas Project and exclusive use of his Italian citizenship in his residency and immigration paperwork in Costa Rica.

¹⁷⁴ *Id.*

¹⁷⁵ Respondent’s Counter-Memorial, ¶ 262.

¹⁷⁶ *Champion Trading Co. v. Egypt*, at 17.

¹⁷⁷ *Id.* at 10.

¹⁷⁸ Respondent’s Counter-Memorial, ¶ 263.

212. In their Reply Memorial, Claimants take issue with the applicability of *Champion Trading* to the matter at hand stating that Respondent failed to express the customary international law rules governing allegations of multiple nationalities in diplomatic protection practice. *Champion Trading* involves an investor whose dual nationality is shared between the U.S. and the host country of the investment whereas Mr. Aven's second nationality is neither the host country nor a Party to the Treaty. Accordingly, the case is not readily applicable to Mr. Aven's case as his second nationality is Italian and not Costa Rican, the host country of the investment. Claimants' proposition is echoed by the *Champion Trading* Tribunal's assertion that "dual nationals are excluded from invoking the protection under the [ICSID] against the host country of the investment of which they are also a national"¹⁷⁹.
213. To support their assertion, Claimants rely on Article 6 of the ILC's Draft Articles on Diplomatic Protection¹⁸⁰ cited above. This idea is expanded upon in the ILC's commentary on Article 6 with the Commission explaining that "unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State"¹⁸¹.
214. In other words, the Article 10.28 reference to customary international law rules governing nationality for diplomatic protection "would preclude an investor possessing the nationality of Party A from pursuing a claim against Party B in the event that his dominant and effective nationality was that of Party B"¹⁸². Consequently, Mr. Aven is not automatically barred from the protections of DR-CAFTA based on his Italian nationality alone.
215. The Tribunal agrees with Claimants' reasoning with respect to the customary international law rules regarding dual nationals. Through reference to the dominant and effective party language, DR-CAFTA seeks to provide protections for foreign investors

¹⁷⁹ *Champion Trading Co. v. Egypt*, at ¶ 16.

¹⁸⁰ CLA-141, United Nations, *International Law Commission's Draft Articles on Diplomatic Protection*, 2006 available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf, accessed 1 August 2016, at 41.

¹⁸¹ *Id.* at 42-43.

¹⁸² Claimants' Reply Memorial, ¶ 35.

who are characterized by their lack of proximity and experience with the host country. As a result, dual nationality becomes relevant where an investor seeks to take advantage of the substantive protections contained within Chapter 10, while possessing a legal right to citizenship in the host country. The dominant and effective test would then determine whether the investor is truly a foreigner or the investor enjoys the same degree of personal connection to the host State that any other of its nationals enjoys. In this sense, Article 10.28 provides a mechanism to avoid punishment of legitimate investors deserving of protection in spite of the fact that they might possess the legal right to nationality of the host State. Thus, the Tribunal believes that the fact that Mr. Aven is a national of both the United States of America and Italy, whose investment lies in Costa Rica, does not trigger Article 10.28's mechanism for dealing with dual nationals.

216. Accordingly, Respondent's conclusion that "Mr. Aven's claims are barred since DR-CAFTA excludes claims by dual nationals whose dominant and effective nationality is of a non-Contracting State"¹⁸³ neither follows logically from the precedent cited nor does it reflect the meaning of Article 10.28.
217. Another case cited by Respondent in support of its position of the dominant and effective test leads the Tribunal to a similar conclusion. In *Eudoro Armando Olguín v. Republic of Paraguay*, the claimant was a dual national of both Peru and the U.S. who resided in Miami, Florida. The respondent in that case sought to contest Mr. Olguín's access to ICSID arbitral jurisdiction based on a bilateral investment treaty between Peru and Paraguay since the Peruvian legal system establishes that in cases of dual nationality, the person's registered address will determine the exercise of specific rights by that person.
218. However, in *Olguín*, the Tribunal noted that "in the case of a dual national's diplomatic protection, either of his mother countries has the capacity to act on his behalf against a third country, and the third country would have no way of invoking rules, on an international scale, that would serve ... to transfer the responsibility for such protection ... to the other co-mother country, on account of the person's registered address or other

¹⁸³ Respondent's Rejoinder Memorial, ¶ 143.

similar factor”¹⁸⁴. Instead, what was relevant for the *Olguín* Tribunal was simply whether the Claimant had Peruvian nationality and if that nationality was effective. Thus, the Tribunal found that Mr. Olguín’s Peruvian nationality was effective to determine that he could not be excluded from the protections of the BIT.

219. Here, Respondent, like the Republic of Paraguay, intends to invoke additional factors to negate the effectiveness of Mr. Aven’s U.S. nationality. However, the Tribunal notes that *Nottebohm* stands as the standard for the analysis of dominant and effective nationality for the purpose of diplomatic protection. Therefore, any “other similar factor”—including Mr. Aven presenting Costa Rican authorities with his Italian passport—cannot be used to successfully contest this Tribunal’s jurisdiction.
220. Nevertheless, under either the dominant and effective *ad hoc* approach, or Claimants’ more persuasive argument of the inapplicability of such approach to this case, the Tribunal finds that Mr. Aven’s U.S. nationality is effective to garner the protections afforded under DR-CAFTA for investors of the Parties to the Treaty based on the facts presented in his witness statements—*i.e.*, that Mr. Aven was born in the United States, completed his schooling exclusively in the U.S., has never lived in Italy, nor does he have any personal, financial, or business connection to Italy¹⁸⁵. Pursuant to the factors articulated by the *Nottebohm* Court and the standards of customary international law, Mr. Aven has met his burden of proof with respect to the effectiveness of his U.S. nationality.
221. Although that is true, the Tribunal needs to examine further the elements that can allow identifying what was “effective and dominant”. During the December Hearing Arbitrator Baker asked Mr. Aven to comment on the allegations of Respondent. Mr. Aven testified that: “I do have dual nationality. But I don’t have any attachments to Italy. My dominant residence has always been the United States. I don’t do any business in Italy. I don’t have any bank accounts, own property. I don’t vote there. I don’t have anybody I correspond with over there. I haven’t been there in ten years. I mean, been totally to Italy probably five times in my life. So--so my dominant residence is, no question, United States. I was born in New Castle, Pennsylvania, graduated high school there. Graduated

¹⁸⁴ *Mr. Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, July 26, 2001, ¶ 61 (RLA-63).

¹⁸⁵ See First Witness Statement, David Aven and Second Witness Statement, David Aven.

college from Baylor University in 1964. So--and been living and working in the United States all of my life except for the time period I was living in Costa Rica”¹⁸⁶.

222. In its Rejoinder Memorial, Respondent elaborates on another argument briefly mentioned in its Counter-Memorial. Respondent alleges that Mr. Aven only decided to appear as an American citizen when bringing this claim against Costa Rica; that is after wetlands were discovered by authorities on the Las Olas Project site and the state apparatus reacted to prevent continuing damage to the environment. This conduct, according to Respondent, constitutes an exercise of treaty shopping and ultimately, prevents Mr. Aven from availing himself of DR-CAFTA’s protections¹⁸⁷. Respondent argues that because he “consistently interacted with the Costa Rican authorities and judiciary as an Italian national, Mr. Aven cannot now claim that he should benefit from the protections of DR-CAFTA in relation to those same interactions, but this time as a U.S. national”¹⁸⁸. In tandem with its view that Mr. Aven’s conduct amounts to treaty shopping, Respondent also characterizes Mr. Aven’s conduct as undermining principles of good faith and reciprocity and indicative of an abusive exercise of rights¹⁸⁹.
223. The Tribunal believes that a brief overview of the legal concepts that underpin Respondent’s allegation is called for prior to an analysis of the facts of this case. ‘Treaty shopping’ refers to the conduct of foreign investors managing their nationality for the purpose of acquiring the benefits of investment treaty protection in their host State through third countries¹⁹⁰.
224. The principle of good faith has been recognized by the International Court of Justice as “one of the basic principles governing the creation and performance of legal obligations”¹⁹¹. This principle addresses the conduct of the Parties, requiring them to deal fairly with each other, to represent their motives and purposes truthfully, and to refrain

¹⁸⁶ Transcript Pages 890:20, 891:12.

¹⁸⁷ Respondent’s Rejoinder Memorial, ¶ 144.

¹⁸⁸ Respondent’s Counter-Memorial, ¶ 267.

¹⁸⁹ Respondent’s Rejoinder Memorial, ¶ 144.

¹⁹⁰ Matthew Skinner, Cameron A. Miles, and Sam Luttrell, “Access and advantage in investor-state arbitration: The law and practice of treaty shopping” (2010) 3(3) *Journal of World Energy Law & Business*, p. 260 (RLA-77).

¹⁹¹ *Nuclear Tests Case (New Zealand v. France)*, Judgment, ICJ Rep (1974), ¶ 46 (RLA-55).

from taking unfair advantage¹⁹². Indeed, it is a well-established general principle of law that good faith is a keystone of the Law of Treaties.

225. The Tribunal shall address whether Mr. Aven’s change in position as to his nationality, from Italian to American, may be deemed to constitute an abuse of his rights, and whether the timing of the investment or the claim could affect his access to the protection under DR-CAFTA.

226. Similarly, the principle of reciprocity—on which investment agreements are based—prevents unfair and unwarranted advantages. Respondent explains that “investment treaties are purported to establish reciprocal rights and obligations between the contracting states. However, the principle of reciprocity will be breached if allowing investors with no substantial ties to a contracting state to unfairly benefit from investment treaty protection, even if the actual home state does not assume any of the converse obligations”¹⁹³.

227. Breach of the aforementioned doctrines may constitute an abuse of rights. As Hersch Lauterpacht noted:

There is no legal right, however well established, which could not, in some circumstances be refused recognition on the ground that it has been abused¹⁹⁴.

228. In essence, Respondent has asked the Tribunal to find that Mr. Aven’s use of Italian nationality renders his legal rights as a U.S. national revoked with respect to this matter, and thereby, find him unprotected by the provisions of DR-CAFTA.

229. The Tribunal now considers the relevant case law presented by Respondent wherein international investment tribunals have found an abuse on the part of an investor when he employs another nationality after the dispute with the host state has arisen. It should be noted that the following cases involve the abuse of rights doctrine in the context of corporate restructuring. Respondent has asserted the applicability of these cases to analyze the matter of Mr. Aven, although he is an individual investor.

¹⁹² *Phoenix Action, Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009 (hereinafter *Phoenix Action v. Czech Republic*), ¶ 107 (RLA-75).

¹⁹³ Respondent’s Rejoinder Memorial, ¶ 152.

¹⁹⁴ RLA-54, Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Limited 1958), page 158.

230. These cases urge, as does the Respondent, that the timing of the investment and the timing of the subsequent claim are key factors in determining whether the shift in nationality is *bona fide* or amounts to an abuse of rights¹⁹⁵.
231. In *Phoenix Action, Ltd v. The Czech Republic*, the Claimant, Phoenix, was controlled by a former Czech national who fled his country and later gained Israeli citizenship. Thereafter, he incorporated Phoenix as an Israeli company and used the company to acquire an interest in two Czech companies owned by members of his family. Prior to the acquisition, legal action had already been taken by the Czech Republic against these companies. Two months after the acquisition, Phoenix notified the Czech Republic of an investment dispute and shortly thereafter, commenced ICSID arbitration.
232. The Tribunal examined the timing of the investment and the timing of the claim to reach its conclusion. With respect to the timing of the investment, the tribunal noted that “all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made.” Further, after the acquisition of such companies, Phoenix did not make any further investment or implement any new business strategies with respect to their recent acquisition. The Tribunal stated that “the whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled”¹⁹⁶.
233. Importantly, the Tribunal concluded that “if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment”¹⁹⁷. (Emphasis added). The Tribunal’s conclusion in *Phoenix Action* was concerned with ensuring that the ICSID mechanism does not protect domestic investments disguised as international investments for the sole purpose of access to this treaty dispute mechanism.
234. In *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, the importance of the sole purpose factor once again comes to light. In that case, the Claimants, Venezuela

¹⁹⁵ Respondent’s Rejoinder Memorial, ¶ 154; Respondent’s Post-Hearing Brief, ¶ 597.

¹⁹⁶ *Phoenix Action v. Czech Republic*, ¶ 136.

¹⁹⁷ *Id.*, ¶ 93.

Holdings, restructured their corporate structure after claims had already been launched against them by the Respondent, Venezuela. Prior to the restructuring, the Respondent, Venezuela, began levying a series of rate and tax increases on private petroleum interests that culminated in a decree that would nationalize Venezuela Holdings' investments. After Venezuela Holdings had become subject to some of the rate and tax increases, the company restructured its corporate structure under the laws of the Netherlands to avoid the nationalization of their assets and to take advantage of a BIT between the Netherlands and Venezuela in the event of future disputes.

235. With respect to Venezuela's claim of abuse of rights, the Tribunal found that restructuring to protect their investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT was a "perfectly legitimate goal as far as it concerned future disputes." However, with respect to disputes that pre-existed the restructuring, the tribunal declined to exercise jurisdiction and cited *Phoenix Action* stating that "to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute... 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'"¹⁹⁸. (Emphasis added). Therefore, the Tribunal in *Venezuela Holdings* was primarily focused on the timing of the claims to determine whether it had jurisdiction to hear the matter.
236. Finally, *Phillip Morris Asia Ltd. v. The Commonwealth of Australia* dealt with a situation where corporate restructuring took place not before a claim had already arisen, but at a time when there was a reasonable prospect that the dispute would materialize, leading to the conclusion that such restructuring was carried out for the sole purpose of gaining Treaty protection. Accordingly, the Tribunal found that the legal tests for abuse of rights revolve around and are broadly analogous to the concept of foreseeability¹⁹⁹. In that case, Phillip Morris Asia acquired an Australian subsidiary prior to the implementation of Australia's tobacco plain packaging laws. Australia's public health initiative to decrease

¹⁹⁸ *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, June 10, 2010, ¶ 185 (RLA-1).

¹⁹⁹ *Phillip Morris Asia Ltd v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, ¶ 554 (RLA-90).

smoking had already been publicized and accordingly, the Tribunal determined that Phillip Morris Asia had reason to believe that a dispute under the BIT between Hong Kong and Australia with respect to the new law was foreseeable.

237. After determining that the dispute was foreseeable prior to the restructuring, the tribunal turned to the Claimant's reasons for restructuring. In the view of the tribunal, it would not normally be an abuse of rights to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently of the possibility of bringing such a claim²⁰⁰. Ultimately, the tribunal concluded from all the evidence on file that the main and determinative, if not sole, reason for restructuring was the intention to bring a claim under the Treaty²⁰¹ and subsequently declined to exercise jurisdiction over Phillip Morris' claims. The decision in *Phillip Morris* shows yet another tribunal using the timing of the claim to inquire into whether the sole purpose for the switching of nationality was to bring a claim under a Treaty whose protections were previously unavailable.
238. The Tribunal has found that Mr. Aven's dominant and effective nationality is that of the United States of America and under the express language of DR-CAFTA, he is a protected Investor of a Party.
239. The Tribunal considers that Mr. Aven did not engage in an abuse of rights by initially choosing to represent himself to Respondent as an Italian national and later bringing a claim under DR-CAFTA as a U.S. national because such a conclusion requires that Mr. Aven changed his nationality for the 'sole purpose' of pursuing a claim. His effective and dominant nationality was that of the U.S.A. even before he made, along with the other interests, the investment.
240. Timing of Investment. First, unlike the facts in *Phoenix Action*, nothing indicates that Mr. Aven acquired the Las Olas Project in 2002 as an investment for the sole purpose of pursuing a claim under DR-CAFTA. To the contrary, Mr. Aven purchased the property, took steps to begin development, and navigated Costa Rican administrative and environmental agencies—facts that all serve as indicators of his intention to economically

²⁰⁰ *Id.* at ¶ 570.

²⁰¹ *Id.* at ¶ 584.

develop the land as a *bona fide* investment. While Respondent argues that Mr. Aven conveniently switched his nationality to take advantage of DR-CAFTA's protections, such change of professed nationality did not coincide with the timing of his investment in the Las Olas Project, which long preceded the arising of Respondent's claims against him. Accordingly, no red flag is raised with respect to timing of the investment.

241. Timing of Claim. Second, while it may be true that Respondent initiated criminal claims against Mr. Aven before he decided to present himself as a U.S. national before Respondent, what differentiates the case of Mr. Aven is that he did not profess his U.S. nationality "only in order to gain jurisdiction," which would amount to a manipulation of the Treaty and international law. As explained in the previous section, Mr. Aven already had access to DR-CAFTA by virtue of his dominant and effective U.S. nationality. In other words, even though throughout the administrative proceedings with respect to the Las Olas Project Mr. Aven used his Italian passport to identify himself, his dominant and effective nationality was of the U.S at the time the investment claims arose.
242. Sole Purpose. Perhaps most significantly, even if the timing of the Claimants' arbitral claim is determinative, each and every cited case turns on whether or not the switch in nationality occurred for the sole purpose of gaining benefit from a Treaty's provisions. However, there is no evidence that Mr. Aven used his Italian passport in numerous transactions with the Costa Rican authorities for any legal advantage, which is the issue. Instead, the Tribunal finds Mr. Aven's explanation reasonable and credible that he was trying to avoid "bias against Americans" and most likely, to avoid being yet another U.S. national attempting to do business in Costa Rica. What Mr. Aven surely sought, and that which he describes as the "convenience" of the Italian passport, was the privilege of holding two passports in, at times, a hostile world. As he provided in his Second Witness Statement:

I elected to get an Italian passport for the sole reason that it was available to me, and because there were (and still are) many Americans targeted while traveling abroad. I thought it would be a good option to be able to travel on a non-U.S. passport²⁰².

²⁰² *Id.*, at ¶ 17, page 5.

243. Mr. Aven's Italian passport was bestowed on him by virtue of his grandfather's Italian citizenship. While the State of Italy is free to determine that the citizenship of one's grandfather is a basis for conferring naturalization on an individual, under the DR-CAFTA and the law of international treaties generally, such naturalization does not render Mr. Aven an Italian for the effects and purposes of this dispute *even though* he presented his Italian passport to Respondent.
244. In reality, Mr. Aven has no substantial ties to Italy. He has never lived there, has not established any residences or bank accounts, and has only visited the country a handful of times. The only country to which the Tribunal could fairly say Mr. Aven has "substantial ties," is in fact the United States. Consequently, Mr. Aven could not have "switched" his nationality for the sole purpose of taking advantage of DR-CAFTA, because he already was a protected party under the Treaty by virtue of his dominant and effective U.S. nationality.
245. Additionally, with respect to the principles of good faith and reciprocity, Mr. Aven has substantiated the fact that he, many times, used and has been recognized by his American nationality in his interactions and business dealings with both Costa Rican businesses and Costa Rican authorities and in official submissions with Governmental authorities.²⁰³ In this sense, Respondent had notice of the possibility of a claim being brought under DR-CAFTA. As such, neither good faith nor reciprocity has been breached by Mr. Aven.
246. In conclusion, it is the decision of the Tribunal that it can exercise jurisdiction over the claims of Mr. Aven as an investor of a Party pursuant to Article 10.28 of DR-CAFTA, based on his dominant and effective American nationality.
247. Because the Tribunal has found that Mr. Aven is a national of the U.S. for purposes of the protections enshrined in the DR-CAFTA, the Respondent's argument that Mr. Aven does not qualify as an "Investor of a Party" under applicable standards of international law fails.

²⁰³ *Id.*, at ¶ 22, page 6.

B. Whether the Investments by Mr. Shioleno and Mr. Raguso are Covered Investments

1. The Parties' Positions

248. In its Post-Hearing Brief, Respondent raised for the first time during the arbitration a challenge to the jurisdiction of this Tribunal on the basis that Claimants presented no evidence of any capital contributed by Mr. Shioleno or Mr. Raguso to the Las Olas Project, and that Article 10.28 DR-CAFTA requires that an asset have characteristics of an investment to be considered a protected investment under the Treaty. Specifically, according to Respondent the Treaty requires that an investor commits capital or other resources for it to be considered the holder of a “covered investment”²⁰⁴.
249. Respondent quoted Mr. Shioleno during his examination at the December Hearing²⁰⁵, who acknowledged that he committed no resources. His involvement was limited to marketing efforts in Tampa, Florida, and he acknowledged also that the project did not realize any sales during the period of his efforts.
250. In the case of Mr. Raguso, Respondent adds, he provided no services to the investment because he was supposed to act as construction manager in mid-2011 when the suspension of the works was ordered. Though Mr. Raguso might have an expectation of gain from his conversations with Mr. Aven, that, by itself, does not equate such conversations and expectations to actually having contributed some resource with an assumption of risk to the alleged investment in Costa Rica²⁰⁶.
251. Respondent further contended that neither Mr. Shioleno nor Mr. Raguso ever received any stock certificates, nor were they registered as shareholders in the registries of the Enterprises.
252. Given that this challenge was brought by Respondent in its Post-Hearing Brief, Claimants were not afforded the possibility to comment. The Tribunal did not deem this necessary since prior statements made by Claimants in their Notice of Arbitration, Memorial and their Post-Hearing Brief provide sufficient argument. Claimants have explained that Mr.

²⁰⁴ Respondent’s Post-Hearing Brief, ¶¶ 600-605, pages 122 and 123.

²⁰⁵ Cross Examination of Jeffrey Shioleno, Day 2 Transcript, 365:2-7, 371:4-10, and 366:4-6.

²⁰⁶ Respondent’s Post-Hearing Brief, ¶ 604, page 123.

Shioleno's, investment was "sweat equity"²⁰⁷ on marketing efforts to develop brochures and other marketing literature and similar references were made as to Mr. Raguso.

2. The Tribunal's Analysis

253. Although there is indeed no reference to monetary contributions made by Messrs. Shioleno and Raguso, Claimants have made it clear that they both contributed their marketing and real estate development experience.
254. DR-CAFTA does not restrict an investment to monetary contributions. When the Treaty defines "Investment" in Article 10.28, it states that the term 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". Thus, the Treaty expressly acknowledges that the investment may be in the form of a commitment of capital or other resources or the assumption of risk.
255. The Article then lists a series of forms the investment may take. Amongst these are "intellectual property rights" (letter (f)) which by definition do not necessarily require a monetary contribution but rather creativity and effort to develop, whether these are in the form of a copyright, a trademark, a patent, or simply "know-how".
256. Albeit it is clear that this reference in Article 10.28 relates to a protected "investment" under the Treaty, and not the contribution itself of the investors in an enterprise, the principles equally apply.
257. If intangible assets are to be contributed, and deemed to be an investment, there needs to be proof that the non-monetary contribution has been received as participation in the enterprise. Under Costa Rican law, this must be proven through the issuance of shares and the registration in the shareholders registry book²⁰⁸.

²⁰⁷ Claimants' Memorial, ¶¶ 49 and 124, pages 14, and 35, respectively, and in Claimants' Post-Hearing Brief, ¶ 27, page 20.

²⁰⁸ Exhibit C-4 to the Notice of Arbitration contains certificates issued by each of the Enterprises attesting to the ownership of the stock of each company, including that of Messrs. Shioleno and Raguso.

258. The Tribunal therefore believes that work undertaken and/or commitments made by Messrs. Shioleno and Raguso therefore qualify as an investment, and therefore the objection brought by Respondent is dismissed.

C. Properties that are not owned by The Claimants

1. The Parties' Positions

259. Respondent argued in its Rejoinder that its agencies carried out a thorough investigation, including of the information received from Claimants during the document production stage of the proceedings, and concluded that a relevant number of the properties alleged to be owned by Claimants were in fact not owned by Claimants, whether directly or through the Enterprises. Respondent stated that Claimants had failed to provide proof of ownership of all of the properties that make up the Las Olas Project. Some of these properties, Respondent added, had never been owned or had been sold during the course of the arbitration²⁰⁹.
260. Respondent stated that of the 288 lots in the Condo Section, 28 lots had been sold to third Parties between 2010 and 2015, and further, that of the 81 lots in the Easements Section, 50 did not belong to the Claimants, either directly or through the Enterprises²¹⁰. To this end, Respondent submitted exhibits R-322 and R-323 that relate to either properties which it alleged Claimants wrongfully included as part of their alleged investment, or as properties that at that time were no longer owned by Claimants.
261. At the closing of the February Hearing, the Tribunal invited Claimants to address in their Post-Hearing Brief the issue of ownership of the 78 properties alleged by Respondent not to be owned by Claimants, and to identify which properties had been sold before and after the Notice of Arbitration was submitted in January of 2014.
262. Claimants then provided in their Post-Hearing Brief (Annex B) a detailed table explaining the ownership structure of the properties, and confirmed the information found in several slides of Dr. Abdala's presentation at the February Hearing. In their listing, Claimants acknowledge that they sold properties before and after the submission of the Notice of Arbitration but take the position that they are still protected under DR-CAFTA.

²⁰⁹ Respondent's Rejoinder Memorial, ¶ 166, page 44.

²¹⁰ Respondent's Rejoinder Memorial, ¶ 167-170, pages 44-45.

After Respondent questioned on March 8, 2017, the works that were being undertaken in the Las Olas Project site at the end of January and early February 2017, which Respondent argued could be “illegal” in light of the injunctions in place issued by SINAC, the TAA and the criminal court in Quepos, Costa Rica, Claimants swiftly responded on March 10, 2017, indicating that Claimants had recently entered into an agreement with Mr. Carlos Alberto Mora Solano, pursuant to which Mr. Mora intended to purchase “the whole of the Olas Project site”²¹¹ but that, given the timing of the transaction, they were waiting to make this disclosure precisely in their Post-Hearing Brief. Then, after Respondent submitted another communication on March 13, 2017, detailing works being carried out, and questioning how Claimants could allege not having been aware of such works as they were still owners of the properties, Claimants provided in a letter of March 27, 2017 additional information on the sale of the properties to Mr. Mora²¹², and even made reference to other properties in Easements Nos. 1 and 2 that had been also previously sold to Mr. Mora and his sister, Ms. Yesenia Venegas Alvarado.

263. Claimants have also acknowledged in their Post-Hearing brief that on March 3, 2017 they concluded an agreement to sell to Mr. Carlos Alberto Mora Solano, 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 Condo Section, and the land in the Concession Site²¹³.
264. The Claimants added that they had 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, and that these efforts had always failed because of the status of the project and the land following Costa Rica’s actions²¹⁴. Claimants accept that the purchase price of US\$650,000 dollars is much lower than they seek but readily argue that it 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)

²¹¹ Letter of Claimants dated March 10, 2017, addressed to Respondent.

²¹² Letter of Claimants dated March 10, 2017, addressed to the Tribunal.

²¹³ Claimants’ Post-Hearing Brief, ¶ 545, page 253.

²¹⁴ Claimants’ Post-Hearing Brief, ¶ 547, page 285.

the Claimants' inability to develop the property due to the actions of the Costa Rican authorities.

265. The Claimants stated they decided to accept this "very low offer for the property" because of the aforementioned conditions of the properties and the absence of any representations they had to make as sellers as to the injunctions still in place on the property and the permits issued²¹⁵.
266. Considering such sale, Claimants asked their valuation expert, Dr. Manuel Abdala of Compass Lexecon, to adjust the valuation of the properties to recalculate their value by including this recent sale to estimate 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 previously done²¹⁶.
267. In Respondent's Post-Hearing Brief, Respondent maintained its objection and requested the Tribunal to decline jurisdiction to hear any claims arising out of the 78 properties that are not part of Claimants' alleged investment.

2. The Tribunal's Analysis

(a) Legal Framework and Authorities

268. As Respondent correctly asserts, Claimants have the burden to prove the legitimate ownership of their investment. First of all, Article 27(1) of the UNCITRAL Rules of Arbitration provides that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense." Further, Article 20(4) of such Rules also imposes a duty on a claimant to include, along with the statement of claim, "... all documents and other evidence relied upon by the claimant, or contain references to them". Therefore, if the ownership of the properties that are the subject of alleged expropriation is not proven by Claimants, there is no protection under Article 10.28 of DR-CAFTA.
269. To recall, Claimants filed a claim against Respondent alleging breach of Articles 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) of DR-CAFTA with respect to their Investment.

²¹⁵ *Id.*

²¹⁶ Claimants' Post-Hearing Brief, ¶ 548, page 254.

270. The Tribunal recalls once more the definition of “Investment” under Article 10.28 of DR-CAFTA, which encompasses, other things, property: “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.”
271. Additionally, Claimants were required to provide all necessary documentation to support such claims of ownership pursuant to Section 3 of the same UNCITRAL Rules of Arbitration provision, which directs that “[a]t any time during the arbitral proceedings the arbitral Tribunal may require the Parties to produce documents.” Indeed, considering the lack of information submitted by Claimants, the Tribunal directed Claimants in its post-hearing questionnaire to “... provide a detailed ownership structure of each enterprise which owns the different properties comprising the development, and attach a table listing the ownership structure at the time the Notice of Arbitration was submitted based on the following schedule example”²¹⁷.
272. Likewise, case law evoked by the Respondent also shows such obligation. In *CCL v. Kazakhstan*, the Tribunal emphasized the Claimant’s burden in light of the Respondent’s statements which questioned the legitimacy of the ownership of the investment.
- In consequence hereof it must be a procedural requirement that a Claimant party, requesting arbitration on the basis of the Treaty, provides the necessary information and evidence concerning the circumstances of ownership and control, directly or indirectly, over [Claimant-investor] at all relevant times. This is especially the case when reasonable doubt has been raised as to the actual ownership of and control over the company seeking protection²¹⁸.
273. Because the claimant in *Kazakhstan* did not provide the necessary evidence to prove the ownership of the investment despite repeated requests from the respondent, the tribunal denied jurisdiction on the basis of the Treaty.
274. In a similar disagreement, the tribunal in *Perenco Ecuador v. Ecuador* navigated the difficulties of proving ownership and reviewed information presented to corroborate the

²¹⁷ Letter of February 13, 2017, whereby the Tribunal sent to the Parties a list of questions to consider in their respective post-hearing briefs.

²¹⁸ *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Jurisdiction Award, January 1, 2003, at ¶ 82 (RLA-155).

investor's claim to the investment²¹⁹. In that case, a witness statement served as the only evidence "produced" by the claimant to substantiate their ownership. The tribunal found that although the claim was brought under a BIT between Ecuador and France and the claimant company was not directly controlled by French nationals but by a Bahamian company, the evidence contained in the witness statement sufficiently demonstrated that the French nationals had sufficient control of the companies to invoke jurisdiction.

275. The examples of *Kazakhstan* and *Perenco Ecuador* demonstrate the tendency of tribunals to hold claimants to their burden of proof and further demonstrate the factual inquiry that tribunals engage in to determine whether the burden has been met. This of course is not a particularly revelatory practice, however, the misinformation supplied by Claimants regarding the sale of properties and their unwillingness to refute Respondent's statements of Claimants' non-ownership forces the Tribunal to more thoroughly consider Claimants' failure to meet its burden and whether or not consequences should follow from the same.
276. In *Europe Cement Investment v. Turkey*, the tribunal drew an adverse inference against the claimant due to the deficiency of evidence produced to rebut the Respondent's allegation of lack of ownership:

The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden²²⁰.

277. The tribunal in *Europe Cement Investment* later went on to examine circumstantial evidence to determine ownership of the investment in the absence of documentation provided by the Claimant and ultimately determined that the investment was not covered under the Treaty.

²¹⁹ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014 (RLA-21).

²²⁰ *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, August 13, 2009, at ¶ 166 (RLA-27).

278. Accordingly, the relevant case law and basic procedural mechanisms affirm that the Claimants had an unequivocal duty to provide the information requested by the Tribunal to substantiate their claims to ownership over the properties in question.
279. In the case at hand, it appears that Claimants initially chose to ignore their own omissions and focus only on the valuation of the Project Site in May 2011 rather than fully answering Respondent's requests for information.
280. Claimants did not only include properties that did not belong to them as part of their alleged investment but also failed to disclose ongoing sales of the lots to third Parties during the course of this arbitration. This duty of Claimants extended to report to the Tribunal and the Respondent when properties were sold after the submission of the Notice of Arbitration and once arbitral proceedings were ongoing. Perhaps not each lot individually, but certainly a report by the December Hearing.
281. Despite such duty to provide the information, the Tribunal was forced to instruct Claimants at the end of the February Hearing to "confirm which lots within the project as a whole have been sold, before and after the Notice of Arbitration". It was only after the Tribunal specifically asked the Claimants to identify which lots encompassing the Las Olas Project had been sold, that Claimants provided in their Post-Hearing Brief a comprehensive and detailed list of properties comprising the Las Olas Project site identifying when these were purchased, through which Enterprise, and when and to whom these had been sold. This information should have been clearly submitted earlier, and would have avoided much discussion and time of the Respondent and the Tribunal.
282. Thus, the Tribunal believes that the Claimants should have acted with more diligence and properly defined the properties that they owned at the moment of initiating the arbitral proceedings or better disclose the reasons for failing to do so.
283. Whereas in *Kazakhstan* the claimant-investor did not provide the necessary documentation to evidence ownership based on a desire to keep the identity of the investors confidential, here, Claimants did not offer any explanation as to why they initially failed to provide any answers. Rather than an actual intent of gaining benefits improperly, it would appear that the issue was one of lack of order and due diligence.

284. Respondent characterized Claimants’ maneuver of selling the remainder of the Las Olas Project site without fully divulging such transactions as an “attempt to dissipate the assets they own in Costa Rica in order to prejudice any collection from Costa Rican agencies in pending local proceedings”²²¹. The Tribunal declines to comment on Respondent’s condemning account of the Claimants’ motives.
285. Claimants urge the Tribunal that the date they performed a valuation of the properties, May 2011, is the relevant date from which to determine the value and ownership of the lots at issue. They characterize any post-May 2011 sales as being relevant with respect to damages only to the extent that the residual value of the project land is reduced to account for the fact that the Claimants no longer own certain lots. Similarly, Claimants recognize that the sales themselves have generated some small revenue in mitigation of the alleged damages suffered, which is to be deducted from the damages figure²²².
286. Although Claimants have taken the position that sales to third parties are not relevant to their case, and that the income should be considered as an effort to mitigate damages and be taken into account for purposes of the calculation of damages in a Final Award, this argument cannot ignore a duty of good faith and transparency towards Respondent and the Tribunal.
287. The Tribunal finds it pertinent to spell out the actions and omissions: (1) Claimants’ submission of numerous charts to the Tribunal listing their various Enterprises as the owners of certain properties, despite the continued selling of these properties from 2014-present; and (2) the failure to adequately answer the Tribunal’s request to identify which lots had been sold after the Notice of Arbitration, as evidenced by the absence of any sales made to Corazón de la Tierra en Esterillos S.A. in Annex B to the Claimants’ Post-Hearing Brief; (3) Failure to provide documentation regarding the sale of the remaining areas of the Las Olas Project Site to Mr. Alberto Mora via Claimant’s Enterprise Corazón de la Tierra en Esterillos S.A. until their April 26, 2017 letter—after Respondent had requested clarification; (4) the Claimants’ alleged lack of knowledge regarding works being carried out on the properties sold to Mr. Mora despite their longstanding

²²¹ Respondent’s counsel April 17, 2017 letter to Tribunal, ¶ 25.

²²² Claimants’ Post-Hearing Brief, ¶ 647, page 293.

relationship with him and the commencement of such works in February 2017, a month before the sale allegedly took place.

288. Nevertheless, since the Claimants have now stated without qualification the ownership of the properties included in Respondent's challenge, the Tribunal will consider the evidence on the record to determine which properties fall under its jurisdiction.

(b) Relevant Date for Determining Ownership

289. As Claimants have acknowledged that they sold properties before and after the submission of the Notice of Arbitration²²³, and even sold practically the remainder portion of the Las Olas Project site shortly before the filing of their Post-Hearing Brief, the central dispute between the Parties is whether the properties sold before and during this arbitration should be included in the Claimants' investment.
290. On the one hand, Respondent relies on Costa Rica's National Registry for evidence that the Claimants simply do not own the lots in question. Respondent notes, as described above, that the Claimants have not disputed their lack of ownership of the properties and, accordingly, Respondent takes the position that Claimants have not met their burden to prove the legitimate ownership of their investment. Therefore, Respondent asks the Tribunal to deny jurisdiction over the 78 properties it has identified as not owned by Claimants as of October 28, 2016—the date of their Rejoinder Memorial.
291. Therefore, it is for the Tribunal to decide which of the 78 properties that Claimants do not presently own should be deemed part of the Investment of Claimants, based on their date of sale, for purposes of this arbitration.
292. As a preliminary matter, the Claimants urge the Tribunal that their Investment should always be regarded as the entirety of the investment in the Las Olas Project, not discrete elements thereof²²⁴. However, based on the sales of the 78 properties in question, the Claimants' actions do not support their assertion. Hence, the Tribunal will consider whether or not the individual lots that have been sold can form part of the Investment pursuant to Article 10.28 of DR-CAFTA.

²²³ *Id.* Annex B.

²²⁴ *Id.* at ¶ 130, page 61.

293. To facilitate the Tribunal’s determination, an overview of another ICSID Tribunal with respect to the timing of the disposal of property that is the subject of the arbitral proceeding is merited.

294. In *CSOB v. Slovakia*, the Claimant assigned its interest in the investment following initiation of arbitral proceedings. The tribunal stated that jurisdiction is determined based on the state of the investment interest upon the date of arbitration’s commencement.

[I]t is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the tribunal has jurisdiction to hear their case regardless of the legal effect, if any, the assignments might have had on Claimant’s standing had they preceded the filing of the case²²⁵. (Emphasis Added)

295. Respondent further asserts that due to the Claimants’ failure to “establish by reference to credible evidence that such qualifying investments have been made and continue to exist”²²⁶ (emphasis added), this Tribunal cannot exercise jurisdiction. The tribunal’s decision in *CSOB v. Slovakia* instructs that the relevant date for which the claimants are required to prove ownership of their investment is the date upon which arbitral proceedings have commenced, not thereafter.

296. Therefore, the Tribunal finds that the relevant precedent articulates that investments liquidated or transferred *after* the initiation of arbitral proceedings are covered investments in DR-CAFTA proceedings. In line with Article 3(2) of the UNCITRAL which states that “arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent”, the Tribunal determines that the date of the Notice of Arbitration – in this case, January 20, 2014 – is the date which should delineate which properties were sold after the initiation of this arbitration and thereby, which have the character of a covered investment under Article 10.28 of DR-CAFTA. Accordingly, the Tribunal expressly rejects Claimants’ assertion that all lots

²²⁵ *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, at ¶ 31 (CLA-177).

²²⁶ Respondent’s Rejoinder Memorial, ¶ 164, page 44.

sold after May 2011 are covered investments. Instead, the threshold date of sale stands as January 20, 2014.

297. In the Las Olas Project, properties were not only sold after arbitral proceedings began, but also *before*. To that end, *Mondev International, Ltd. v. United States*, a matter that arose under Chapter 11 of NAFTA, proves instructive. In that case, the investor lost ownership of its investment as a result of the foreclosure of a mortgage due to delays in a real estate development project imputable to the city of Boston. Unlike the situation in *CSOB v. Slovakia*, such ownership was lost prior to the initiation of arbitral proceedings. The tribunal found that the NAFTA dispute settlement procedures

will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its ‘sale or other disposition’²²⁷ (Emphasis added).

298. Thus, in *Mondev*, the tribunal exercised jurisdiction because the investment had failed due to the actions of a third party—the city of Boston. In this sense, *Mondev* provides an exception to the general rule that an investor must own the investment at the date of Notice of Arbitration to benefit from treaty protection.
299. Claimants seem to evoke the *Mondev* tribunal’s reasoning with their assertion that the Las Olas Project had been destroyed by the Respondent’s actions through the Municipality Shutdown Notice in May 2011, resulting in the subsequent sales of lots made “at a fraction of their value (absent the shutdown), solely in an effort to mitigate the Claimants’ losses”²²⁸. To that effect, the issue becomes whether or not Respondent’s imposition of a shutdown of the Las Olas Project, exhibits the same level of direct causation as evidenced by the city of Boston’s actions in *Mondev* to warrant the exercise of jurisdiction over all properties sold after May 2011.

²²⁷ *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 91. (CLA-50).

²²⁸ Claimants’ Post-Hearing Brief, at ¶ 132, page 62.

300. The Claimants have failed to show whether the sales made between May 2011 and January 20, 2014 were for distressed prices compared to those previously earned on sales made prior to May 2011. In their Post-Hearing Brief Claimants allege those sales were made in a distressed situation, but fail to show the impact on the sales price²²⁹.
301. To summarize, the Tribunal finds that the relevant case law instructs that in general terms, an investment sold after the date of Notice of Arbitration meets the criteria for an “investment” in the terms of DR-CAFTA. On the other hand, an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty’s protection, unless special circumstances are present. Such circumstances include, *inter alia*, the loss of the investment by the actions of a third party or the retroactive application of a treaty, neither of which are applicable to the matter at hand.

(c) Properties Over Which the Tribunal May Exercise Jurisdiction

302. Now that the relevant date has been established as January 20, 2014—the date of the Notice of Arbitration, the Tribunal considers evidence presented by both Parties to determine which of the 78 properties disputed by Respondent will be included in “the investment” as defined by Article 10.28 of DR-CAFTA.
303. The following table compiles all of the properties that (i) Claimants have acknowledged were sold prior to the Notice of Arbitration, and (ii) with respect to which Respondent agrees, and has provided evidence to confirm in its Annex II to its Rejoinder²³⁰.

| Lots Sold Prior to Notice of Arbitration (January 20, 2014) | | | | |
|---|------------|----------------|-------------------------|-------------------|
| | Lot Number | Location | Owner | Registration Date |
| 1 | 158363-000 | Easement/Other | Carosomu noventa y tres | 21 May 2008 |
| 2 | 158362-000 | Easement/Other | Leon & Mussio, S.A. | 11 December 2008 |
| 3 | 158411-000 | Easement/Other | Vistas de Esterillos | 02 July 2009 |

²²⁹ *Id.*, ¶ 648(g). page 294.

²³⁰ The information contained in the table was provided in Annex II of Respondent’s Rejoinder Memorial, and is sourced from the Costa Rican National Registry.

| | | | | |
|----|-------------|----------------|-------------------------------------|-------------------|
| 4 | 158366-000 | Easement/Other | LO con guacamayas siete | 02 September 2009 |
| 5 | 158367-000 | Easement/Other | Las Olas beach resort | 01 October 2009 |
| 6 | 158360-000 | Easement/Other | Pozas tranquilas de Esterillos | 02 October 2009 |
| 7 | 159610-000 | Easement/Other | Famosos de vista en el trópico | 28 January 2010 |
| 8 | 159611-000 | Easement/Other | Costal life properties | 26 April 2010 |
| 9 | 159612-000 | Easement/Other | Noelani Costa Can, S.A. | 11 May 2010 |
| 10 | 79301-F-000 | Condominium | Maes Family Corp, S.R.L. | 05 July 2010 |
| 11 | 158361-000 | Easement/Other | LO Esterillos nueve | 12 August 2010 |
| 12 | 158414-000 | Easement/Other | Las Olas Limpias Cinco | 13 August 2010 |
| 13 | 79303-F-000 | Condominium | Las Olas y los Árboles Diez, S.R.L. | 22 September 2010 |
| 14 | 159849-000 | Easement/Other | Las Olas y La Selva Cuatro | 03 November 2010 |
| 15 | 159848-000 | Easement/Other | Las Olas Monos Tres | 09 December 2010 |
| 16 | 79304-F-000 | Condominium | Las Olas Más Bellas Seis, S.R.L. | 03 February 2011 |
| 17 | 79305-F-000 | Condominium | Puerta Azul Al Mar Uno, S.R.L. | 23 February 2011 |
| 18 | 159850-000 | Easement/Other | Bandera de Mar Dos | 25 February 2011 |
| 19 | 79363-F-000 | Condominium | The Dull's Investment, S.R.L. | 14 March 2011 |
| 20 | 79344-F-000 | Condominium | Puerta Azul Al Mar Uno, S.R.L. | 28 March 2011 |
| 21 | 79346-F-000 | Condominium | Andata de la Playa Cero Uno, S.R.L. | 06 June 2011 |
| 22 | 79345-F-000 | Condominium | Isla Maui Internacional, S.A. | 24 June 2011 |
| 23 | 159552-000 | Easement/Other | Manuel Rojas | 19 January 2012 |
| 24 | 158408-000 | Easement/Other | Honorable Cartulario Nocturno | 04 May 2012 |
| 25 | 79375-F-000 | Condominium | Las Olas y Los Mangos Ocho, S.R.L. | 21 November 2012 |
| 26 | 158412-000 | Easement/Other | CRG Group Holdings | 11 January 2013 |
| 27 | 158413-000 | Easement/Other | CRG Group Holdings | 11 January 2013 |
| 28 | 79309-F-000 | Condominium | Three Oceans International, S.R.L. | 01 April 2013 |
| 29 | 79310-F-000 | Condominium | Three Oceans International, S.R.L. | 01 April 2013 |
| 30 | 79311-F-000 | Condominium | Three Oceans International, S.R.L. | 01 April 2013 |
| 31 | 79314-F-000 | Condominium | Three Oceans International, S.R.L. | 01 April 2013 |
| 32 | 79315-F-000 | Condominium | Three Oceans International, S.R.L. | 01 April 2013 |
| 33 | 79316-F-000 | Condominium | Three Oceans International, S.R.L. | 01 April 2013 |

| | | | | |
|----|-------------|----------------|------------------------------------|------------------|
| 34 | 159553-000 | Easement/Other | Sand Group Investments, S.A. | 29 April 2013 |
| 35 | 159554-000 | Easement/Other | Sand Group Investments, S.A. | 29 April 2013 |
| 37 | 159607-000 | Easement/Other | Sand Group Investments, S.A. | 29 April 2013 |
| 38 | 159608-000 | Easement/Other | Sand Group Investments, S.A. | 29 April 2013 |
| 39 | 159609-000 | Easement/Other | Sand Group Investments, S.A. | 29 April 2013 |
| 40 | 79323-F-000 | Condominium | DW Blue Group, S.A. | 29 May 2013 |
| 41 | 79324-F-000 | Condominium | DW Blue Group, S.A. | 29 May 2013 |
| 42 | 79332-F-000 | Condominium | DW Blue Group, S.A. | 29 May 2013 |
| 43 | 79348-F-000 | Condominium | DW Blue Group, S.A. | 29 May 2013 |
| 44 | 79349-F-000 | Condominium | DW Blue Group, S.A. | 29 May 2013 |
| 45 | 79350-F-000 | Condominium | DW Blue Group, S.A. | 29 May 2013 |
| 46 | 79317-F-000 | Condominium | Three Oceans International, S.R.L. | 30 May 2013 |
| 47 | 79318-F-000 | Condominium | Three Oceans International, S.R.L. | 30 May 2013 |
| 48 | 79319-F-000 | Condominium | Three Oceans International, S.R.L. | 30 May 2013 |
| 49 | 79320-F-000 | Condominium | Three Oceans International, S.R.L. | 30 May 2013 |
| 50 | 79321-F-000 | Condominium | Three Oceans International, S.R.L. | 30 May 2013 |
| 51 | 79322-F-000 | Condominium | Three Oceans International, S.R.L. | 30 May 2013 |
| 52 | 162482-000 | Easement/Other | Three Oceans International, S.R.L. | 04 July 2013 |
| 53 | 162483-000 | Easement/Other | Three Oceans International, S.R.L. | 04 July 2013 |
| 54 | 162484-000 | Easement/Other | Three Oceans International, S.R.L. | 04 July 2013 |
| 55 | 162485-000 | Easement/Other | Three Oceans International, S.R.L. | 04 July 2013 |
| 56 | 162486-000 | Easement/Other | Three Oceans International, S.R.L. | 04 July 2013 |
| 57 | 162487-000 | Easement/Other | Three Oceans International, S.R.L. | 04 July 2013 |
| 58 | 159847-000 | Easement/Other | Samuel Bermúdez | 11 December 2013 |

304. Respondent identified in Annex II to its Rejoinder another lot which was sold before the filing of the Notice of Arbitration which Claimants have not contested, nor have provided information acknowledging the sale either.

| | Lot Number | Location | Owner | Date Sold |
|----|------------|----------------|------------------------------|---------------|
| 59 | 159556-000 | Easement/Other | Sand Group Investments, S.A. | 29 April 2013 |

305. On the other hand, the following lots were identified by Claimants in their Annex B to their Post-Hearing Brief as having been sold before the Notice of Arbitration (albeit without identifying the date on which transfer occurred) but either (i) were not identified by Respondent, or (ii) were identified by Respondent to have been sold after the Notice of Arbitration. In this respect, it suffices for the acknowledgement of Claimants of the date of disposition prior to the Notice of Arbitration for the Tribunal to accept as accurate.

| Lots Sold Prior to Notice of Arbitration (January 20, 2014) | | | | |
|---|------------|----------------|--------------------------|------------------------|
| | Lot Number | Location | Owner | Date Sold |
| 60 | 159555-000 | Easement/Other | Samuel Bermúdez | Pre-Notice Arbitration |
| 61 | 159557-000 | Easement/Other | Soluciones Unica Fiesta | Pre-Notice Arbitration |
| 62 | 159558-000 | Easement/Other | Soluciones Unica Fiesta | Pre-Notice Arbitration |
| 63 | 159559-000 | Easement/Other | Soluciones Unica Fiesta. | Pre-Notice Arbitration |
| 64 | 159851-000 | Easement/Other | Bandera de Mar Dos | Pre-Notice Arbitration |
| 65 | 159852-000 | Easement/Other | Rolando Solano Romero | Pre-Notice Arbitration |
| 66 | 159853-000 | Easement/Other | Rolando Solano Romero | Pre-Notice Arbitration |
| 67 | 159854-000 | Easement/Other | Rolando Solano Romero | Pre-Notice Arbitration |

306. Accordingly, a total of 67 lots were sold prior to the Notice of Arbitration, 66 of which have been acknowledged by Claimants; for the one lot not acknowledged by Claimants, however, Respondent has provided evidence to the effect that a new owner was registered in the Costa Rican National Registry before the Notice of Arbitration was filed. Therefore, the Tribunal concludes that a total of 67 properties are not protected investments under Article 10.28 and the Tribunal will refrain from exercising jurisdiction over these properties²³¹.

307. The Tribunal expresses concern over the failure of the Claimants to submit a careful report from the outset of the arbitration, but in any case, after Respondent challenged initially the properties. Not only do Claimants have the burden of proving the facts relied

²³¹ Although Respondent alleged that 78 properties were not protected investments, the Tribunal notes that Respondent's figure included properties sold *after* the Notice of Arbitration and two properties which were recorded under the former names of the Claimants' Enterprises – which the Costa Rican registry has not updated.

on to support its claim or defense under the UNCITRAL Rules of Arbitration, but under a duty of candor towards the Tribunal, Claimants also have the duty to submit a detailed identification of properties owned and, even if Claimants desire to take the position that the sale of properties made prior or after the submission of the Notice of Arbitration does not affect their claim and may still be treated as part of their investment for purposes of the valuation of damages, to disclose this fact in their submissions.

D. The Concession Site

1. The Parties' Positions

308. The allegations over the protection of the investment made by Claimants in the Concession Site are more complex. Initially, in the Counter-Memorial Respondent objected to protection on the basis of the fact that Claimants had failed to comply with the rules applicable to the Concession. Among other reasons, because Claimants had failed to pay taxes to the municipality for the fourteen years they held the Concession, because they failed to begin construction within one year after grant, or within the grant of the construction permits, and because the ownership of the capital of La Canícula, S.A. - the Costa Rica commercial entity that owned the property and held the Concession title, was not maintained in accordance with applicable law- the Maritime Terrestrial Zone Law (the “**MTZ Law**”) since a Costa Rican national failed to hold at all times at least 51% of the shares of said company²³².
309. In Claimants' Reply Memorial and Mr. Aven's Second Witness Statement, evidence was submitted in respect of payment of the taxes to the Municipality²³³ along with arguments concerning the fact that the Municipality was aware of the failure to commence construction, but nonetheless issued the relevant construction permits. In addition, these materials contained evidence advising of the valuation of the constructions to be completed. On the subject of ownership of La Canícula, Claimants explained how the purchase of this property was made in 2002, and how the purchase of one of the portions was contingent upon receipt of the Concession title from the Municipality of Parrita; upon receipt, Mr. Aven closed the purchase on April 1, 2002. Thereafter, on April 30,

²³² Respondent's Counter-Memorial, ¶¶ 309-317, pages 78-80.

²³³ Claimants' Reply Memorial, ¶ 296, page 100. (C-269).

2002, all of the shares in trust were placed in trust with Banco Cuscatlán, S.A. with Mr. Aven listed as one of the beneficiaries. Additional evidence was produced to the effect that an agreement was executed on March 8, 2005 whereby "... Ms. Paula Murillo was assigned 51% of the shares in La Canícula and that Ms. Murillo agreed to assign all future profits generated by the La Canícula development to the Claimants"²³⁴. Claimants affirmed that they ensured that a Costa Rican national held, at all times, the requisite 51% of the shares in La Canícula in accordance with Costa Rican law²³⁵. Again, on May 10, 2010, they assigned to Ms. Murillo 51% of the shares²³⁶ to meet the legal requirement. However, there is no evidence that Ms. Murillo was registered as a shareholder in the shareholders registry book, as prescribed by Costa Rica's law.

310. In the Rejoinder, Respondent challenged the structure described by Claimants, and asserted that Claimants had failed to identify details of termination of the initial trust, of payments made when the 49% were sold to other Claimants, and the satisfaction of legal formalities for the transfer. Respondent also highlighted that Mr. Aven, alone or with other Claimants, had owned all of the shares of La Canícula during a period of time in breach of Costa Rica law, which had as a consequence that the Concession would be forfeited under the MTZ Law²³⁷. To support their position, they referred to the witness statement of Dr. Julio Jurado²³⁸, arguing that the acquisition and/or holding of 100% of the stock of La Canícula at any time would render the Concession to be null and void.
311. In their Post-Hearing Brief, Respondent confirmed its objection to the jurisdiction of the Tribunal over any claims relating to the Concession Site because Mr. Aven owned the totality of shares in La Canícula in violation of Articles 47 and 53 of the MTZ Law²³⁹ insofar as Mr. Aven had admitted that he purchased on April 1, 2002 the totality of the shares in La Canícula from Mr. Monge, and kept them under his ownership even after the trust to hold the shares had expired²⁴⁰, despite Claimants' later correction of the date of

²³⁴ This agreement was submitted as Exhibit C-242.

²³⁵ Claimants' Reply Memorial, ¶ 337, page 116.

²³⁶ *Id.*, ¶ 339, page 117, Second Witness Statement of David Aven, ¶ 37.

²³⁷ Respondent's Rejoinder Memorial, ¶¶ 180-188, pages 47-49. The Maritime Terrestrial Law was submitted as Exhibit C-221.

²³⁸ Second Witness Statement of Julio Jurado, ¶¶ 204, 205 and 216.

²³⁹ Claimants' Post-Hearing Brief, ¶ 608, page 123.

²⁴⁰ Respondent's Post-Hearing Brief, ¶¶ 636-652, page 131-134.

acquisition to April 30, 2002. Furthermore, based on the fact that there was no evidence that at least 51% of the shares in La Canícula had been transferred to a Costa Rican national, and the purported transfer to Ms. Paula Murillo was not definitive²⁴¹, Respondent alleged that Claimants were therefore in breach of Article 47 of the MTZ Law. The acquisition of the investment in violation of the laws of the host State has been recognized by international investment case law as trumping the jurisdiction of the arbitral tribunal²⁴².

312. In response to the argument of Claimants that Articles 2.1 and 10.28 DR-CAFTA only require the investors to prove *prima facie* that they have “ownership or control” of an investment, Respondent argues that this position has been examined by other tribunals in the context of *ratione personae* jurisdiction and not, as in this case, in dealing with an issue of *ratione materiae*²⁴³.
313. Regarding the several cases involving *de facto* control by the investor cited by Claimants, Respondent provided counter arguments to each, distinguishing them in light of the alleged illegality of the acquisition of the property comprising the Concession Site. In response to the argument that tribunals have historically been reluctant to deny standing on the basis of non-compliance with formalistic/technical rules, Respondent stated that while it did not disagree with this premise, it denied that Claimants’ violation of the MTZ Law can be considered a mere formality. In his witness statement, Dr. Jurado categorized this as constructive or legal fraud.
314. Respondent has added that Claimants have the burden of proving the legitimate ownership of their investment, not only under UNCITRAL Rules but also under the international case law that it cited²⁴⁴, and that Claimants have failed to meet such burden.
315. Furthermore, in an attempt to demonstrate the Claimants’ failure to meet the requirements of the laws of Costa Rica Respondent presented a thorough analysis of the

²⁴¹ *Id.*, ¶¶ 657-665, page 135-138.

²⁴² *Id.*, ¶ 609, page 123. Respondent cited *Inceysa v. El Salvador*, Award, August 2, 2006, ¶¶ 238-239 (RLA-11), *Phoenix v. Czech Republic*, Award of April 15, 2009, ¶ 145 (RLA-75), *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No ARB/07/16, Award, November 8, 2010 (RLA-163) ¶ 294, *Saba Fakes v. Republic of Turkey*, ICSID Case No ARB/07/20, Award, July 14, 2010, ¶¶ 147-156 (RLA-162).

²⁴³ Respondent’s Post-Hearing Brief., ¶¶ 612-627, pages 124-127.

²⁴⁴ *Id.*, ¶¶ 631-635, pages 129-130.

chronology of the acquisition by Mr. Aven of the shares in La Canícula, the transfer into trust with Banco Cuscatlán, S.A., the subsequent termination of the bank trust, and the transfer to Ms. Murillo²⁴⁵. The failure to comply with the MTZ Law at several instances (including at the time of the original acquisition and upon termination of the bank trust), should forfeit the Claimants' acquisition of the Concession Site property, and therefore, by operation of law deprive the Claimants of any rights over the property.

316. During the December Hearing there was discussion regarding the constitutionality of the MTZ Law that requires a Costa Rican national to own at least 51% of the shares in a company owning property along a coastal beach. With respect to the same, Respondent argued in the Post-Hearing Brief that Claimants' expert, Mr. Ortíz, failed to justify the alleged unconstitutionality of the provision, under either argument of alleged violations of international human rights (because the case cited by Mr. Ortíz - *Ivcher Bronstein v. Peru* did not, in any way, address any discrimination issues comparable to the 51% rule whatsoever), or the decisions rendered by the Constitutional Chamber of Costa Rica, since in its Decision No. 11351 of June 29, 2010 the Constitutional Chamber has already upheld as constitutional the rationale behind the 51% rule contained in Article 47 of the ZMT Law. The dissenting opinion by one of the Justices referenced by Mr. Ortíz, aside from dealing with an issue of transparency and not discrimination of a foreign national, is irrelevant as it is not binding in nature²⁴⁶.
317. Claimants' Post-Hearing Brief addressed the allegations on the timing of the execution of the agreements and corrected the date of acquisition of the shares (to April 30, 2002) to coincide with the date these were placed in trust with Banco Cuscatlán de Costa Rica S.A. Further, Claimants asserted that the ownership of the shares in trust did not conclude simply by reason of expiration of the agreement, but rather continued until a new trust was executed with Mr. Aven's former lawyer, Juan Carlos Esquivel.
318. Claimants also argued in their Post-Hearing Brief that Respondent failed to raise this particular jurisdictional objection in due course, i.e., by the time it submitted its statement of defense (as identified under Article 23(2) of the 2010 UNCITRAL Arbitration

²⁴⁵ *Id.*, ¶¶ 636-659, pages 131-136.

²⁴⁶ *Id.*, ¶ 660-665, pages 136-138.

Rules²⁴⁷), but rather did so at its closing arguments during the December Hearing. The cited provision indicates: “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.

319. Finally, as to control over the Concession Site, Claimants argued that Municipal officials at Parrita were well aware that the U.S. investors exercised control over the Concession at all relevant times²⁴⁸. They added that in Costa Rica, there is general practice of non-enforcement of the so called 51% Rule, and that Respondent had never raised any issue regarding the Claimants’ alleged non-compliance with the 51% Rule until this arbitration²⁴⁹.

2. The Tribunal’s Analysis

320. The issue to address at this time deals with whether the Tribunal can examine the claims of the Claimants in respect of the investment made in the Concession, and not on whether the structure initially made by Claimants or subsequently amended was appropriate or even whether it was legitimate under the laws of Costa Rica.
321. During the examination of Mr. Aven during the December Hearing, Arbitrator Siqueiros asked Mr. Aven about the structure utilized where a Costa Rican person holding the 51% of the shares in La Canícula was only a service provider, and not an investor; this because the agreement executed²⁵⁰ expresses a service to be provided by Ms. Murillo rather than a true transfer of ownerships. He responded that:

This is one of those quirky things in Costa Rica you have to understand. That they have this law that if you--foreigners invest--buy property on the Concession, that a foreign national (*sic*) has to have 50--own 51 percent. But it’s understood that this--and normally the foreign nationals are attorneys or people--you know,

²⁴⁷ 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.”

²⁴⁸ Claimants’ Post-Hearing Brief, ¶¶ 134-137, page 62-64.

²⁴⁹ *Id.* ¶ 300, page 147.

²⁵⁰ The one-page agreement provides for no purchase price to be paid by Ms. Murillo, but rather that Ms. Murillo assigns all future profits to the US Investors and she will transfer the shares received to whomever the US Investors appoint in the future. Finally, that she will be compensated “for her services”. (C-242).

people, you know, you have confidence in. They won't steal it. But normally it's understood that they're just holding it. You know, it's like a placeholder. Okay. And you generally have an arrangement where, okay, they're holding this as a placeholder, but they're holding it like--almost like in trust for the--the person that bought it, the foreigner that bought it.

He then added

The Costa Rican didn't put any money in. This was just a--one of the quirky things in Costa Rica law. And it's done commonly. This is the way it's done down there. We didn't invent this, the way things are done. We--again, another example of following the rules that are established in Costa Rica. So this is the way it's done²⁵¹.

322. The Tribunal acknowledges based on evidence reviewed that such arrangements appear to be common throughout Costa Rica, and the government of Costa Rica has elected not to enforce the laws that could void such structures. During the examination of Mr. Julio Jurado, the Attorney General for Costa Rica, who had been presented an Expert Witness Report on behalf of Respondent, he responded to questions from Arbitrator Siqueiros, and on the subject of the Concession Site shareholder arrangement he accepted that the structure where Costa Rican nationals would simply "lend their name" used by Claimants was not uncommon, although he referred to it as "legal fraud". When asked whether he had ever handled a case, or ever known of a case that was brought to courts, he responded in the negative²⁵².
323. The Tribunal will first examine whether on the merits of the arguments this is a valid challenge, and whether procedurally Respondent is entitled to challenge the jurisdiction for having failed to exercise this until its Post-Hearing Brief, and not at the time it submitted its statement of defense as required under the UNCITRAL Arbitration Rules.
324. Costa Rica was aware of the situation in La Canícula, and it never challenged the Concession on the ground of Articles 47 and 53 of the MTZ Law. The Tribunal believes that, insofar as the Respondent has knowledge of these structures, and according to the testimony of Dr. Jurado, the Attorney General's office has even discussed the issue with the municipalities which have the authority to issue the MTZ concessions, but the government of Costa Rica has elected to tolerate said structures, and not take any action

²⁵¹ Transcript Page 927-16 931 -13.

²⁵² Transcript 1540-2 / 1541-4.

against any of the existing concessions that may be similar in nature, implies their tacit acceptance. Perhaps this is made in an effort to promote tourism and/or investment in the country and not deter real estate developments along the coasts.

325. Accordingly, the Tribunal believes that Respondent's longtime tolerance of analogous structures bars it from challenging the legality of the structure in the instant case. On the other hand, the fact that the challenge has been found to be barred implies that the Tribunal needs not examine the second part dealing with procedural timing of its submission.
326. Likewise, the challenge argued by Respondent based on the fact that Claimants had failed to pay municipal taxes for several years should be dismissed because neither the Municipality nor Respondent took any action prior to the filing by Claimants of the Notice of Arbitration to remedy such failure, whether by fining the concession holder or initiating a procedure to revoke the Concession. In any case, Claimants submitted evidence during the proceedings in respect of payment of the taxes to the Municipality²⁵³.

IX. ADMISSIBILITY OF THE CLAIMS

A. Positions of the Parties

1. Unlawful and Illegal Conduct in the Operation of the Investment

327. In addition to the challenges to the jurisdiction of the Arbitral Tribunal based on the allegations of *Ratione Personae* and *Ratione Materiae*, the Respondent has also raised challenges to the admissibility of the Claimants' claims arguing that under international law Claimants cannot avail themselves of the protections of DR-CAFTA due to the illegalities committed during the operation of their alleged investment in Costa Rica²⁵⁴.
328. Respondent initially raised a challenge to the jurisdiction of the Tribunal in its Counter-Memorial, based on the illegalities allegedly committed by Claimants during the development of Las Olas project and their subsequent failure to comply with the

²⁵³ See Exhibit C-268 with a receipt of taxes paid to the Municipality, which lists payments made by La Canícula, S.A., in respect to the Concession Site as well.

²⁵⁴ Respondent's Counter-Memorial, ¶ 112, page 29, Respondent's Rejoinder Memorial, ¶ 198, page 51.

applicable laws of Costa Rica with respect to construction and the damages caused to the environment²⁵⁵.

329. In its subsequent Rejoinder, Respondent clarified its position by stating that if there is illegal conduct in the acquisition of the investment, then there can be no property rights and no “investment” for purposes of the Treaty, and a tribunal would lack jurisdiction *ratione materiae*. But in the present claim, Respondent added, the issue is whether a claim based on serious misconduct by Claimants during the operation of the investment should be heard by this Tribunal, allowing Claimants to (potentially) receive the protection of the DR-CAFTA²⁵⁶. Respondent thus changed its objection on the basis of “admissibility” of the claim, arguing that the inadmissibility of claims based on investments which have been operated in an illegal manner is supported by the DR-CAFTA itself since one of the aims of the DR-CAFTA is to strengthen the rule of law among the State Parties, and thus, the substantive protections of the DR-CAFTA cannot apply to investments that are conducted contrary to law²⁵⁷.
330. Respondent insisted in the Post-Hearing Brief that under international law investors are barred from the substantive protection of an investment treaty when they have *obtained* or *operated* their investment illegally, and that Claimants (i) misled Costa Rican authorities by deliberately omitting key information which, at the same time, enabled them to lessen the extent of the environmental impact of their Project; and (ii) acted against the requirements of Costa Rican law and international law²⁵⁸. Citing the case *Plama v. Bulgaria*²⁵⁹ where investor misconduct was not viewed as a jurisdictional issue, but as an issue that affected the substantive inadmissibility of the claim, Respondent argued that the illegalities committed by Claimants during the performance of the investment should constitute a barrier to the admissibility of Claimants’ claims.
331. On the question of whether the DR-CAFTA or the UNCITRAL Arbitration Rules allow the Tribunal to reject or admit claims on the basis of non-compliance with the host State

²⁵⁵ *Id.*, ¶¶ 258, page 66, and 270, page 70.

²⁵⁶ Respondent’s Rejoinder Memorial, ¶¶ 527 and 528, pages 134-135.

²⁵⁷ *Id.*, ¶ 531, page 136.

²⁵⁸ Respondent’s Post-Hearing Brief, ¶ 679, page 140.

²⁵⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB 03 24, Award, August 27, 2008. (RLA-12).

law, Respondent first argued that this is an inherent power of the Tribunal, despite the absence of express provisions under the Treaty or the arbitration rules²⁶⁰. Although Respondent recognizes that DR-CAFTA does not explicitly require an investment to be *in accordance with* the law of the host State, Respondent contends that it *implicitly* provides for the inadmissibility of claims based on investments which have been operated in an illegal manner. Respondent reaffirmed an argument made in the Rejoinder asserting that the ultimate aim of the Treaty is to strengthen the rule of law among the State Parties, which entails that the Treaty should be interpreted in a manner consistent with this objective, and any attempt to provide substantive protection to an investment operated contrary to the law will be clearly against such purpose²⁶¹, while citing several cases in support of this proposition²⁶².

332. During the December Hearing and in their Post-Hearing Brief, Claimants addressed that the objections of Respondent were premised upon examples in which a respondent alleged that serious criminality or fraud had materially contributed to establishment of the investment and cited precedents in other international investment cases²⁶³ where compliance with municipal law is construed as a legality requirement, and that the temporal scope of the legality requirement is limited to the establishment of the investment, but does not extend to the subsequent performance. In any event, it is the Respondent, they claim, that has the burden of proof to establish that the investment was procured by fraud or non-compliance with municipal law²⁶⁴.
333. Finally, although Claimants object that Respondent had not addressed the illegality of complaints prior to this arbitration, and suggest that Respondent advanced “*ex post facto*

²⁶⁰ Respondent’s Post-Hearing Brief, ¶ 696, page 143.

²⁶¹ *Id.*, ¶¶ 699-702, page 144.

²⁶² In addition to *Plama v. Bulgaria* above, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* [II], ICSID Case No. ARB/11/12, Award, December 10, 2014, para. 332 (RLA-14), *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, para. 123 (RLA-161).

²⁶³ *Quiborax SA and others v. Bolivia*, Decision on Jurisdiction, ICSID Case No ARB/06/2, IIC 563 (2012), September 27, 2012, at ¶ 266, (cited in Claimants’ Post-Hearing Brief, ¶ 139, page 64) *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 (CLA-199) and *Copper Mesa Mining Corporation v. Ecuador*, Award, PCA Case No 2012-2, IIC 841 (2016), March 15, 2016, at ¶¶ 5.54-5.55, and 5.59 (CLA-179).

²⁶⁴ Claimants’ Post-Hearing Brief, ¶¶ 141-142, page 66.

allegations” of Claimants’ alleged illegalities²⁶⁵, Respondent mentions that where illegalities were found before the commencement of this arbitration, Claimants were duly informed. With respect to those illegalities that were identified after the commencement of the arbitration, Respondent asserts that given such “concealment of information from local agencies” upon the disclosure of information on these proceedings, it is the Tribunal’s duty to determine whether the legality requirement is met as a finding of fact in order to adjudicate this dispute. Therefore, it is not necessary – adds Respondent, to have a local court’s decision declaring that an investment has breached the law to allow the Tribunal to conclude that it is illegal²⁶⁶.

2. Claims for Breach to provide Full Protection and Security

334. Claimants argued 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, and that Prosecutor Martinez’s refusal to perform a good faith investigation of credible corruption charges leveled was an example of failing to honor this minimum standard of protection²⁶⁷.
335. Respondent has also raised an objection to what it refers to a “new cause of action” brought by Claimants at the end of the December Hearing, wherein Claimants allege a breach by Respondent of the full protection and security standard. Prior to the December Hearing, Claimants had exclusively raised breaches to fair and equitable treatment in their Notice of Arbitration and then, in their Reply, that Respondent had (i) frustrated Claimants’ legitimate expectations; (ii) failed to afford due process; (iii) were arbitrary; and (iv) implied an abuse of rights²⁶⁸. These claims are examined below.
336. In its Post-Hearing Brief Respondent has requested that the Tribunal declare as inadmissible any claims from Claimant regarding alleged breaches of the duty to provide full protection and security to the investors, since this allegation was raised only at the closing of the December Hearing, and not as a claim in the Request for Arbitration or

²⁶⁵ *Id.*, ¶ 599, page 274.

²⁶⁶ Respondent’s Post-Hearing Brief, ¶¶ 707-717, pages 145-147.

²⁶⁷ Claimants’ Reply Memorial ¶ 370, page 124.

²⁶⁸ Respondent’s Post-Hearing Brief, ¶¶ 720, page 147.

subsequently²⁶⁹, and that Article 10.16.2 DR-CAFTA sets forth the need for a “Notice to submit a claim to arbitration” and establishes that such notice must specify the provision of the Treaty alleged to have been breached as well as the “legal and factual basis for each claim”²⁷⁰.

337. Respondent made reference to *Supervisión y Control, S.A. v. The Republic of Costa Rica* where the Tribunal, in a decision issued against Costa Rica, nonetheless established that:

Additionally, the Tribunal would like to remind the importance of proper notice, which is an important element of the State’s consent to arbitration. Indeed, proper notice allows the State to examine and possibly resolve the dispute through negotiation.

The failure to duly notify the State receiving the investment of the existence of a dispute constitutes a violation of Article XI.1 of the Treaty. This implies that any claim that has not been notified is inadmissible in the respective proceeding, because the prior negotiation process agreed to by the Parties has not been exhausted.

In the event the Investor notifies certain claims to the State, but upon presenting the Request for Arbitration of its Claims Memorial it adds as claims different and not directly related to those previously presented, all the claims not notified will be inadmissible. Thus, the proceeding will only address the previously notified claims under the requirements set forth in Article XI of the Treaty²⁷¹.

3. Exhaustion of Domestic Proceedings

338. Respondent argues that Claimants have asserted an unsupported claim for Respondent’s failure to afford due process and arbitrary conduct with the clear purpose of avoiding the high threshold that a claim of denial of justice entails: exhaustion of local remedies, or in the event that it has not been complied with it, futility of the remedies available²⁷².
339. Claimants allege that the DR-CAFTA does not contemplate exhaustion of local remedies. There is no provision under Chapter 10, they state, that could permit the Respondent to unilaterally impose an exhaustion requirement, and Article 10.18(3) permits an investor-claimant to “initiate or continue an action that seeks interim injunctive relief and does not

²⁶⁹ *Id.*, ¶¶ 718-726, pages 147-149.

²⁷⁰ *Id.*, ¶¶ 722, page 148.

²⁷¹ *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶¶ 339-341 (RLA-169).

²⁷² Respondent’s Post-Hearing Brief, ¶¶ 867, page 182.

involve the payment of monetary damages” simultaneously with the pursuit of a damages claim under Article 10.16²⁷³.

340. Claimants further stress that any such measures would be prohibited under Chapter 10 since the Treaty parties provided investor-claimants with the right to pursue both arbitration and a local remedy simultaneously²⁷⁴.
341. On the other hand, Claimants reject that they have brought a denial of justice claim²⁷⁵, and challenge the right of Respondent to re-characterize their claim as such.

B. The Tribunal’s Analysis

1. Unlawful and Illegal Conduct in the Operation of the Investment

342. The Tribunal has not found evidence that Claimants acted fraudulently in the establishment of the investment made in the Las Olas Project, and sides with the temporal scope of the legality requirement premised in the *Quiborax*, *Yukos Universal* and *Copper Mesa Mining* cases that have been cited. It should not extend to the subsequent actions during the performance of the investment. Respondent failed to establish that the investment was procured by fraud or non-compliance with applicable law. Thus, the challenge to the admissibility of the Claimants’ claims due to the illegalities committed during the operation is dismissed.

2. Claims for Breach to provide Full Protection and Security

343. The Tribunal will now address the issue of whether the alleged failure by Claimant to argue in the Request for Arbitration the breach by Respondent to the duty to provide full protection and security to the Investors, and only brought the claim at the closing of the December Hearing, as Respondent states, bars them from now making the claim under Article 10.16.2 DR-CAFTA.
344. The Tribunal agrees that the State’s consent to arbitration under DR-CAFTA presupposes the compliance with the requirement for the submission of a claim, including but not limited to those under article 10.16(2), which establish the need to include in the notice of

²⁷³ Claimants’ Post-Hearing Brief ¶¶ 143-144, page 67.

²⁷⁴ Article 10.18(3) DR-CAFTA, which allows an investor-claimant to “initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages”.

²⁷⁵ Claimants’ Post-Hearing Brief, ¶¶ 430-434, pages 206-209.

intent not only a factual description for each claim, but also the “legal basis” thereof. It is a right of the Respondent to have a clear framework of the claims from the outset.

345. Claimants failed to expressly plead a claim for breach of full protection and security. The Tribunal takes note that Claimants referred to the duty to provide protection and security to the investors only in passing in their Memorial²⁷⁶, and claimed a breach of Article 10.5, which covers both standards of fair and equitable treatment and full protection and security. In their Reply, they added the following passage: “What the Claimants stated in their Memorial was that the manner in which the Respondent investigated those complaints amounted to a breach of the Claimants’ DR-CAFTA fair and equitable treatment and full protection and security standards”²⁷⁷. It is relevant to note that the same facts alleged by Claimants were primarily framed by them as breaches of fair and equitable treatment.
346. The Tribunal finds that even though there were limited mentions in Claimants’ Memorial and Reply to breaches on the part of Respondent to the standard of full protection and security, Article 10.16.2 DR-CAFTA requires more from a Claimant. The “Notice to submit a claim to arbitration” must specify not only the specific provision of the Treaty alleged to have been breached, but the ‘legal and factual basis for each claim’. Similar provisions are found in UNCITRAL Arbitration Rules Article 20. The need to timely and properly submit a claim is evident: to allow a respondent State to prepare and argue its defense. Therefore, since Claimants failed to timely plead a claim for breach of full protection and security, it declares this claim as inadmissible *in limine*. The Tribunal nonetheless expressly states that this does not prejudice the rest of the claims timely presented by Claimants, and these will be examined below.

3. Exhaustion of Domestic Proceedings

347. The positions of both Parties in this arbitration in respect of the requirement of exhausting domestic proceedings need to be examined in the light of certain general principles under international law.

²⁷⁶ Claimants’ Memorial, ¶¶ 268-270, pages 84-85.

²⁷⁷ Claimants’ Reply Memorial, ¶ 95(k), page 39.

348. On the subject of whether there is a need to exhaust local remedies, to which Respondent argues that the Claimants must be forced to exhaust any and all remedies available under the applicable law of Costa Rica, Claimants' position is that, by operation of Articles 10.16 to 10.18 DR-CAFTA, the Treaty Parties established a *lex specialis* regime for the resolution of disputes under the Treaty that perforce displaces the customary international law rule in favor of exhausting local remedies²⁷⁸. Otherwise, the text of Article 10.18(3) would be superfluous²⁷⁹.
349. The Tribunal cannot accept the argument of Claimants on the ground that DR-CAFTA does not does not require the exhaustion of internal remedies for admissibility of a claim. What Respondent has alleged in this regard does not appear to be directed to questioning the admissibility of the claim, but rather an issue of the merits of the dispute, as it is to establish whether a denial of justice claim has been configured, as a component for the standard of fair and equitable treatment in accordance with Article 10.5.2.a. DR-CAFTA. Alleging that domestic remedies have not yet been exhausted within the internal jurisdiction to oppose the admissibility of the claim would be manifestly impertinent. On the other hand, it is valid to allege the failure to exhaust such remedies to challenge an alleged breach of fair and equitable treatment claim.
350. Claimants have the burden to prove that domestic tribunals failed to afford proper protection which the State is bound to provide under customary international law. Failure to do so does not in any way oppose to the admissibility of the claim, but the merits of the claim should be discarded.
351. In the framework of the admissibility of an international claim, the rule for previous exhaustion of internal remedies is established for the benefit of the respondent State before an international tribunal, and expresses respect to its sovereignty. It provides the State accused of a breach of international law, in detriment of a national of another State, the opportunity to address in litigation under its own means prior to taking this before an international tribunal.

²⁷⁸ *Id.*, ¶ 75, page 26.

²⁷⁹ *Id.*, ¶¶ 78, page 27.

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an **opportunity to redress it by its own means, within the framework of its own domestic legal system**²⁸⁰. (Emphasis added).

352. In a procedural instance not exhausting internal remedies is always a means of defence that the respondent State has, and may be waived either in an express or tacit manner by the relevant State benefited therefrom.
353. In respect of the nature of the rule for exhaustion of internal remedies, the predominant precedents and legal scholars, as well as treaties that address this principle lean toward considering it as a procedural requirement, and not one of merits. The International Court of Justice has treated it as a preliminary defence, directed at objecting to the admissibility of a case, as a *raison d'être* of this rule. Likewise, the Articles on Diplomatic Protection of the International Law Commission (Article 14.1) contemplate it as an admissibility requirement²⁸¹, as it is also explicitly referred to in certain Human Rights conventions²⁸².
354. In customary international law rules and minimum standard of treatment, denial of justice occurs when a State breaches an international obligation to provide non-nationals access to justice and due process for the determination of their rights and duties through competent, independent and impartial courts, as per internationally recognized standards²⁸³. This implies a certain degree of connection and sometimes intertwined relationships between exhaustion of domestic remedies as a condition for admissibility of a claim and denial of justice as a substantive of unlawful action. The International Court of Justice so established in the *Barcelona Traction* case:

²⁸⁰ Interhandel Case, Judgment of March 21st, 1959: I.C. J. Reports 1959, p. 27.

²⁸¹ "A State **cannot present an international claim** in respect to a harm caused by one of its nationals or one of the persons referred to under draft article 8 before the harmed person has exhausted in domestic remedies" (**emphasis added**).

²⁸² Article 35 of the Convention on Human Rights, Article 46 of the American Convention on Human Rights, among others.

²⁸³ The due process right which is acknowledged and protected by most relevant conventions on Human Rights is more generous than that arising from minimum standard of treatment to non-nationals, but is applied in a different arena, which does not differentiate among nationals and non-nationals, and has its source in law and not custom.

[...] this is not a case where the allegation of failure to exhaust local remedies stands out as a clear-cut issue of a preliminary character that can be determined on its own. **It is inextricably interwoven with the issues of denial of justice which constitute the major part of the merits**²⁸⁴. (emphasis added).

355. This proximity, however, does not mean in any way identity. When the victim of an illegal action exhausts domestic remedies to attempt to resolve his/her claim internally, not only does he/she seek justice, but also clears the way to make such claim admissible by an international tribunal examining diplomatic protection, regardless of whether the original claim referred to denial of justice, or any other breach to an international duty of the respondent State. Obviously, if the claim relates to denial of justice and the claimant alleges that he/she has not been able to exhaust domestic remedies because these are non-existent, illusory or the decision is to be delayed unjustifiably, then the claimant-victim shall have the burden to assert this situation to ensure the admissibility of the international claim, and also to address the merits of the case. But no confusion should exist among the preliminary requirement of exhausting domestic remedies, as a procedural issue, and the denial of justice as an international unlawful act. For the latter to arise, it is necessary that internal remedies have been commenced without result, or are non-existent or illusory.
356. This Treaty, as most of those that deal with the international protection of investments differentiates itself clearly from diplomatic protection. DR-CAFTA does not require prior exhaustion of internal remedies as a requirement of admissibility to access international investment arbitration. This, however, does not mean that the DR-CAFTA does not recognize denial of justice as an unlawful act, which may be caused against an investor of one of the Parties to the Treaty. On the contrary, DR-CAFTA suggests that fair and equitable treatment has as a fundamental component of denial of justice; “fair and equitable treatment” includes the obligation not to deny justice in criminal civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; Article 10.5.2.a DR-CAFTA.
357. Therefore, the claimant investor alleging the breach of the obligation to afford fair and equitable treatment has the burden of proof to show denial of justice, insofar as Article

²⁸⁴ Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment. I.C. J. Reports 1964, p. 44

10.5.2.(a) DR-CAFTA may be applicable. The investor may not be released of such burden invoking that DR-CAFTA does not require the prior exhaustion of domestic remedies to have access to arbitration, because what is at play is not the admissibility of the claim but the merit of the claim. Certainly, for the admissibility of a claim within DR-CAFTA, it is not necessary to have exhausted domestic remedies, but to establish the merits on the basis of denial of justice it is necessary to evidence that the State which receives the investment breaches its international obligation to provide investors of the other Parties to the Treaty, access to justice and due process for the resolution of their rights and obligations through competent, independent and impartial courts, under generally recognized international standards.

358. Accordingly, Claimants late filed claim for breach of full protection and security is rejected. The same facts as alleged breaches of fair and equitable treatment are considered below.

X. ALLEGED LIABILITY UNDER DR-CAFTA

A. The Submissions of the Parties

1. The Claimants' Submissions

(a) Article 10.5 DR-CAFTA and Annex 10-B as the Legal Basis for the Claims.

359. Claimants expressed the legal basis of their claim in the Notice of Arbitration, and subsequently in their Memorial of Claims and Reply, which are examined below. But in their Post-Hearing Brief they concluded that they commenced this arbitration both on the basis of (a) sub-paragraph (1)(a)(i)(A) of Article 10.16 DR-CAFTA, each on his or her own behalf, and also on behalf of the Enterprises each respectively and/or collectively owned and/or controlled, and (b) under sub-paragraph 1(b)(i)(A) of DR-CAFTA Article 10.16, which deal with allegations that a Party has breached an obligation contained in Section A of Chapter 10 of the Treaty²⁸⁵.

360. In the Notice of Arbitration, they alleged that "... Costa Rica has violated the fair and equitable treatment ("FET") standard of DR-CAFTA Article 10.5, as it did not treat the

²⁸⁵ Claimants' Post-Hearing Memorial, ¶ 85, page 41.

Investors and their Investments fairly and equitably. Specifically, Costa Rica’s conduct violated the Investors’ and their investments’ rights to transparency, due process and treatment that is not arbitrary, among other fundamental tenets of fair and equitable treatment. Costa Rica’s actions also violated the Investors’ legitimate expectation that Costa Rica would uphold the rule of law and act in accordance with its own laws and validly-issued permits”²⁸⁶.

361. Claimants complained that the municipal, the appellate and the supreme courts of Costa Rica gave the Prosecutor a chance “... to resuscitate a case that should have resulted in the acquittal of Mr. Aven following the Prosecutor’s failure to prove any liability. This type of harassment and re-trial is outlawed in Costa Rica and in any rule-of-law system”²⁸⁷.
362. In addition, Claimants asserted in the Notice of Arbitration that Respondent “... has also breached its obligation to afford U.S. investors and their investments non-discriminatory treatment under DR-CAFTA Articles 10.3 and 10.4”²⁸⁸.
363. Finally, Claimants alleged that, Costa Rica violated Article 10.7 DR-CAFTA by indirectly expropriating the Investors’ right to the value of their investment without compensation, since Respondent had “effectively deprived the Investors of their right to develop the Project and to enjoy the profits from their investments”²⁸⁹. Article 10.7 provides that no Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization except “(a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation and (d) in accordance with due process of law and Article 10.5.”
364. In their Memorial of Claims, Claimants expressed that Article 10.5(2) DR-CAFTA confirms the Parties’ consensus opinion that the standards of “fair and equitable treatment” and “full protection and security” are not only treaty standards, but also standards of customary international law, and that the provision in the Treaty constitutes

²⁸⁶ Notice of Arbitration, ¶ 53, page 16.

²⁸⁷ *Id.*, ¶ 54, page 16.

²⁸⁸ *Id.*, ¶ 55, page 16.

²⁸⁹ *Id.*, ¶ 60, page 17.

an admission, on the part of Costa Rica and the other DR-CAFTA Parties, that they regard themselves as being bound by these two standards as a matter of customary international law – i.e., even if the terms “fair and equitable treatment” and “full protection and security” did not appear anywhere in the Treaty²⁹⁰. They added that, in agreeing to Article 10.5(1) the Parties have undertaken to “accord to covered investments treatment in accordance with customary international law,” and through Article 10.16 the Parties have consented to be held to account for breaches of Article 10.5. Annex 10-B defines the category of customary international law “included” by the Parties in Article 10.5 as: “all customary international law principles that protect the economic rights and interests of aliens”²⁹¹. Also, Claimants assert that the Parties’ reference to “principles” in Annex 10-B DR-CAFTA signifies their acceptance of the fact that the “customary international law minimum standard of treatment of aliens” is evolutive by nature, rather than being trans-substantive. Its content is “... perennially subject to renewal, through the application of general legal principles to evermore disputes arising from forever changing patterns of fact...”²⁹².

365. Further, Claimants affirmed in their Memorial of Claims that “... Costa Rica and the other DR-CAFTA Parties have – given the language of Chapter 10 – inescapably renounced any right to rely upon the customary international law rule on exhaustion of local remedies as a defense to claims brought under Article 10.5. The Parties’ constitutive renunciation of the customary exhaustion defense is manifested in one of the conditions precedent they have established in order for their consent to arbitration under the Agreement to be valid”. They add that before the investor can proceed with her prospective claim, “... she must first provide written proof to the would-be respondent that she has irrevocably waived her “right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”²⁹³.

²⁹⁰ Claimants’ Memorial, ¶ 268, page 84.

²⁹¹ *Id.*, ¶ 270, page 85.

²⁹² *Id.*, ¶ 271, page 85.

²⁹³ *Id.*

366. According to Claimants, the text of Annex 10-B, read in conjunction with Articles 10.5(1) and 10.16(1), recognizes the right of “investors of another Party” to pursue arbitration against DR-CAFTA Parties for *any* conduct/measure that is demonstrably inconsistent with “all [i.e. any] customary international law principles that protect the economic rights and interests of aliens.” Such right of action is for the investor to exercise at his discretion, and must not be dependent upon whether he can prove that he has already exhausted local remedies²⁹⁴.
367. Claimants continue and mention that when the Parties to DR-CAFTA referred to “customary principles of international law,” they intended for treaty interpreters to approach the matter of how Article 10.5(1) should be construed and applied, in any given case, through recourse to relevant and applicable principles of international law, and that they further intended that relevant principles would be the ones oriented towards protection of individual economic rights and interests, ensuring, in this way, that the protection offered under Article 10.5 would continue to reflect modern conceptions of protection for foreign investors, whilst preventing the provision from being injudiciously expanded to include non-economic and/or communal specimens of customary international law²⁹⁵.
368. To support their argument, Claimants then expressed that two general principles of international law critically inform the construction and application of Article 10.5(1) DR-CAFTA for this case: (a) the *principle of good faith* and (b) the *principle of due process*. From the general international law principle of good faith flow two injunctions against host State behavior that results in: (1) frustration of the foreign investor’s legitimate, investment-backed expectations; and/or (2) arbitrary and/or discriminatory exercise of governmental authority, whether by willful intention or neglect. From the general international law principle of due process flows the obligation to accord procedural fairness to foreign investors, with respect to all decision-making processes, whether legislative, executive or judicial in nature²⁹⁶. Claimants then proceed to examine both

²⁹⁴ *Id.*, ¶ 277, page 88.

²⁹⁵ *Id.*, ¶ 281, page 90.

²⁹⁶ *Id.*, ¶ 282, page 90.

principles in detail, and examine different decisions from international investment tribunals and treatises from renowned publicists²⁹⁷.

369. Claimants summarize the argument of frustration of the foreign investor's legitimate, investment-backed expectations, and state that customary international law protects the foreign investor who is engaged in making important decisions concerning the establishment, expansion, and/or operation of his investment in the territory of the Host State. Informed by the principle of good faith, customary international law entitles the investor to expect that municipal administrative, regulatory and adjudicative regimes – and the officials responsible for operating them – will function in a transparent, stable and predictable manner²⁹⁸. The foreign investor, they add, is not entitled to expect perfection from these regimes, but he is entitled to expect officials to execute their responsibilities in good faith, with consistency and in a lawful manner. The investor thus enjoys the absolute right to be free from demands for illegal payments by host State officials – on the threat of withholding or revoking the permits required for the investment to succeed, and should a bribe ever be solicited, his complaint to the host State about the crime will be immediately and thoroughly investigated, in good faith, without suffering any retribution for having reported it to the proper authorities. These are the expectations that Claimants say have been sanctioned under customary international law and vouchsafed through Costa Rica's participation in the DR-CAFTA²⁹⁹.
370. On the subject of arbitrariness in the exercise of governmental authority, Claimants make the argument that the current position is to concentrate on finding evidence of manifest procedural unfairness in the exercise of discretionary authority, or by determining whether the overall outcome of the discretionary act appears manifestly unjust, unreasonable, arbitrary, and/or patently discriminatory, such that the adjudicator can still

²⁹⁷ *Id.*, ¶¶ 283-307, pages 102-106.

²⁹⁸ *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No ARB/01/8 (May 12, 2005), ¶¶ 274-277 (CLA-62); *CMS Gas Transmission Company v. Argentina*, Annulment Decision, ICSID Case No ARB/01/8 (September 25, 2007), ¶ 89 (CLA-82).

²⁹⁹ Claimants' Memorial, ¶ 291, page 95.

recognize and maintain appropriate deference to the sovereign authority under which the scrutinized decision was made³⁰⁰.

371. The third element that Claimants examine is how the principle of good faith informs the customary minimum standard, specifically in relation to the doctrine on abuse of right, in order to address the connection between abuse of right and corruption on the part of public officials vested with discretionary authority to make decisions that could have a material impact upon the investment³⁰¹. Article 10.5 is also breached, Claimants argue, in the event that the proper authorities in a host State fail to either maintain appropriate procedures for the prosecution of the crime of bribery or they fail to maintain appropriate measures to protect persons – obviously including foreign investors – who have reported the occurrence of such crimes to the host State. In drafting and agreeing to the terms of Article 18.8, Costa Rica and the other DR-CAFTA Parties committed themselves to serious obligations upon which legitimate expectations of future behavior can clearly be based³⁰².
372. Examining the principle of due process, Claimants differentiate this principle from that of good faith (while recognizing that the two principles are closely associated with one another) because the due process approach is more concerned with identifying procedural flaws that may have contributed to decisions affecting an investment – either because the decision-maker erred in observing existing procedural rules or because no such rules existed, whereas the good faith approach requires one to focus on the ultimate outcome for investors affected by the exercise of discretionary power by administrative and regulatory decision makers³⁰³.
373. Claimants believe that, informed by the general principle of due process, Article 10.5 DR-CAFTA and the minimum standard require the Republic of Costa Rica to: (1) ensure that investors receive notice of important rules or decisions that could negatively impact upon their investments; (2) provide investors with a meaningful opportunity to have their objections and/or recommendations heard; (3) not refuse to enforce valid judgments

³⁰⁰ *Id.*, ¶ 305, page 101.

³⁰¹ *Id.*, ¶ 310, page 104.

³⁰² *Id.*, ¶ 312, page 105.

³⁰³ *Id.*, ¶¶ 313-321, pages 106-110.

issued by municipal courts, even if perceived as unfavorable to the government's interests; (4) make decisions based only upon relevant criteria, and for legitimate reasons of public policy, which can be known by those affected by that decision before it is made; (5) not make decisions on the basis of discriminatory criteria, such as nationality, local content, gender, race or creed; and (6) guarantee freedom from coercion, whether to participate in corruption or to accept terms less favorable than that to which the investor would otherwise be entitled under the municipal legal regime³⁰⁴.

374. Therefore, Claimants submit that: (1) if an official cannot produce convincing evidence that contemporaneous consideration of the factors mentioned in Article 18.8 DR-CAFTA actually did occur, and (2) the decisions actually taken by that official appear to have been out-of-proportion, or otherwise not in accord with the principle of due process, then a *prima facie* breach of Article 10.5 DR-CAFTA shall exist³⁰⁵.
375. Claimants have stated that under Article 10.22(1) DR-CAFTA the governing law for claims filed under those two provisions is limited to the Treaty itself and “applicable rules of international law.” And, they argue, both Parties are in agreement that the customary international law rules of treaty interpretation constitute “applicable rules of international law” under Article 10.22(1) DR-CAFTA. and that such rules are reflected in the Vienna Convention on the Law of Treaties (the “VCLT”)³⁰⁶.
376. Because the only relevant substantive norms concerning this dispute are, in the opinion of Claimants, found in Section A of Chapter Ten DR-CAFTA, 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 norm³⁰⁷.
377. In their Reply, Claimants defended their position from the challenges submitted by Respondent by identifying the evidence and cases cited, while they argued that Respondent concentrated its view to a very limited number of cases.

³⁰⁴ *Id.*, ¶¶ 317, page 107.

³⁰⁵ *Id.*, ¶¶ 321, page 110.

³⁰⁶ *Id.*, ¶ 243, page 74.

³⁰⁷ Claimants' Post-Hearing Brief, ¶ 87, page 42.

(b) Article 10.7(1) and Annex 10-C DR-CAFTA Claims

378. Claimants have also alleged as a legal basis of their claim Respondent's unlawful expropriation of said investment.
379. In their Memorial of Claims they first make reference to, Article 10.7 and Annex 10-C DR-CAFTA, and then mention that the orthodox test for determining whether a measure, or combination of measures, constitute an "indirect expropriation" is whether such measure substantially interferes with the foreign investor's ability to derive the full economic benefits from (i.e. to "use and enjoy") an investment established in the territory of the host State. Thus, the host State conduct rises to the level of an expropriation under Article 10.7 when it leads to a substantial deprivation of the investment, or effectively neutralizes the enjoyment of an investment³⁰⁸. The operative question is not whether an investment, *per se*, has been taken or destroyed, but rather on the individual rights, through which an investment is established, maintained, operated or alienated in exchange for a fair return³⁰⁹. This is reinforced by the inclusion of the DR-CAFTA Parties of paragraph (2) to Annex 10-C which expropriation must arise in relation to "interference with a tangible or intangible property right or property interest in an investment". Further, Claimants argue that the definition of "investment" in Article 10.28 sub-paragraphs (g) & (h) should be construed as including, *inter alia*, "... (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges"³¹⁰. In their Reply, Claimants focus on the erroneous interpretation of their claim taken by Respondent in the Counter Memorial, and indicate that it is not the Claimants' position that their "investment" constituted solely of "construction permits." Rather, they possessed property rights in land, the use of which was enhanced by the granting of various certifications and permissions³¹¹.
380. Therefore, if the host State conduct has the effect of substantially interfering with a foreign investor's use of permits granted with respect to property rights he exercises in an

³⁰⁸ Claimants' Memorial, ¶ 394, page 138.

³⁰⁹ *Id.*, ¶ 395, page 138.

³¹⁰ *Id.*, ¶ 396, page 139.

³¹¹ Claimants' Reply Memorial, ¶ 382, page 129.

investment, or deprives him of the use and enjoyment of that investment, and these circumstances remain for more than a “merely ephemeral” period of time, which will be found based on the particular circumstances of each case, then this constitutes an indirect expropriation of his investment, contrary to DR-CAFTA Article 10.7(1)³¹². The relevant question, they add, is whether the claimant-investor would have been able to recover from the State’s actions given the financial exigencies and commercial/market circumstances actually at play in his case.

381. Claimants also remind that all indirect expropriations are *per se* unlawful because they are not accompanied by the payment of prompt, adequate and effective compensation – and they remain so until such time as the stipulated compensation has been paid³¹³.
382. In their Post-Hearing Brief Claimants did not strongly argue the indirect expropriation claim, and primarily made reference to their prior allegations in their Memorial of Claims³¹⁴, and certain actions that in their view constitute a separate *prima facie* breach of Article 10.7 DR-CAFTA, which they referred to as expropriatory measures: (i) the ongoing Municipal permit suspension; (ii) the TAA injunction; and (iii) the criminal proceedings injunction, for which Respondent refuses to pay prompt, adequate and effective compensation³¹⁵.
383. Claimants also argued how Article 10.7(1)(d) DR-CAFTA deals with the concept of “due process” and that it applies to procedural matters in environmental regulation³¹⁶.

2. Respondent’s Submissions

384. Respondent rejected the notion that it has indirectly expropriated the investment of Claimants. First, it argued in its Counter-Memorial³¹⁷ the systematic analysis that the Tribunal should undertake based on an analysis of Article 10.7 and Annex C DR-

³¹² Claimants’ Memorial, ¶ 398, page 139. In making the reference to a merely ephemeral” period of time, Claimants cite *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Eng’rs of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984) 225–226 (CLA-30) and *SD Myers Inc. v. Canada*, UNCITRAL/NAFTA Tribunal, First Partial Award, November 13, 2000, (2001) 8 ICSID Rep 18, (2001) 40 ILM 1408, (2003) 15(1) World Trade & Arb. Mat. 184, (2002) 121 ILR 72, ¶ 283 (CLA-43).

³¹³ Claimants’ Memorial, ¶ 407, page 142.

³¹⁴ Claimants’ Post-Hearing Brief, ¶ 441, page 210.

³¹⁵ *Id.*, ¶¶ 660-667, page 278.

³¹⁶ *Id.*, ¶ 578, page 267.

³¹⁷ Respondent’s Counter-Memorial, ¶¶ 611-613, pages 149-152.

CAFTA, and conclude that none of the requirements for an indirect expropriation are present in this case³¹⁸. The construction permits are not covered investments to this allegation, the actions of Costa Rica are non-discriminatory regulatory actions designed and applied to protect the environment, these actions have not permanently deprived Claimants of the value or control of their investment, Respondents actions have not interfered with Claimants' reasonable expectations. And the actions taken are *bona fide* exercise of police powers.

385. From the outset in their Response to the Notice of Arbitration, Respondent has argued that Claimants failed to refer to Article 10.11 DR-CAFTA (Investment and Environment), pursuant to which “nothing shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.” Respondent contends that the suspension of Claimants’ real estate project was conducted by the Government of Costa Rica in pursuit of legitimate environmental interests protected under DR-CAFTA, as well as in accordance with the implementation of Costa Rica’s international obligations and the provisions of the Environmental Organic Law, precisely to ensure that investment activity in its territory is undertaken in a manner sensitive to the protection of wetlands. Respondent further states that these rules were in place prior to the alleged investment of Claimants³¹⁹ and that enforcement of such laws and policies is consistent with Article 17.2 DR-CAFTA (Enforcement of Environmental Laws), which states that “it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws.” Based on the above, and given that Claimants breached Costa Rica’s environmental laws and policies in connection with their alleged investment, Respondent argued that Claimants are not entitled to the protection they claim under DR-CAFTA³²⁰.

386. Respondent also rejects that it breached Article 10.5 DR-CAFTA, since Claimants have not been deprived of a fair and equitable treatment, nor have they been denied justice in

³¹⁸ *Id.*, ¶¶ 615-646, pages 152-160.

³¹⁹ Response to the Notice of Arbitration, ¶ 12, page 4.

³²⁰ *Id.*, ¶ 13, page 4.

criminal, civil, or administrative adjudicatory proceedings in accordance to the principle of due process and, as a matter of fact, it was Claimants who proceeded deliberately against the environmental provisions recognized in Costa Rica's laws and policies. Rather than a breach of the duty to afford non-discriminatory treatment or a treatment no less favorable than that it accords, in like circumstances, to its own investors or investors of any other Party or of any non-Party, which is a right under Articles 10.3 and 10.4 DR-CAFTA, Respondent indicated that the rationale behind the measure to suspend the real estate project was based on environmental protection, and not on the investor's nationality³²¹. Finally, Respondent also rejected the claim that Claimants' property has been expropriated by the Government of Costa Rica, either directly or indirectly. On the contrary, Respondent stated not only had it not expropriated the investment but that Claimants could fully exercise their property rights in compliance with Costa Rica's environmental laws and policies³²².

387. Respondent confirmed the view that the arbitration is conducted under the UNCITRAL Arbitration Rules, and that Article 35(1) thereof provides that the Tribunal "...shall apply the law designated by the Parties as applicable to the substance of the dispute", and that Article 10.22(1) DR-CAFTA provides: "the tribunal shall decide the issues in dispute in accordance with [DR-CAFTA] and applicable rules of international law"³²³. As a consequence, Respondent argues that Claimants completely misconstrue the meaning of Chapter 17 of the DR-CAFTA, and in so doing fundamentally overlook the principal obstacle to the legitimacy of their claims, as the ability for DR-CAFTA signatories to implement sound and efficient measures to protect the environment is key to the implementation of the Treaty³²⁴.
388. Respondent highlights and provides relevance to the object and purpose of Chapter 17 DR-CAFTA, and specifically the language in the first two articles which reaffirm the right of the host State to establish laws, policies and measures within their territory to ensure high levels of environmental protection, and to enforce such laws.

³²¹ *Id.*, ¶ 14-16, pages 4-6.

³²² *Id.*, ¶ 17, page 6.

³²³ Respondent's Counter-Memorial, ¶ 434, page 108.

³²⁴ *Id.*, ¶ 436, page 108.

389. Respondent stated that Chapter 17 DR-CAFTA contains a clear articulation of how the Parties to the Treaty agreed that environmental matters would not be subject to the same kind of protection envisaged in Chapter 10, as expressed by Article 10.2(1), providing: “In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency”³²⁵. The DR-CAFTA Parties established an entire Chapter of the DR-CAFTA, it adds, to expressly reserve a policy space for environmental issues. In doing so, they enunciated the Parties’ intention to not apply other Chapters of the DR-CAFTA, including Chapter 10, by virtue of Article 10.2(1)³²⁶. Respondent states that Article 17.1 constitutes a statement of how pre-existing “levels of domestic environmental protection” that already meet the desired standards of environmental protection, will be maintained going forward.
390. In response to a challenge by Claimants as to how these principles could or should be incorporated into the analysis by the Tribunal in this case, Respondent argued that since Article 10.22(1) of the DR-CAFTA provides in pertinent part: “the tribunal shall decide the issues in dispute in accordance with [DR-CAFTA] and applicable rules of international law”, environmental rules and principles provided both in domestic and international law become applicable³²⁷. Then, Respondent ties-in Article 17.22(1) DR-CAFTA, which expressly allows the application of environmental agreements to which the Parties are also a party in order to establish that those treaties must become applicable to achieve the environmental objectives stated under DR-CAFTA³²⁸, and finally, cites several of the multiple multilateral agreements to which Costa Rica is a party that recognize this principle³²⁹.
391. Although there are provisions in the DR-CAFTA that recognize the right to effective enforcement, and the means to address under-enforcement of environmental laws, Respondent argues that when Article 17.2(1)(b) establishes discretionary powers to the

³²⁵ *Id.*, ¶ 440, page 108.

³²⁶ *Id.*, ¶ 442, page 109.

³²⁷ Respondent’s Rejoinder Memorial, ¶ 66, page 21.

³²⁸ *Id.*, ¶¶ 69-70, page 22.

³²⁹ Among them, the Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993 (RLA-39), the Rio Declaration on Environment and Development, 1992 (RLA-40), the United Nations Framework Convention on Climate Change (RLA-107), and the Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987 (RLA-108). Rejoinder, ¶¶ 71-78, page 21-23.

member Party to the Treaty with respect to investigatory, prosecutorial, regulatory and compliance for enforcement of environmental matters, this implies a manner of ensuring that a Party can, as it sees fit, implement its own environmental laws without fear of violating DR-CAFTA³³⁰.

392. Thus, Respondent concludes this point by stating that, even if there is an inconsistency between the applicable standards recognized in Chapter 17 and the standards recognized in Chapter 10, Article 10.2 would operate to marginalize the standards contained in Chapter 10, in favor of those contained in Chapter 17³³¹.
393. On the other hand, Respondent further contends that Costa Rican environmental law is entirely applicable because Article 10.22 DR-CAFTA establishes that the Tribunal shall decide the issues in dispute in accordance with the Treaty, with Articles 17.1, 17.2 and 17.3 allowing this application.
394. In any case, Respondent has also argued, neither the Treaty, nor customary international law, exonerates Claimants from complying with Costa Rica's framework for the protection of its environment. Costa Rican constitutional law exalts the "protection of a healthy and ecologically balanced environment"³³². Costa Rica's constitutional and administrative case law, as well as the practice of its decentralized administrative agencies has developed around this imperative of prevention of environmental damage³³³. The principle of preventative action, reflected in Costa Rica's constitution, requires Costa Rica to prevent damage to the environment, and to otherwise reduce, limit or control activities which might cause or risk such damage³³⁴. This principle was recognized in the 1972 Stockholm Declaration on the Human Environment and is embodied in the Principle 15 of the Rio Declaration, the RAMSAR Convention and the Biodiversity Convention, all three of which were signed by both the United States and Costa Rica, a relevant fact under Article 17.12 DR-CAFTA, which provides: "The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective

³³⁰ Respondents' Counter-Memorial, ¶ 451, page 110.

³³¹ *Id.*, ¶ 459, page 112.

³³² The 1949 Constitution of Costa Rica, Article 50, Exhibit R-214.

³³³ Respondent's Counter-Memorial, ¶ 464, page 113.

³³⁴ *Id.*, ¶ 468, page 114.

implementation of these agreements is critical to achieving the environmental objectives of these agreements (...)"³³⁵.

395. On the subject of "treatment" afforded to Claimants, Respondent has indicated that Claimants were treated fairly and equitably, and therefore, it corresponds to Claimants to prove their case.
396. In connection with the argument submitted by Claimants as to their legitimate expectations to develop a project on the Las Olas site based on the *Tecmed v. Mexico* award³³⁶, Respondent rejected the notion that the purported standard as a part of the *fair and equitable* standard of protection is a valid standard recognized under international law. Further, recent tribunals have clarified that qualifying elements that must be met include: (i) legitimate expectations may arise only from a State's specific commitment or representation made to the investor, on which the latter has relied, (ii) the investor must be aware of the general regulatory environment in the host country, and (iii) investors' expectations must be balanced against legitimate regulatory activities of host countries³³⁷.
397. In response to the allegation in the Claimants' Reply Memorial that they should have the "... legitimate expectation that they would be able to act on the permits granted to them, and to be free from being shaken down for payment by corrupt local officials"³³⁸, Respondent confirmed in its Rejoinder the argument that not all expectations are protected, and the issue is whether Claimants' belief was justified and reasonable, from an objective point of view, in light of Costa Rican law and the circumstances surrounding the Parties and their interactions³³⁹. The deficient Environmental Viability D1 Application misled SETENA as to the real physical conditions on the Las Olas Project Site, Respondent argues, which resulted in the issuance of an EV Permit that Claimants were not entitled to obtain nor reasonably rely upon as a State assurance. Accordingly, Respondent adds, this EV Permit could not have generated a legitimate expectation that

³³⁵ *Id.*, ¶ 470, page 115.

³³⁶ *Técnicas Medioambientales Tecmed SA v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, (CLA-54).

³³⁷ Respondent's Counter-Memorial, ¶ 481, page 117, citing United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment, p. 68.

³³⁸ Claimants' Reply Memorial, ¶ 69, page 23.

³³⁹ Respondent's Rejoinder Memorial, ¶ 795, page 200.

Claimants' development would not be stopped in the event that they caused damage to the environment³⁴⁰.

398. Respondent then argued in its Post-Hearing Brief that legitimate expectations cannot be considered under the umbrella of the "fair and equitable treatment" protection under customary international law that gives rise to an independent state obligation, and cites several cases where this has been expressed by DR-CAFTA Parties³⁴¹.
399. On the subject of alleged abuse of authority, Respondent states that there is no express provision under DR-CAFTA addressing prohibition or arbitrary measures or abuse of authority, and so the analysis therefore that the Tribunal needs to make deals with whether minimum standard of customary international law prohibits arbitrary measures and abuse of authority³⁴², adding that only egregious and shocking conduct can be deemed as part of the minimum standard of treatment that host States must apply to foreign investments.
400. Respondent also denied in its Counter-Memorial that Costa Rican public officials failed to conduct themselves in a manner consistent with the principle of due process. To that effect, Respondent asserted that public officials involved in the actions acted only in protection of the environment, and certain actions taken were a consequence, *inter alia*, of Claimants' misleading or concealment of information pointing to the existence of wetlands and forests in the site³⁴³. In its Post-Hearing Brief, Respondent argues that in accordance with international law, no claim for denial of justice can be leveled in the absence of domestic proceedings having been exhausted, or proven to have been futile. Therefore, in light of the plain text of the Treaty, due process is not an independent obligation of the host State. Because DR-CAFTA frames the obligation of due process alongside the promise not to deny justice³⁴⁴, lack of due process is not a standard of protection unless it could be considered a denial of justice³⁴⁵. Claimants rejected that they

³⁴⁰ *Id.*, ¶ 802, page 202.

³⁴¹ Respondent's Post-Hearing Brief, ¶¶ 742-746, pages 153-154.

³⁴² *Id.*, ¶ 748, page 154.

³⁴³ Respondent's Counter-Memorial, ¶, ¶¶ 506-562, pages 123-137.

³⁴⁴ Article 10.5.2 (a) DR-CAFTA reads "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." (Annex E to Claimants' Post-Hearing Brief).

³⁴⁵ Respondent's Post-Hearing Brief, ¶ 751, page 155.

have brought a denial of justice claim³⁴⁶, and challenged the right of Respondent to re-characterize their claim as such.

401. Besides, Respondent added, a careful analysis of the text shows that neither the concept of legitimate expectations, arbitrariness, due process nor abuse of authority are standards of protection that DR-CAFTA Parties envisaged to be part of the Treaty³⁴⁷, referencing the United States non-disputing Party Submission made during this arbitration on the extent of the protection that DR-CAFTA Parties intended to provide to investors pursuant to Article 10.5 thereof³⁴⁸. Respondent argues that in order to avoid any misunderstanding as to the scope of Article 10.5(1) DR-CAFTA which requires that each Party “accord to covered investment treatment in accordance with customary international law, including fair and equitable treatment and full protection and security”, the Parties to the Treaty included a clarification in the second paragraph of Article 10.5 on the meaning of “treatment in accordance with customary international law”, and in this regard expressly agreed that that is “the minimum standard of treatment to be afforded to covered investments.” In addition, they agreed that the concepts of “fair and equitable treatment” and “full protection and security” do not imply treatment in addition to or beyond that which is required by the standard and, most importantly, they do not create additional substantive rights³⁴⁹.

402. Respondent stated that, the United States of America made it clear in its Submission, that very few areas have been sufficiently crystallized into customary international law as to be considered a “minimum standard of treatment”, and that DR-CAFTA Parties seemed to have identified those areas because they expressly included the obligation to provide “fair and equitable treatment” (Article 10.5.2(a)) on the one hand, and “full protection and security” (Article 10.5.2(b)) on the other. The former includes the obligation, as provided in the text of the Treaty, not to deny justice. Furthermore, according to Respondent, the DR-CAFTA Parties included in Annex 10-B an understanding of what they consider customary international law rules covered by Article 10.5 of the Treaty,

³⁴⁶ Claimants’ Post-Hearing Brief, ¶¶ 430-434, pages 206-209.

³⁴⁷ Respondent’s Post-Hearing Brief, ¶ 731, page 151.

³⁴⁸ This submission is examined in more detail above in Section V.

³⁴⁹ Respondent’s Post-Hearing Brief, ¶ 733, page 151.

requiring general and consistent practice of States and *opinion iuris*; i.e. practices that they follow from a sense of legal obligation. Thus, “the annex provides important guidance for assessing whether an alleged norm has been sufficiently demonstrated to be an element of customary international law”³⁵⁰.

403. In its Post-Hearing Brief, Respondent requested that the Tribunal dismiss as inadmissible the claim that Respondent has violated the standard of full protection and security, insofar as the alleged breach of the duty to provide protection and security to the investors was never raised as a claim in the Request for Arbitration or subsequently, until the closing of the December Hearing³⁵¹, and that Article 10.16.2 DR-CAFTA sets forth the need for a “Notice to submit a claim to arbitration” and establishes that such notice must specify the provision of the Treaty alleged to have been breached as well as the “legal and factual basis for each claim”³⁵².
404. On the subject of the claims for indirect expropriation of the investment of Claimants in Costa Rica, Respondent first argued in their Counter Memorial that before any measure can be considered as such there are several factors that the Tribunal needs to take into account: (i) first, examine the definition of investment provided in Article 10.28 which includes the definition of “investments” covered in DR-CAFTA; (ii) give consideration to the express exception provided in Annex 10-C.4(b) of the Treaty, and assess whether the actions of the host State are non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment; (iii) analyze the economic impact of the actions under Annex 10-C.4(a)(i); (iv) consider in accordance with Annex 10-C.4(a)(ii) whether the actions have interfered with reasonable expectations of the investor; (v) analyze under Annex 10-C.4(a)(iii) the character of the State’s actions, and whether the actions display the characteristics of a *bona fide* exercise of police powers by the host State; and finally (vi) if the actions fall under all the categories above then, it is necessary to consider whether the expropriation is legal or illegal for compensation purposes³⁵³.

³⁵⁰ *Id.*, ¶¶ 736 and 737, page 152.

³⁵¹ *Id.*, ¶¶ 718-726, page 147-149.

³⁵² *Id.* ¶ 722, page 148.

³⁵³ Respondent’s Counter-Memorial, ¶ 612, page 150.

405. Although Respondent challenged the position taken by Claimants on whether all indirect expropriations are unlawful, and cited a couple of recent cases to that effect³⁵⁴, it elected not to “extend the debate” insofar as it had determined that there was no expropriation in this case³⁵⁵.

B. The Tribunal’s Approach

406. The Arbitral Tribunal is faced with the need to determine whether the protection afforded under Chapter Ten DR-CAFTA to investors is subordinate to the laws enacted by the Parties to the Treaty seeking the protection of the environment, and under which circumstances can a State that is party to DR-CAFTA establish laws, policies and/or adopt measures to that end.

407. Claimants have based their claims under paragraphs (1)(a)(i)(A) of Article 10.16 DR-CAFTA (as individuals), and under sub-paragraph 1(b)(i)(A) of DR-CAFTA Article 10.16 (on behalf of the Enterprises each respectively and/or collectively owned and/or controlled). Each of these provisions relates to a breach of Costa Rica to an obligation under Section A of Chapter Ten. Of the different obligations that have been alleged to have been breached, these are in Articles 10.5(1) and (2), as well as 10.7(1).

408. The text of those provisions of DR-CAFTA that have been cited by Claimants in respect to protection of their investment are:

Article 10.5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

³⁵⁴ *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, ¶¶ 302-306 (RLA-1).

³⁵⁵ Respondent’s Counter-Memorial, ¶ 612, page 151.

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 10.7: Expropriation and Compensation

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and in accordance with due process of law and Article 10.5.

2. Compensation shall: be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”); not reflect any change in value occurring because the intended expropriation had become known earlier; and be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than: the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Fifteen (Intellectual Property Rights).

409. On the other hand, although Respondent does recognize said Treaty obligations, Respondent makes reference to other provisions which establish the rights of DR-

CAFTA Parties to adopt, maintain and enforce measures to protect their environment. These are found in Chapters Ten and Seventeen:

Article 10.11. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 17.1. Levels of Protection. Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies

Article 17.2. Enforcement of Environmental Laws.

Article 17.2(1)

“(a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

Article 17.2(2). The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

410. Thus, the debate among Claimants and Respondent revolves not only on whether there is any subordination by the rights to protection under Chapter Ten to the right to adopt and enforce the laws and measures under Chapter Seventeen, but also as to whether there has been a breach to the standards of “fair and equitable treatment” and “full protection and security” under the Treaty, and under customary “international law” as well.

411. The Tribunal believes that the rules of treaty interpretation provide the answer. As Claimants have noted³⁵⁶, 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 VCLT³⁵⁷. Article 31(1) VCLT provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Further, Sub-paragraph (3)(c) of such Article 31 provides that: “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. This section thus provides an additional ground for treaty interpreters, such as the Tribunal, to take into account not only other provisions of the DR-CAFTA, general principles of law, but also custom, in construing in context the proper meaning of DR-CAFTA provisions, such as Articles 10.5 and 10.7.
412. Although the express terms of Article 10.11 essentially subordinate the rights to investors under Chapter Ten to the right of Costa Rica to ensure that the investments are carried out “in a matter sensitive to environmental concerns”, this subordination is not absolute in the view of the Tribunal. It requires that the actions to be taken by the States Parties to DR-CAFTA act in line with principles of international law, which require acting in good faith. It is not a question of “not-applying” those provisions under Chapter Ten, but rather giving preference to the standards of environmental protection that were stated to be of interest to the Treaty Parties at the time it was signed.
413. Although Respondent argues that when Article 17.2(1)(b) establishes discretionary powers to the Treaty member Party with respect to investigatory, prosecutorial, regulatory and compliance for enforcement of environmental matters, this implies a manner of ensuring that a Party can, as it sees fit, implement its own environmental laws without fear of violating DR-CAFTA³⁵⁸, the Tribunal believes that this is not an absolute right either that may be exercised in any manner Respondent desires. By signing the Treaty, Respondent has agreed that there are limits to the manner in which a Party may

³⁵⁶ Claimants’ Post-Hearing Brief, ¶ 86, page 42.

³⁵⁷ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

³⁵⁸ Respondent’s Counter-Memorial, ¶ 451, page 110.

implement and enforce its own environmental laws. It must do so in a fair, non-discriminatory fashion, applying said laws to protect the environment, following principles of due process, not only for its adoption but also for its enforcement.

414. The question then becomes, did Costa Rica exercise its rights under DR-CAFTA and act *vis a vis* the investors and the investment in a manner that is compliant with both the Treaty and customary international law?
415. Claimants do not argue that the laws enacted by Respondent are in breach of the Treaty, or that it has lowered its standards to attract trade or investment. During the Opening Statement made by Claimants' counsel during the December Hearing, counsel stated that they did not challenge the validity of any law or regulation, but added that the case was one about enforcement of such laws³⁵⁹. Hence, the Arbitral Tribunal does not need to examine whether the laws enacted by Costa Rica are compliant with the Treaty and customary international law. What the Tribunal needs to decide, however, is whether the manner in which such laws were applied as regards the Claimants is compliant with the DR-CAFTA and customary international law.
416. To determine whether enforcement was proper and lawful, it makes sense to undertake a brief review of the key legislation applicable to the investment. For obvious reasons, even though the objective is to examine environmental legislation that might have been applicable to the investors and the investment, the analysis will be focused on the two types of protected areas involved in this case: wetlands and forests.

C. Costa Rica's Environmental Law and Authorities

417. It is widely acknowledged that the protection of wetlands is a key objective sought by all civilized nations. The Convention on Wetlands (known as the "**Ramsar Convention**") is the oldest of the modern global intergovernmental environmental agreements. The treaty was negotiated during the 1960's by countries and non - governmental organizations concerned about the increasing loss and degradation of wetland habitat for migratory water birds. It was adopted in the Iranian city of Ramsar in 1971 and came into force in

³⁵⁹ Claimants' Opening Statement, Transcript 80:1-22, and 81:1-2.

1975³⁶⁰. Costa Rica signed and ratified the Ramsar Convention in 1992, and it became effective in the country on April 27, 1992. There are currently 169 contracting Parties and a total of 2,280 “Ramsar Sites” of protection registered around the world, of which 12 sites have been designated as Ramsar Sites in Costa Rica alone with a surface area of 569,742 hectares³⁶¹.

418. Another treaty seeking protection of wetlands, the Convention on Biological Diversity (known as the “**Biodiversity Convention**”), was entered into at the Earth Summit held in Rio de Janeiro in 1992³⁶², which a total of 196 countries have signed and ratified³⁶³. Costa Rica executed and ratified the Biodiversity Convention in 1992 and 1994, respectively.
419. Costa Rica has stated throughout the proceedings its high regard for the protection of the environment, and how it has received recognition for its efforts; for example, Costa Rica was recognized as a leader in sustainable policy and practice by the United Nations Environment Program, which has called Costa Rica “a leader in sustainable policy and practice”; it was awarded the Future Policy Award for its Biodiversity Law “as a milestone of excellence in meeting the goals of the UN Convention on Biological Diversity”, at the United Nations Summit on Biological Diversity in 2010; and was ranked first in the Americas and fifth globally for the quality of its environmental performance by the Environmental Performance Index 2012³⁶⁴. Respondent has cited several precedents from the Constitutional Chamber of the Supreme Court of Justice and the Contentious Administrative Tribunal that highlight the relevance of these international Conventions³⁶⁵.
420. Intimately linked to such recognition, one must acknowledge that international tourism – which is recognized as an important contributor to the local economy given the flows of foreign currency, is strongly dependent on the variety and current status of ecosystems available in Costa Rica. It is therefore not surprising that the country has adopted internal

³⁶⁰ <http://www.ramsar.org>. A copy was submitted by Respondent as exhibit R-192.

³⁶¹ <http://www.ramsar.org/wetland/costa-rica>.

³⁶² Copy submitted by Respondent as exhibit RLA-39.

³⁶³ <https://www.cbd.int/information/Parties.shtml>.

³⁶⁴ Respondent’s Counter-Memorial, ¶ 54, page 12.

³⁶⁵ *Id.*, ¶¶ 61-69, pages 14-17.

legislation seeking to protect nature, in parallel to efforts to protect the health and well-being of its population.

421. At the time that the DR-CAFTA Parties executed the Treaty, they recognized their ability to implement and enforce their own internal laws, particularly regarding the environment, and to regulate investments that could have an impact thereon. Respondent has placed special emphasis on Article 10.11 that recognizes that nothing prevents the Treaty Parties “... from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns”.
422. This is what Costa Rica has argued it has implemented within its territory. Thus, the Tribunal needs to examine whether the actions taken by Respondent were contrary to its obligations under DR-CAFTA. To this end, it is helpful to determine not only the applicable law but also which authorities are entrusted with applying the law in Costa Rica. A careful analysis of these two points will assist the Tribunal in defining a position in this case.
423. The environmental legal framework in Costa Rica that applies to this dispute is essentially comprised of the following laws and regulations:
- (a). The 1949 Constitution of Costa Rica³⁶⁶;
 - (b). The Convention on Wetlands (or Ramsar Convention)³⁶⁷;
 - (c). The Biodiversity Convention³⁶⁸;
 - (d). The Environmental Organic Act (*Ley Orgánica del Ambiente* or Law 7554)³⁶⁹;
 - (e). The Biodiversity Law (*Ley de Biodiversidad* or Law 7788)³⁷⁰, and its Regulations (*Reglamento a la Ley de Biodiversidad*)³⁷¹;
 - (f). The Forestry Law (*Ley Forestal* or Law 7575)³⁷²;

³⁶⁶ Exhibit R-214.

³⁶⁷ Exhibit RLA-41.

³⁶⁸ Exhibit RLA-39.

³⁶⁹ Exhibit C-184.

³⁷⁰ Exhibit C-207.

³⁷¹ Exhibit R-15.

³⁷² Exhibit C-170.

- (g). The Wildlife Conservation Law (*Ley de Conservación de la Vida Silvestre* or Law 7317)³⁷³;
- (h). Environmental Impact Assessment Regulations (*Reglamento General sobre los Procedimientos de Evaluación de Impacto*)³⁷⁴;
- (i). SETENA Guidelines Executive Decree N. 34522 – MINAE (*Reglamento para la Elaboración Revisión y Oficialización de las Guías Ambientales de Buenas Prácticas Productivas y Desempeño Coeficiente*)³⁷⁵;
- (j). SETENA Guidelines D1 Decree (*Manual de Instrumentos Técnicos para el Proceso de Evaluación de Impacto Ambiental*)³⁷⁶; and
- (k). Provisions about the Organization of SETENA, Decree N. 36815 (*Reglamento de Organización de la Estructura Interna de Funcionamiento de la Secretaría Técnica Nacional Ambiental*)³⁷⁷.

424. The government agencies entrusted with the enforcement of the above environmental legislation as it applies to this claim are:

- (a). Ministry of Environment and Energy (*Ministerio de Ambiente y Energía* - “MINAE”);
- (b). National System of Conservation Areas (*Sistema Nacional de Areas de Conservación* - “SINAC”);
- (c). National Technical Environmental Secretariat (*Secretaría Técnica Nacional Ambiental* – “SETENA”);
- (d). National Wetland Program (*Programa Nacional de Humedales* or “PNH”)
- (e). National Institute for Agricultural Innovation and Technology Transfer (*Instituto Nacional de Investigación e Innovación en Transferencia de Tecnología Agropecuaria* - “INTA”), an agency of the Ministry of Agriculture; and
- (f). Departments of Environmental Management (*Departamento de Gestión Ambiental*) in each of the Municipalities.

425. The following chart is helpful in identifying how these agencies interrelate within the government of Costa Rica.

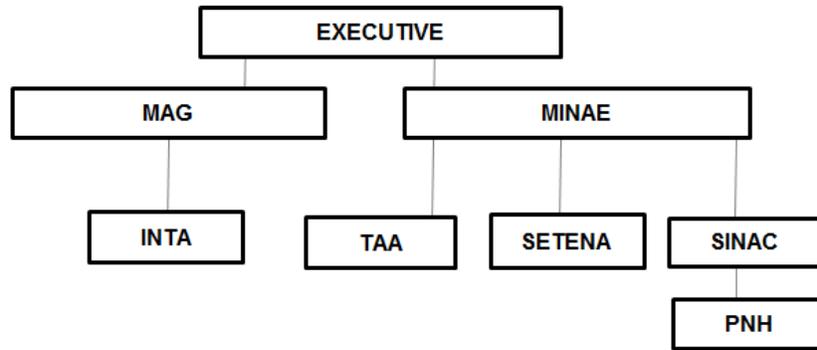
³⁷³ Exhibit C-220.

³⁷⁴ Exhibit C-208.

³⁷⁵ Exhibit C-214.

³⁷⁶ Exhibit C-215.

³⁷⁷ Exhibit C-212.



426. SINAC is entrusted with, and is responsible for the planning, development and control of wildlife in Costa Rica³⁷⁸. Several laws apply to its responsibilities, including the Biodiversity Law and the Wildlife Conservation Law, which grant SINAC authority, *inter alia*, to establish the technical guidelines for the use, conservation and management of wildlife in Costa Rica; to protect, supervise and manage—as it relates to ecosystems—wetlands and determine the qualification of national or international importance; to create and manage the programs related to the use, control, surveillance and investigation of wildlife; and to coordinate with other agencies responsible for the prevention, mitigation, attention and monitoring of damage to wildlife. SINAC also has jurisdiction under the Biodiversity Law, over matters involving forestry, wildlife, protected areas and the protection and use of river basins and hydrological systems, and over the regulation and protection of, among others: (i) wetlands and mangroves; and (ii) forest management and exploitation, including permits for cutting trees³⁷⁹. Both Parties agree that the SINAC is the authority in charge of registering Wildlife Protected Areas (*áreas silvestres protegidas*) created by Executive Decree which may be located within wetlands and forests, and also that SINAC has the authority to delineate a wetland or a forest³⁸⁰.
427. SINAC divides its jurisdiction among eleven different territories in Costa Rica known as “conservation areas” or *áreas de conservación*, with each of the conservation areas in charge of applying environmental legislation within its respective territory³⁸¹. The Las

³⁷⁸ Article 6, Wildlife Conservation Law (C-220).

³⁷⁹ *Id.*, Articles 6-7, and Articles 5-6 of the Forestry Law (C-170).

³⁸⁰ Respondent’s Counter-Memorial, ¶ 183, page 49, and Claimants’ Reply Memorial, ¶ 217, page 76.

³⁸¹ Article 28 (C-207).

Olas project corresponds to the Central Pacific Conservation Area (*Area de Conservación Pacífico Central* or “ACOPAC”).

428. SETENA – which is created under the Environmental Organic Law³⁸², is entrusted, on the other hand, to examine the impact on the environment of “production processes”. It reviews applications by land developers as to the likely impact of their projects on the environment, and will be charged with monitoring compliance by the permit holder with any conditions attached to the Environmental Viability³⁸³.
429. Public officials from MINAE and SINAC have police power authority (*autoridad de policía*) which gives them legitimate powers to enter and inspect private properties in order to investigate irregular activities taking place at the sites³⁸⁴. MINAE officials, inspectors and technicians must cooperate with the Environmental Prosecutor’s Office (*Fiscalía Agrario Ambiental*) on the investigation of environmental crimes and are empowered file criminal complaints before the competent authorities³⁸⁵.
430. The PNH is the specialized agency under SINAC, created by Executive Decree No. 28058 of September 23, 1999 that is entrusted with the promotion, planning and development of wetlands in Costa Rica. By express provision of such decree, however, it is SINAC which remains primarily responsible for the management of wetlands.
431. INTA has authority under the Regulations to the National Institute for Agricultural Innovation and Technology Transfer Law to provide laboratory services, among others, of physio microbiological-chemical analysis of soil³⁸⁶. Although it may draw conclusions regarding soil samples, it is not the competent agency to determine the existence of wetlands.
432. In addition, Costa Rica’s regulatory structure includes judicial and administrative courts, as well as bodies that are either specialized or competent in examining and deciding on environmental related matters:

³⁸² Article 83 (C-184).

³⁸³ Claimants’ Reply Memorial, ¶ 208, page 73.

³⁸⁴ Article 54 of the Forestry Law (C-170) and Article 15, Wildlife Conservation Law (C-220).

³⁸⁵ Article 284 of the Criminal Procedure Code (R-197).

³⁸⁶ Articles 35-37 of the Regulations of May 19, 2004 (R-203).

- (a). The Environmental Administrative Tribunal (*Tribunal Administrativo Agrario* or “TAA”), also created under the Environmental Organic Law;
- (b). The Environmental Prosecutor’s Office;
- (c). Municipalities; and
- (d). The *Defensoría de los Habitantes*, which is a body that directly reports to the Legislative of Costa Rica.

433. The TAA is an administrative tribunal that has authority under the Environmental Organic Law to, *inter alia*, (i) hear and decide complaints against public or private entities for violations to environmental protection laws, (ii) issue injunctions such as the enjoinder of works, and (iii) establish the corresponding compensation for damage against the environment³⁸⁷. Under the “precautionary principle”, it also has authority to issue precautionary measures *sua sponte* with the purpose of enjoining the violation of any legal provision or preventing the possible commission of damage to the environment or the continuation of harmful actions thereto, which powers include, among others, those to establish partial or total restrictions, suspension of the relevant administrative actions, and temporarily closing, in whole or in part, any activities that give rise to damage to the environment³⁸⁸. It also has the power to issue sanctions that include warnings, suspensions, cancellation of permits, and enforcement of environmental guarantees.

434. The Environmental Prosecutor’s Office is a specialized agency within the Attorney General’s Office of Costa Rica that focuses exclusively on the prosecution of criminal offenses against the environment. Its prosecutors have a duty to investigate every complaint filed with the institution. These complaints can be filed by any individual or may even be filed anonymously³⁸⁹. Upon receipt of a complaint, the prosecutor can request the issuance of precautionary measures to prevent any damage or further impact on the environment³⁹⁰.

435. In addition to the agencies of the central government of Costa Rica, there are the Municipalities which are political subdivisions of the Costa Rican State that have authority in respect to the development of a real estate project such as Las Olas. Their

³⁸⁷ Article 111 of the Environmental Organic Law (C-184).

³⁸⁸ Article 99 of the Environmental Organic Law, and Articles 11, 45 and 54 of the Biodiversity Law.

³⁸⁹ First Witness Statement, Luis Gerardo Martínez Zúñiga, ¶ 9, page 3.

³⁹⁰ *Id.*, ¶¶ 79-80, pages 20-21.

competence includes, *inter alia*: (i) the issuance of certificates of land use, (ii) the approval of permits for earth movement works, (iii) the approval of construction permits, and (iv) the supervision of construction works to verify compliance of the developer with the approved permits³⁹¹.

436. In each municipality there is a Department of Environmental Management whose role is to act *ex officio*, or upon the filing of complaints, in cases where there is a suspicion of an impact on the environment. This department shall inform specialized agencies such as SINAC, SETENA and/or the TAA, and has an obligation to report possible breaches of environmental regulations and to monitor the cases³⁹².
437. The *Defensoría de los Habitantes* is a type of Ombudsman in Costa Rica. Rather than being a part of the Executive branch of government as the other agencies previously examined, it is part of the Legislative branch of government of Costa Rica, albeit with functional and administrative independence³⁹³. Its stated purpose is to oversee the conduct of public officials in accordance with law, morality and justice, and it has the authority to initiate investigations *ex officio* or at the request of any party which has a complaint in relation to acts or omissions of such public agencies³⁹⁴. Within its structure there are specialized areas, including the Department of Quality Life (*Dirección Calidad de Vida*), which is involved in environmental matters.
438. As part of the standard procedures required for determining whether the public administration acted in accordance with the law, the *Defensoría de los Habitantes* may request information from those agencies involved in the relevant complaint, and each investigation concludes with a report determining whether a violation of rights has been proven or not. In those situations where a violation has been proven, a recommendation is made to take the appropriate corrective action³⁹⁵.

³⁹¹ Urban Planning Law (*Ley de Planificación Urbana*) articles 28-29 (C-219), Constructions Law (*Ley de Construcciones* or Law 833) Articles, 2,9,11,55,74,83-87 (C-205); Municipal Code (*Código Municipal* or Law 7794) Articles 1-5,75-76 (R-266), as cited by Respondent. Counter-Memorial, ¶ 98, page 22.

³⁹² Respondent's Counter-Memorial, ¶ 99, page 23, citing the First Witness Statement, Hazel Díaz Meléndez.

³⁹³ To learn more http://www.dhr.go.cr/la_defensoria/quienes_somos.aspx.

³⁹⁴ First Witness Statement, Mónica Vargas Quesada, ¶¶ 8 and 10, page 3.

³⁹⁵ *Id.*, ¶¶ 17, page 5.

439. The Arbitral Tribunal believes that Respondent has both adopted international conventions and has enacted internal legislation in environmental matters that are not only consistent with most international conventions, but are at the forefront of most jurisdictions.

440. However, as the above description of laws and agencies shows, there is a high possibility that two or more agencies may become involved in the investigation of any action that threatens the environment and in the issuance of measures to enforce applicable laws, there is concurrent jurisdiction among them which may trigger, in the best of cases, full coordination, but in unfortunate instances, overlapping, inconsistent and conflicting measures.

D. Environmental Principles under Costa Rica Law

441. The conduct of these agencies is guided by seven “guiding principles” that Respondent has referred are found under the Constitution and Environmental legislation, which principles are designated to acknowledge and protect nature in Costa Rica³⁹⁶:

- (a). Equality of all citizens in their access to, and benefit from the protection of the environment;
- (b). Sustainability in the use of natural resources;
- (c). Precautionary principle;
- (d). Preventative principle;
- (e). Restorability principle;
- (f). Strict liability (“one who pollutes, pays”); and
- (g). Citizen participation.

442. Although all seven principles are relevant, three are of particular interest given the emphasis placed on them in this arbitration: (i) the precautionary principle; (ii) the preventative principle; and (iii) citizen participation. These are addressed in more detail below.

443. Precautionary Principle. Under this principle, the mere risk of impact to the environment triggers an obligation for the competent authorities to act and protect the environment

³⁹⁶ Respondent’s Counter-Memorial, ¶ 60, page 13.

without necessitating that such risk be supported by scientific evidence. Respondent has stated that public agencies in Costa Rica need to comply with the precautionary principle when it comes to their knowledge that there is a mere likelihood of an adverse impact to the environment³⁹⁷. The relevant agency does not have to be certain of the existence of damage, but likelihood thereof is sufficient for it to undertake the necessary measures to prevent any impact on the environment. The Supreme Court of Justice of Costa Rica³⁹⁸ has referred to it as a “principle of prudent avoidance” that is contained in the United Nations Conference on Environment and Development, the so-called “Rio Convention”, which provides: “Principle 15. In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of absolute scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Further, said Court has determined that “Properly understood, the precautionary principle refers to adopting measures, not against the lack of awareness of risk generating facts, but against the lack of certainty of whether those facts will actually cause harmful effects to the environment”³⁹⁹.

444. One of the main consequences of the application of the “precautionary principle”, Respondent argues, is that there is a shifting of the burden of proof; it is reversed on the party allegedly causing a risk of harm⁴⁰⁰. This means that the relevant person must evince that it is not going to hurt the environment with the actions it intends to take rather than a burden on the government to prove the existence of harm. This principle is recognized in Article 109 of the Biodiversity Law, which provides: “The burden of proof, of the absence of non-permitted contamination, degradation or damage, shall correspond to whom requests the approval, the permit, or the access to biodiversity, or whom is accused of having caused the environmental harm”⁴⁰¹.

³⁹⁷ *Id.*, ¶ 357, page 89.

³⁹⁸ Decision 9773-00, Constitutional Chamber, Supreme Court of Justice, November 3, 2000 (R-188).

³⁹⁹ Decision 3480-03, Constitutional Chamber, Supreme Court of Justice, May 2, 2003 (R-201), as cited in the Respondent’s Counter-Memorial, ¶ 358, page 89.

⁴⁰⁰ Respondent’s Counter-Memorial, ¶ 471, page 115, and Respondent’s Rejoinder Memorial, ¶ 98-99, page 30.

⁴⁰¹ The original Spanish language text is: “La carga de la prueba, de la ausencia de contaminación, degradación, o afectación no permitidas, corresponderá a quien solicite la aprobación, el permiso o acceso a la biodiversidad o a quien se le acuse de haber ocasionado el daño ambiental”. Exhibit C-207.

445. Preventative Principle. Under this principle, action is warranted in the event that a project is assessed to cause damage to the environment. The TAA or Contentious Administrative Tribunal⁴⁰² has stated that it refers to the assumptions which are made in relation to the damaging consequences of certain actions. Preventive policies are issued to try to avoid such harm in advance; for example, through environmental impact assessments. This principle is recognized in the Constitution of Costa Rica which mandates the prevention of damage to the environment and to otherwise reduce, limit or control activities which might cause or risk such damage. It is also acknowledged in the Stockholm Declaration on the Human Environment⁴⁰³.
446. Citizen Participation. As the TAA also recognized, while making reference to Article 10 of the Rio Convention: “Citizen participation in matters of the environment is a consequence of the principle of democracy and includes the right to access information relating to environmental projects or projects which may cause harm to natural resources and the environment, as well as the opportunity to participate in the decision-making process ...”⁴⁰⁴. It has been recognized by the TAA⁴⁰⁵ in at least in one decision cited by Respondent, and can also be identified through the possibility of filing anonymous complaints relating to harm to the environment.

E. **The Tribunal’s Analysis**

1. **Whether Respondent has breached Article 10.5 (FET) or Article 10.7 (Unlawful Expropriation) of the DR-CAFTA**

447. The position of Claimants and the defense of Respondent in respect to allegations on frustration of their legitimate expectations and expropriation are essentially dependent, first, as to whether (a) there were wetlands and forests in the Las Olas Project site during the relevant periods when the government actions took place, and (b) whether these were adversely impacted.

⁴⁰² Decision 0083-2013, Contentious Administrative Tribunal, Section IV, September 16, 2013 (R-190), as cited in the Respondent’s Counter-Memorial, ¶ 64, page 15.

⁴⁰³ This principle is also acknowledged by Principle 21/2 of the Stockholm Declaration on the Human Environment, 1972 (RLA-43), as cited in the Respondent’s Counter-Memorial, ¶ 468, page 114.

⁴⁰⁴ Cited in Respondent’s Counter-Memorial, ¶ 69, page 16.

⁴⁰⁵ Decision 0083-2013, Section IV, September 16, 2013 (R-190).

448. Although they argued throughout the case that neither wetlands nor forests were present at relevant times, Claimants stress that even though wetlands could have been present, that does not affect the failure of Respondent to accord fair and equitable treatment to the investors, or excuse the unlawful expropriation of their investment; assuming such wetlands and/or forests existed and these were damaged, Claimants have challenged that the Respondent acted within its authority to deal with Claimants' actions or omissions.

(a) Process to Develop a Real Estate Project

449. It is not an easy or unencumbered endeavor being an investor, and less so being an investor in another jurisdiction where the laws and practices are different from those that with which one is familiar. Such laws and practices may be on occasions stricter, while in other occasions these will be more lenient, but the investor has the burden to be well informed and advised thereof. This is particularly true in dealing with real estate projects, where there may be not only a complex mixture of issues to be addressed that involve land and construction, but also two levels (or more) of regulation, including those of a federal, state and/or municipal nature. In each such case, success of a development is necessarily dependent on proper structure and implementation of the project. And to achieve success it is indispensable to have proper advice from experts and counsel who will lead the investor through a path, sometimes obscure and full of unknowns.

450. The Arbitral Tribunal believes that despite the efforts and good faith actions of Claimants which they have expressed in their submissions, it does not appear they sought and received proper advice to develop the Las Olas Project, and if they did, they chose to ignore it.

451. An unfortunate situation in the case of this investment is that, even though it appears that Mr. Aven was closely involved in the day-to-day issues involving the project, it also appears that when the issues dealt with regulatory matters he relied on the advice and action taken by his subordinates or third parties who were engaged to assist. Despite his interest in Costa Rica, and the years living there, he did not learn to speak, read or write in Spanish. Mr. Aven was quite clear on his language limitations during the December

Hearing⁴⁰⁶. He openly disclosed “So, I was relying on these professionals. I never actually was involved in any of that. And I relied totally on the professionals. As you said, I don’t speak Spanish, I don’t read Spanish, I don’t write Spanish. And so, I relied totally on the professionals that I had employed”⁴⁰⁷.

452. This impacted the extent of the knowledge he and other Claimants had over the legal implications and information he knew about the applications being filed for the project.

453. When questioned during the hearing as to whether he received any advice regarding disclosure obligations in the D1 Application, he responded that he did not “... recall any of that whatsoever, because my understanding from the lawyers, [...], was that they were the team that had expertise in shepherding a project through the permitting process, and they knew the requirements”. Further, he did not seem to be involved with the authorities, whether SETENA or any other relating to the project. This was dealt with by those third parties⁴⁰⁸.

454. In respect of one of the critical documents alleged by the Respondent to have impacted the accuracy of the information submitted to the Costa Rican environmental authorities, the so-called “Protti Report”, which was not submitted along with the D1 Application, but subsequently submitted to SETENA after the Environmental Viability was secured for the Condo Section, Mr. Aven testified during the December Hearing that the letter submitting the report to the authorities was written by “... my attorney, Sebastián Vargas. He had me sign it. He didn’t do a translation of this document. He just told me this was a document that we were objecting to--objecting to the illegal shutdown letter he sent me on--earlier than this February 23rd date”. In an open acknowledgement he responded further to that same question:

But he sent it. And he wrote it. I didn’t write this letter. As you know, I don’t read--write--read or write or speak Spanish.

Now, again, this is a situation where I’m relying on attorneys. All right? Now, maybe the best thing for him to have done was give me a translation in English

⁴⁰⁶ Transcript, Page 818-17:22, and 819:1-6.

⁴⁰⁷ Statement made by Mr. Aven, see Transcript, Page 819:1-6.

⁴⁰⁸ He testified during the December Hearing that “but during the early phases of this whole permitting process, I never even talked to anybody at these agencies ever” *Id*, Pages 819-820.

and say, David, read this thoroughly, and make sure you understand it thoroughly, and then sign it.

He didn't do that. He just wrote it. He told me--again, confirming, like, what I said, that most of the time, this was--what the attorneys told me were verbal--maybe they didn't want to take the time to explain it, you know, do the translation from Spanish to English and explain things to me. They said--they just put documents in front of me and said verbally what they were for, and I signed them, and he sent them...⁴⁰⁹.

455. Claimants' counsel during the December Hearing also questioned Mr. Aven during re-direct examination:

[Mr. Burn] Q. Did you need to take advice to understand the significance of being truthful in an official application?

A. No, I don't need to take advice to be truthful. I generally act that way--acted that had way most of my life. In that particular--like when he--the documents like the D1 document--most of the documents--official documents that I execute, I signed, was in Spanish.

I'm relying on the professionals that I engaged to do various things for me. And all of those official things were done in the Spanish language. And, you know, when they got something--like the D1 is a perfect example. It was presented to me by the professional. And I--I signed it as something that was necessary to--to get executed and submitted.

[Mr. Burn] Q. And subject to that point that these were documents--the D1 application was prepared by others and you relied on others and so on and so forth, which you've made clear, is it your understanding that the D1 application was accurate?

A. Of course. Absolutely⁴¹⁰.

456. Arbitrator Baker then asked Mr. Aven whether he had hired anybody or consult with anybody before he made the purchase of the land in respect to development restrictions or environmental regulations in Costa Rica. Mr. Aven responded that he did not. But he added that he afterwards consulted with Juan Carlos Esquivel, his attorney, with whom he "... talked a lot about what the procedures would be to do a development project. And he stepped me through that. And he was a key guy--the key attorney that--that really

⁴⁰⁹ See Transcript, Pages 839-18 to 840-13.

⁴¹⁰ Transcript Page 871:2-22, 872:1-2.

handled things from 2002 until I moved down there in 2005. He was the one handling everything for me after we bought the Project--the property”⁴¹¹.

457. The absence of close involvement in regulatory issues was compounded by the lack of written legal advice from Costa Rican or other counsel. Although Claimants stated in their Reply Memorial that they sought and received legal advice from counsel⁴¹², during the December Hearing Mr. Aven acknowledged that he did not recall any written legal advice in connection with the Las Olas Project, or in relation to the enforcement actions that that were taken against him, nor in relation to the injunctions that were placed on the property⁴¹³.
458. The above acknowledgements on the part of Mr. Aven, the key investor, are revealing to the Tribunal because it shows that his involvement in the decisions being taken were decisions on the basis of not understanding the language or the relevance of commitments being undertaken or documents being signed. The absence of written legal advice on major aspects of the Las Olas Project is likewise revealing, as it makes it almost impossible to prove diligent understanding. If Mr. Aven or the other Claimants who might have resided temporarily in Costa Rica were unable to understand the Spanish language conversations and/or, most importantly, the documents, applications and permits that were being examined, submitted or issued, and be aware of the extent to which they would affect the project, at minimum a prudent investor should require that his/her counsel provide written comments and opinions which could be examined and discussed. But no such contemporaneous documentation was ever provided by the Claimants.
459. This lack of involvement was also evident when Mr. Aven acknowledged that when the so-called Protti Report was submitted to Costa Rican authorities, he was unaware of what was being actually submitted, and apparently he was not concerned with the lack of information.

⁴¹¹ Transcript Page 897:2-8.

⁴¹² Claimants’ Reply Memorial, ¶ 95, page 34.

⁴¹³ See Transcript, Page 831:13-22; 832:13-15, 17, 21-22; 833: 2-3, 5-6, 10-12,14-17, 834:6-9.

460. Although Mr. Aven repeatedly indicated that he was relying on his attorneys, this is not a valid justification because such reliance cannot be a substitute for diligence in a situation where he elects not to read, understand what is being submitted or even said, and fails to react with prudence when his attorney "... didn't want to take the time to explain it, you know, do the translation from Spanish to English and explain things ..."⁴¹⁴.

(b) Key Issues to be resolved by the Tribunal

461. The immediate questions for the Tribunal include: (i) Were there wetlands and/or forests within the property at the time the D1 Application was filed by Claimants? (ii) Which determine whether a wetland and/or forest exist in Costa Rica? Did Claimants have an obligation to timely disclose the existence of wetlands and/or forests in their property?

462. Related issues to address in this arbitration, on which there has been some disagreement, include: what precisely a "wetland" is; whether or not it is necessary that a prior determination of a wetland is made by an Executive Decree; and which is the competent entity to determine its existence.

463. After these questions are answered, the Tribunal will be in a position to then examine whether or not Claimants took actions to drain and/or refill the wetlands, damaging such ecosystem, and whether or not Respondent acted within its rights under DR-CAFTA, or whether there was a breach to its obligations thereunder or under principles of customary international law. All this becomes relevant not only in respect to the alleged illegality in securing the Environmental Viability but also in respect to the appropriateness of criminal charges brought against Messrs. Aven and Damjanac for presumably draining and filling wetlands. The same issue applies in respect of forests, and the alleged illegal felling of trees.

(c) Wetlands under the laws of Costa Rica

464. Article 40 of the Environmental Organic Law⁴¹⁵ originally defined a wetland. At the time, it provided that "Wetlands are the ecosystems dependent on water regimes, whether natural or artificial, permanent or temporary, lentic or lotic, fresh, brackish or salt, including marine extensions, up to the rear boundary of sea-grass beds or coral reefs or,

⁴¹⁴ Transcript, page 840:8-10.

⁴¹⁵ Exhibit C-184.

in their absence, up to six meters deep at low tide”⁴¹⁶. However, this definition dates to 1995 when the Environmental Organic Law was enacted, and the legal framework in Costa Rica has clearly become more detailed and sophisticated since, rendering this language obsolete in light of the Executive Decree 35803-MINAE published in 2016 providing the Technical Criteria for the Identification, Classification and Conservation of Wetlands⁴¹⁷.

465. Executive Decree 35803-MINAE provides for the “essential ecological characteristics” that identify a wetland, regardless of whether or not they have been created by decree or law, or whether or not they need to be protected and conserved by MINAET through the National Conservation Areas Systems (*Sistema Nacional de Áreas de Conservación*). The three characteristics are⁴¹⁸:

- (a). hydrophilic vegetation, made up of types of vegetation associated to aquatic and semi-aquatic environments, including phreatophytic vegetation that grows in layers of permanent water or shallow water tables;
- (b). hydric soils, defined as those soils that develop in conditions with a high degree of humidity up to reaching a point of saturation; and
- (c). hydric condition, characterized by the climatic influence of a determined territory, in which other variables, such as geomorphic, topographic, soil makeup, and occasionally other processes or extreme events are involved.

466. Article 5 of the Executive Decree then defines what must be understood as (a) hydrophilic vegetation – which are those floristic plant species that grow and develop in aquatic environments which have life cycles that are associated with aquatic environment, and (b) hydric soils, which are those that in their natural condition are saturated, flooded or water logged, or pooled for large periods of time which allow the development of anaerobic conditions in their upper zones. A note to this article adds that wetland soils will generally correspond to soil classes VII and VIII under Executive Decree 23214-MAG-MIRENEM and are to be used only as preservation areas for flora and fauna, areas of aquifer recharge, genetic reserve and scenic beauty⁴¹⁹.

⁴¹⁶ Exhibit C-184 (T).

⁴¹⁷ Published in the Costa Rica Gazette 73 on April 16, 2010. (C-64 and C-218).

⁴¹⁸ Exhibit C-218, Article 6.

⁴¹⁹ *Id.* Article 6 (b), second paragraph.

467. The same Executive Decree classifies wetlands into groups: (a) fluvial, which include those aquatic environments contained in drainages that periodic, permanent or temporarily maintain water in movement, but it excludes those environments with dominance of trees, shrub or persistent emerging vegetation; (b) estuarine, which include deep water habitats and adjoining land with influence of tides, commonly semi-enclosed by land, where ocean water is diluted with fresh water flowing inland, (c) marine, which are those areas that are exposed to the tides of ocean waters; (d) lacustrine, aquatic habitats in depressed topography, such as lakes, or dammed whether naturally or artificially; and (e) palustrine, which include wetlands of non-tidal nature, with the following characteristics: may contain or not vegetation, which may consist of trees, shrubs, emerging vegetation; have depths not exceeding two meters, and salinity levels from ocean water do not exceed 0.5%⁴²⁰.
468. Finally, the Decree identifies that palustrine wetlands include the following⁴²¹:
- (a). Swamps/estuaries/permanent saline/brackish/alkaline pools;
 - (b). Swamps/estuaries/seasonal pools/intermittently saline/brackish/alkaline;
 - (c). Swamps/estuaries/permanent fresh water pools; pools (less than 8 has);
 - (d). Swamps and estuaries on inorganic soils, with emergent vegetation underwater at least during the majority of the growth period;
 - (e). Swamps/estuaries/seasonal pools/intermittent freshwater on inorganic soils; includes flooded depressions (charge and discharge lagoons), potholes, seasonally flooded plains, cypress swamps;
 - (f). Treeless marshes, includes shrub or open bogs, fens, bogs, and lowland marshes; and
 - (g). Fresh water forest wetlands, includes fresh water swamp forests, seasonally flooded forests, tree swamps on inorganic soils.
469. The above are generally utilized concepts. In respect to criminal matters, there are similar but not identical characteristics to determine the existence of a wetland. Under the 2010 Guidelines for the Prosecutorial Investigation of Environmental Crimes there are three characteristics established to demonstrate the existence of a wetland, which characteristics are similar, but not the same, as to those issued by the Executive Decree

⁴²⁰ *Id.* Article 7.

⁴²¹ *Id.*

35803-MINAE: (1) soil permeability; (2) the presence of hydrophilic vegetation; and (3) a slope below or equal to five degrees⁴²². Respondent has downplayed those differences because of the hierarchy of laws principle, where the Guidelines are not law or executive decree but an administrative ruling issued in September 2010 by the Costa Rican Prosecutors Office; are an instrument binding only on prosecutors; and are further superseded by the MINAE Executive Decree which applies, and has *erga omnes* effects in the country.

470. Despite such minor differences, it is relevant to mention that both Parties in the case have relied on the MINAE Executive Decree as to the determination of what are the characteristics of a wetland⁴²³.
471. However, Claimants have introduced another issue that has relevance from their standpoint. Claimants indicated that prior to September 2009 - and for the reasons explained below, wetlands were required to be created and delimited by Executive decree issued by MINAE, in accordance with the Organic Environmental Law and the Wildlife Conservation law.
472. Further, they have argued that before such date there were two other Executive Decrees that confirmed the requirement that wetlands be delimited by executive decree: (a) Executive Decree No. 31849 of 2005⁴²⁴ (Regulations for the Environmental Impact Assessment Procedure), which defines “environmentally fragile areas” (*área ambientalmente frágil*) (including wetlands) as those declared by the State by means of an Executive Decree or law and those located on public property belonging to the State; and (b) Executive Decree No. 35803-MINAE⁴²⁵ which establishes in Articles 2 and 3 that continental and marine wetlands must be part of a Wildlife Protected Area (*área silvestre protegida*), reinforcing the need for an Executive Decree in order to conclude the existence of a wetland.
473. Claimants acknowledge, though, that the two articles last referenced (Articles 2 and 3) were later declared unconstitutional, and explained that the law pertaining to the

⁴²² Exhibit C-297, ¶ 3.3 [*Lakes, non-artificial lagoons, and other wetlands*].

⁴²³ For example, Barboza Expert Report, Section 4, page 13.

⁴²⁴ Exhibit C-208.

⁴²⁵ Exhibit C-218.

delimitation of wetlands in Costa Rica changed on September 9, 2009 because, on that day, a ruling of the Constitutional Chamber⁴²⁶ declared unconstitutional one part of the Wildlife Conservation Law, Article 7, which now reads as follows: “The delimitation of wetlands shall be done by executive decree, based on technical criteria”. The deletion of the words “creation and” before “delimitation” was confirmed by Constitutional Chamber Resolution 016938-2011 of December 7, 2011, which modified Articles 2 and 3 of Executive Decree 35803-MINAE⁴²⁷.

474. The declaration was made after the relevant environmental and construction permits were issued to the Las Olas Project⁴²⁸. Therefore, Claimants argue, prior to September 2009 (that is, prior to SETENA’s issuance of the Environmental Viability for the Las Olas Project), all wetlands in Costa Rica had to be created by executive decree. They support this argument with criminal court judgments that are cited in their Post-Hearing Brief dealing with the creation of wetlands that reflect “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 demarkation of wetlands will be made by executive decree, according to technical criteria’”⁴²⁹ (emphasis added).
475. Claimants also stated that under Article 32 of the Environmental Organic Law, the Executive, through the MINAE, is empowered to establish wildlife protected areas (*áreas silvestres protegidas*), which may or may not include wetlands, and that Article 7 of the Wildlife Conservation Law also provides that the creation and delimitation of wetlands shall be carried out by Executive decree.
476. Another argument of Claimants is that SINAC is now empowered to follow the technical criteria set out in Executive Decree 35803-MINAE (mentioned and analyzed above) in order to determine the existence of a wetland, while the delimitation of any wetland still

⁴²⁶ Resolution 14288-2009, issued by the Constitutional Chamber of Costa Rica.

⁴²⁷ Exhibit C-64.

⁴²⁸ Claimants’ Post-Hearing Brief, footnote 391, page 126.

⁴²⁹ Exhibit R-236, cited in Claimants’ Post-Hearing Brief, ¶ 448, page 213.

needs to be done by Executive decree, as determined by the Constitutional Chamber in its September 9, 2009 ruling⁴³⁰.

477. Since SINAC lacks the requisite technical expertise to carry out all the studies necessary to determine whether or not a wetland exists, Claimants add, SINAC therefore relies on the assistance of INTA as the national authority that administers and enforces Executive Decree 23214-MAG-MIRENEM⁴³¹, establishing 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-MINAE⁴³².
478. Thus, Claimants conclude, in the absence of an Executive Decree, a wetland could not be deemed to exist in the Las Olas Project site before September 9, 2009 for the purposes of the Environmental Organic Law⁴³³. It had not been created and delimited by Executive decree.
479. On a separate but related argument that has a direct connection to the criminal case brought against Messrs. Aven and Damjanac, Claimants have mentioned that the Wildlife Conservation law was amended by the passage of Article 1 of Law 8689 on December 4, 2008 which, although adopted in December 2008, did not actually come into effect until June 24, 2009. Since the law did not have retroactive effect, then they argue that, in accordance with the Costa Rican Constitution and the Costa Rican Criminal Code, any alleged offenses before that date would be irrelevant because such offenses would need to be assessed under the pre-existing law, where a fine was contemplated, which fine did not exceed US\$500 dollars⁴³⁴. This is especially relevant, they add, because Messrs. Aven and Damjanac were charged with violating Article 98 of said law by draining and filling of a wetland⁴³⁵ when, Claimants argue, the legal provision that made such action punishable with a prison term of up to three years did not become effective until June 24, 2009⁴³⁶.

⁴³⁰ Claimants' Post-Hearing Brief, ¶ 459, page 217.

⁴³¹ Exhibit R-401.

⁴³² Exhibit C-64.

⁴³³ Claimants' Post-Hearing Brief, ¶ 243, page 124.

⁴³⁴ *Id.*, ¶ 239, page 122.

⁴³⁵ Criminal charges filed against David Aven and Jovan Damjanac, October 21, 2011 (C-142).

⁴³⁶ Claimants' Post-Hearing Brief, ¶ 248, page 126.

480. Respondent takes a different view. Although it confirms the legal provisions cited by Claimants, it disagrees with the manner in which Claimants describe the law and the interpretation given by Costa Rican courts, including the Constitutional Chamber of Costa Rica's Supreme Court. The essence of Respondent's view is that wetlands may be of two different types: (a) those that are located within a "wildlife protected area" and (b) those which are not; and only those wetlands falling within the first group require the determination of an Executive decree to be created or delimited.
481. Indeed, although Article 42 of the Environmental Organic Law grants MINAE the authority to delimit "protected areas" (*zonas protegidas* or *zonas de protección*) in determined maritime and coastal areas and wetlands, this does not mean that a wetland must necessarily be deemed to be a protected area in the sense of the regulations. Thus, not every wetland to be found is to be declared as a "protected area" within the meaning of such law. Therefore, as Costa Rica's expert has stated, there may be wetlands that are included within a "protected area" by express declaration of MINAE, and wetlands located on private property, that do not lose their nature for that reason⁴³⁷.
482. Respondent has indicated that the Constitutional Chamber of Costa Rica's Supreme Court confirmed this position in a 2011 decision⁴³⁸ by resolving that the protection of wetlands is not exclusive to those that are within a "protected area"; the obligation to conserve wetlands is not simply after they have been created and delimited in a "protected area" but rather the obligation to conserve arises from the duties under the RAMSAR Convention.

If in the specific case MINAE certifies that the property of the private is not within a Wildlife Protected Area, according to the areas administered by it, that does not imply in any form that the wetland that was found [there] does not have to be protected. We ought to remember that the International Convention subscribed by our country established the obligation of a state party to promote the conservation of wet zones and aquatic birds that create natural reserves in the wetlands, regardless of their inclusion or not in the 'List' [...] (Emphasis added)

483. A similar decision was issued even before - in 2005, by the Criminal Court of Appeals of Costa Rica - which ruled that when the Wildlife Conservation Law was enacted, wetlands

⁴³⁷ First Witness Statement, Julio Jurado, ¶ 61, page 98.

⁴³⁸ Decision 12817-2011, Constitutional Chamber, Supreme Court of Costa Rica, December 14, 2001 (R-172), as quoted by Respondent in its Counter-Memorial, ¶ 387, page 98.

were not “wildlife protected areas” and therefore any declaration of wetlands inside public property was required to be done through an Executive decree. However, the court reminded that by express provision of the Environmental Organic Law, wetlands were nonetheless deemed of public interest and, therefore, subject to protection⁴³⁹. Indeed, Article 41 of the Environmental Organic Law deems conservation of every wetland in Costa Rica of “public interest”: “Wetlands and their conservation are hereby declared of public interest, for being of multiple use, whether or not protected by the laws governing this matter”⁴⁴⁰.

484. The Tribunal requested the Parties to address in their Post-Hearing Briefs which is the competent authority in Costa Rica to determine the existence of wetlands. Both Claimants and Respondent examined the issue, and both concluded that it is SINAC⁴⁴¹.
485. Claimants state that 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-MIRENEM be applied for the determination of hydric soils⁴⁴², but add that delimitation of that wetland must be carried out by Executive Decree, which did not occur in the Las Olas Project⁴⁴³.
486. Respondent agrees that it is SINAC who is entrusted with the responsibility for providing protection and control to wetland ecosystems, but places the legal support on Article 7(h) of the Wildlife Conservation Law, which exclusively assigns to SINAC the management and protection of wetlands, as well as their classification. Mr. Jurado, expert witness of Respondent, confirmed SINAC’s powers⁴⁴⁴.
487. Thus, although both Parties accepted SINAC’s competence, they disagree on the scope of the authority. The main difference lies on whether an Executive decree is required, as Claimants allege, to delimit the wetlands in order for this species to be protected under the laws of Costa Rica. The Tribunal disagrees that such requirement applies to determine

⁴³⁹ Decision 01209-2005, Criminal Court of Appeals, November 15, 2005 (R-177), as quoted by Respondent in its Counter-Memorial, ¶ 389, page 98.

⁴⁴⁰ The Spanish language is: “*Se declaran de interés público los humedales y su conservación, por ser de uso múltiple, estén o no estén protegidos por las leyes que rijan esta materia*”.

⁴⁴¹ Claimants’ Post-Hearing Brief, ¶ 450; Respondent’s Post-Hearing Brief, ¶ 887.

⁴⁴² Claimants’ Post-Hearing Brief, ¶ 463, page 218.

⁴⁴³ *Id.*, ¶ 464, page 218.

⁴⁴⁴ First Witness Statement of Julio Jurado, ¶¶ 22-26, pages 9-10.

the existence of wetlands within private property, and based on the above analysis finds that it will only apply in those cases where wetlands to be delimited that are found within a “protected area” or *zonas protegidas* or *zonas de protección*, but not in those instances of wetlands located on private property, as in the Las Olas Project site. It would make little sense that an Executive decree would be required to make a determination of the existence of such a highly protected species.

488. Now, were there wetlands on the Las Olas Project site? Or were the merely “swamp-type flooded areas with poor draining” areas of the property that failed to meet the statutory requirements under Costa Rican law to conclude the existence of a wetland? The record shows that the Las Olas Project site did contain at least one wetland area.
489. A difficulty in this case is that there were inconsistencies in the positions of authorities that were called-in to determine whether wetlands existed on the property. In the background section of this Award, an analysis has been made which depicts the various determinations. Absent the determinations made by SINAC in May 2011, Claimants could have relied in the findings of some agencies that found none were present. However, those findings that support the position taken by Claimants have a flaw: they appear to have omitted examination in the relevant areas of the Las Olas Project site, or failed to make the examination at the relevant times. The three reports prepared by SINAC in 2011, i.e., the SINAC January 2011 Report, the SINAC May 2011 Report and the SINAC October 2011 Report did find the existence of wetlands.
490. Although Respondent has identified through the Expert Witness Reports of KECE prepared by Mr. Kevin Erwin that a total of eight wetlands on the site of the Las Olas Project were found, Claimants originally rejected the existence of any wetlands on the site during the arbitration proceedings. However, in their Post-Hearing Brief Claimants did not dispute the existence of wetlands in the studies and reports carried out in 2016, but argued that there is no proof that those conditions existed during the relevant time (2007-2011), and that neither Mr. Erwin or the Green Roots experts were present when SETENA issued the Condo Section Environmental Viability in 2008, nor were they present when INTA found no hydric soils in 2011.

491. In this regard, Claimants have argued that in reaching its conclusions of protected forest and wetlands, Respondent “willfully ignores an abundance of external factors which could have, and have had, an impact on the current status of the Las Olas site”⁴⁴⁵. This implies their acceptance that wetlands may exist in the site.
492. Respondent countered and stated that if wetlands exist now, then they almost certainly existed at the time Claimants acquired the land⁴⁴⁶.
493. As addressed below, KECE identified in their report various sites where wetland were found within the Las Olas Project Site, and numbered these from 1 to 7. Claimants have alleged that Mr. Erwin failed to meaningfully consider soil data in alleged wetlands 2-7; that his assertion of soils in wetland 8 is not credible; and that the hydrophilic vegetation found is not the species to be found in wetlands⁴⁴⁷. Claimants appear not to dispute the existence of the wetland referred to as “Wetland 1” in the area of easements 8 and 9, but they nonetheless disputed that the determination by Green Roots was based on a “fundamental misapplication of the USDA Keys to Soil Taxonomy” used for this classification.
494. Moreover, Claimants have argued that INTA made no finding of hydric soils at the time of the measures taken in 2011. It is a fact that INTA conducted a soils study of the alleged wetlands at the Las Olas Project site in April 2011, and concluded that no hydric soils were present. Thus, Claimants argue that there simply were no wetlands at Las Olas in 2008 either when the EVs were issued, or in 2011 when the Respondent issued the injunctions⁴⁴⁸.
495. Although Mr. Gerardo Barboza – Wetlands Expert presented by Claimants, rejected the existence of wetlands, during the December Hearing he testified that his conclusions were reached from a document review made by him, and not because of a site visit to confirm whether or not these existed. This, despite the fact in his initial expert report⁴⁴⁹ he stated that when there is a “possible existence” of a wetland it becomes necessary to

⁴⁴⁵ Claimants’ Post-Hearing Brief, ¶ 525, page 247.

⁴⁴⁶ Respondent’s Post-Hearing Brief, ¶ 358, page 70.

⁴⁴⁷ Claimants’ Post-Hearing Brief, ¶¶ 488-498, pages 227-233.

⁴⁴⁸ *Id.*, ¶ 475, page 222.

⁴⁴⁹ First Barbosa Expert Report, ¶ 4.b.), page 11.

carry out a precise, qualitative and quantitative site visit, he never carried out such a visit. When questioned during the December Hearing, he testified that his "... task was not to identify a wetland on the site. It was just to assess/to evaluate the SINAC documents relating to the topic"⁴⁵⁰. Further, he agreed that if the possible existence of a wetland was known during the preparation of a D1 Application, that such a "precise, qualitative and quantitative" site visit would be merited⁴⁵¹.

496. The First and Second Expert Reports from KECE conclude the existence of at least seven (7) wetlands on the Las Olas Project site, of which one was impacted. In addition, KECE was able to identify the location of another wetland outside of the project site but within what he referred to as the "Las Olas Ecosystem", based on the existence of the elements which the RAMSAR Convention and Costa Rica's law establish: (i) the dominance of hydrophytic vegetation; (ii) the presence of hydrological indicators, and (iii) the presence of hydric soils⁴⁵². These sites were referred to in a numerical order, starting from the southwestern end of the property, and then in a clockwise order along the property⁴⁵³. Thus, Wetlands # 1 and 2 are located in the area of Easements, while the rest are located in the Condo Section. Wetland # 4 is located adjacent to the northwestern portion of the property⁴⁵⁴. It is worthwhile to note that the site of defined Wetlands in the KECE Report matches those under the Baillie Reports; for example, KECE # 5 would correspond to "Bajo B2"; KECE 3 would correspond to "Bajo B4"; and KECE 2, would correspond to "Bajo B6".
497. The wetlands are deemed by KECE to be palustrine freshwater wetlands, hydrated by rainfall, groundwater seepage and flow from adjacent higher elevations; seasonally inundated, with alternating periods of saturation/inundation and drought that are directly related to the region's wet and dry seasons, respectively⁴⁵⁵.

⁴⁵⁰ Transcript 1921:16-18.

⁴⁵¹ Transcript -1631:16:22, 1632:1-3.

⁴⁵² Mr. Erwin testified during the December Hearing that the definition of wetlands under the laws of Costa Rica strictly adheres to the RAMSAR definition. The language, he added "... if you hold them up side by side, is nearly identical". Transcript 1868:19-20.

⁴⁵³ KECE First Expert Report, ¶ 55, page 15.

⁴⁵⁴ Figure 2, "Las Olas Ecosystem Wetlands Map", Appendix 12 of the First KECE Expert Report.

⁴⁵⁵ KECE Expert Report, ¶¶ 56 and 188, pages 15 and 51.

498. During the examination of environmental expert witnesses (wetlands and soils) during the December Hearing the discussion centered at one point on whether the soils in the wetlands alleged by Respondent to exist actually had hydric soils. Dr. Baillie argued in his report that he had not found such conditions, but when examined as to whether he shared the findings of Green Roots, Dr. Baillie indicated that he had not drilled to the depth of 105 cms, which is the depth of drills used by Green Roots, which they deemed necessary because in some of the areas there had been work undertaken. In other words, had the ground be untouched, the drills could be closer to the ground, but when it was clear that works had been performed, that it was indispensable to go deeper. And these works were precisely over the wetland referred to by Dr. Baillie as “Bajo 1” which is the same as that referred to in the KECE Report as Wetland # 1. Dr. Baillie indicated that he did not feel it was appropriate to drill that location as there had been development works there, and article 5(b) of the Executive Decree No. 35803-MINAE contemplates a definition of hydric soils under natural conditions.
499. The report prepared by Drs. Calvo & Langstroth has as its scope to determine whether the site contains or has previously even contained wetlands. Dr. Calvo was questioned during the December Hearing as to whether his firm had carried out a soils survey, which Claimants allege (and Respondent does not dispute) is necessary because it is a component to determine the existence of hydric soils, which is one of the three elements of a wetland. Dr. Calvo acknowledged that they did not carry out such survey, because that is something they do not do, but rely on the soils study undertaken by a third party. This meant in the view of the Tribunal that their conclusion as to the existence of wetlands was flawed from the outset, since without such soils study they could not reach the determination of the existence of wetlands. This was acknowledged by Dr. Calvo during examination⁴⁵⁶.
500. In their report on the existence of hydric soils on Wetland # 1, Messrs. Johan S. Perret & B.K. Singh of GreenRoots indicated that Dr. Baillie, as well as INTA, and Mr. Cubero, used soil augering. This is the main tool used for soil exploration. In the case of Dr. Baillie, they added that he used “mini-pits”, which are very shallow, and do not go any

⁴⁵⁶ Transcript 1763:17-22, 1764:1.

deeper than 60 centimeters in depth. Their soil taxonomy methodology, they added, required they go deeper; that is why they went to 1.6 meters⁴⁵⁷. Further, they criticized the fact that Dr. Baillie did not access a road inside of the area where a wetland was deemed or alleged to exist.

501. Upon a direct question by Arbitrator Baker, who asked whether Dr. Calvo deferred to the soils experts to determine the existence of wetlands, Dr. Calvo confirmed⁴⁵⁸ that he did because they had found the other two elements existing in the site.
502. On the other hand, KECE mentioned that such soils study was not indispensable, and their Report shows that soil samples were only taken within a relatively small area in the Las Olas Project site, i.e., that comprised by Wetland # 1, excluding the other wetlands identified by other expert witnesses presented by Respondent. When asked by Arbitrator Baker during the December Hearing as to the reason why he had not undertaken the soil samples in the others, Dr. Erwin responded that in his practice he first looks at the hydrology and then the vegetation; and if he has both, his experience is that there will be hydric soils. His visits to the site showed all of the wetland areas under water, and that fact gave him the assurance he needed to conclude the existence of hydric soils, since these do not disappear with drainage. However, he mentioned that he would only carry out the soil sampling, as he did in this case, when there is litigation or arbitration involved. He added that in his belief Dr. Baillie had not found these because he did not “look enough”⁴⁵⁹.
503. In their examination, Messrs. Perret and Singh discussed how they were able to conclude without doubt as to the existence of a wetland that had been drained and covered to build the road and explained how there was organic matter (leaves and other organic material) that was evident in their soil analysis and showed this in several slides of their presentation⁴⁶⁰. Their conclusions were that there are hydric soils in Wetland # 1, which have been buried with the aid of machinery within the prior ten years. Dr. Perret was

⁴⁵⁷ Transcript 1940:21-22, 1941:1-6.

⁴⁵⁸ Transcript 1795:18-22, 1796:1-22.

⁴⁵⁹ Transcript 1924:19-22, 1925:1-6.

⁴⁶⁰ Slides corresponding to Soil Pit # 9.

logic and clear: “Organic matter is less dense than water; therefore, it will never accumulate below soil unless it has been buried”⁴⁶¹.

504. In addressing the point raised by Dr. Baillie in the sense that the soils which are not in their natural state and have been modified, present an impediment to properly determine their conditions, the Green Roots report indicates that under the USDA definition of hydric soils these include those “soils in which the hydrology has been artificially modified are hydric if the soil, in an unaltered state, was hydric”. Also, the soil taxonomy shows that the soils profile has an aquic moisture regime, with very poor drainage, and ground water near soil surface.
505. Most of the wetlands identified are located on the western side of the Las Olas Project, in the Easements Section. Claimants have alleged that the development of this portion of the project was exempt from an Environmental Viability, and hence there was no need to submit a D1 Application and no need to advice as to the possible existence of wetlands. They have expressed that under applicable regulations in Costa Rica, the nature and size of the nine easements – small developments with access via the main road and no more than six lots fronting an easement each, for a total of 72 residential lots, only required construction permits from the Municipality, which they secured in September 2007 for the first, and on July 16, 2010 for the rest⁴⁶². By the time the Municipality Shutdown Notice was issued by the Municipality of Parrita, in May 2011, five of the nine easements had been completed, with all electrical, water and waste/drainage connections made⁴⁶³.
506. In light of the above analysis, the Tribunal concludes that there were wetlands in at least one location: that referred to was “Wetland # 1” in the easements 8 and 9. And this is sufficient in the determination for purposes of the analysis.

(d) Forests under the laws of Costa Rica

507. On the subject of forests, these are primarily regulated by the Forestry Law (Ley Forestal). A “forest” (*bosque*) is defined as “ecosystem native or autochthonous, intervened or not, regenerated by natural succession or other forestry techniques, that

⁴⁶¹ Transcript 1976:10-12.

⁴⁶² Construction permits attached as Exhibits C-14, C-40 and C-71.

⁴⁶³ Claimants’ Memorial, ¶ 441, page 155.

occupies an area of two or more hectares, characterized by the presence of mature 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”⁴⁶⁴.

508. A “forestry tree” on the other hand, is defined under the Regulations to the Forestry Law as a: “perennial, woody and elevated trunk that branches to greater or lesser height of the soil, which is source of raw material that gives raise to industries such as sawmills, sheets, matches, cellulose, essential oils, resins and tannins”⁴⁶⁵.
509. Although both Parties agree that it is MINAE, which has the authority to determine the existence of “forests”, Claimants argue that MINAE failed to employ sound methodology in determining whether a forest existed at the site during its 2011 determinations because it (i) failed to define the study area; (ii) failed to evaluate the parameters required for defining a forest as a matter of Article 3 of the Forestry Law; and (iii) MINAE included “all trees” in its study, including trees that are not included in the legal definition of a forest under Costa Rican law⁴⁶⁶.
510. The KECE Expert Report compares the INGEOFOR Technical Forestry Report prepared in December of 2011 to the MINAET Report conducted in June of 2011 and identifies the inconsistencies among both. Whereas the INGEOFOR Report shows an average of 117 trees per hectare, the MINAET Report identifies an average of 544 trees per hectare, with the lowest density plot having 433 trees per hectare. KECE deems that the discrepancy is problematic because they apparently sampled the same portion of the Las Olas Project site⁴⁶⁷. KECE believes that the difference may be in selective samples in tree plot based on criteria such as plot area or species. Another explanation is the possibility that a large number of trees had been felled and removed between the dates of the two reports, i.e., between the report from MINAET of June 2011 and that of INGEOFOR of December 2011, as documented in the police report of October 2011⁴⁶⁸.

⁴⁶⁴ Article 3 (Definitions), section d) of the Forestry Law (C-170).

⁴⁶⁵ Article 2, Regulations to Forestry Law, 1997 (R-567).

⁴⁶⁶ Claimants’ Post-Hearing Brief, ¶ 478, page 222-223.

⁴⁶⁷ First KECE Expert Report, ¶¶ 128- 133, pages 41-42.

⁴⁶⁸ ACOPAC-CP-129-2011—DEN (R-264).

511. Article 3(d) of the Forestry Law defines and thereby establishes the requirements for a forest: an “ecosystem native or autochthonous, 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 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)”. In its report, KECE concludes that INGEOFOR appears to only consider trees that have a diameter of more than 15 cm at breast height (DBH). While a “forestry tree” under the above-mentioned law is indeed one that is equal to or exceeds such measurement, and KECE acknowledges that there is a requirement that there be also at least 60 trees per hectare, KECE does not believe that this is a formal requirement, but rather that it is one that “... should not be used to eliminate other criteria”⁴⁶⁹, and gives relevance to tree canopy. The Tribunal disagrees with this view. The statutory terms of the Forestry Law are not expressed as a mere “formal requirement”.
512. Respondent argued that Claimants caused environmental damage to the Las Olas ecosystem, because they cut down trees with no permits to do so. It added that under Costa Rican law it is not only a crime impacting a forest but merely cutting a tree with no permits⁴⁷⁰, and that Mr. Damjanac was charged with this particular crime. Respondent also recalls the definition of a “forestry tree” under the laws of Costa Rica mentioned in earlier paragraph, but clarified that no distinction is made as to the diameter or height of the tree, but in general, all trees are protected from felling without legal permits, adding that during their development of the Las Olas Project, Claimants never obtained one sole permit for the cutting of trees⁴⁷¹.
513. KECE then used its data collected in certain areas of the site to calculate canopy of recorded trees having a trunk DBH of 15 cm or more, and found an average of 60.6% for trees greater than 15 cm DBH, which ranged from 22.5% in one of the plots to 100% in another plot of the site. According to their findings, the discrepancies in recorded

⁴⁶⁹ First KECE Expert Report, ¶ 141, page 44.

⁴⁷⁰ Articles 27 and 61(a), Forestry Law (C-170).

⁴⁷¹ Respondent’s Post-Hearing Brief, ¶¶ 427-428, page 86.

densities led them to question whether the 2011 INGEOFOR Report was reliable, and they conclude that it was not.

514. KECE then evaluated the MINAET Reports of July 7, 2011 and October 31, 2011⁴⁷², which documented, among others: (i) the presence of tree species, and determined the existence of trees per hectare with a DBH higher than that established under the Forestry Law (density ranging from 66.67 to 400 hectare) in the three plots examined, a significant amount higher than that reported by INGEOFOR in their Report and (ii) an area that had been cleared within the previous 30 day period, and even observed several individuals involved in tree cutting activities, which they photographed.
515. In his Witness Statements⁴⁷³, Minor Arce – the Costa Rican forestry expert submitted by Claimants – alleged that he believes MINAET had a poor methodology in its 2011 report (failure to define study area, to evaluate parameters under the law, and that it included all trees rather than only those permitted under local law)⁴⁷⁴, and that based on his 2010 and October 2011 site reviews the species of trees that were identified by MINAET should not be counted, since these included some which cannot be deemed to be a “forest tree” under the Forestry Law (specifically mentioning Guarumo and Guacimo trees). Claimants have stressed that to make a finding of a forest under Costa Rican law, there are mandatory requirements to be met under the Forestry Law⁴⁷⁵.
516. KECE disagrees and argues that even though they branch out at different height, they are still used as a source of raw materials for different types of forestry industries.
517. In turn, KECE critiques the reports from Mr. Arce because these reports ignore the fact that logging activities were undertaken on site, and that Mr. Arce’s 2012 report was mainly addressed to critique the 2011 MINAET study that reported unpermitted logging. KECE concludes that the majority of the Las Olas Project site ecosystem can be considered as forested, albeit with different percentages of canopy closure⁴⁷⁶.

⁴⁷² First KECE Expert Report, ¶¶ 152-166, pages 45-47.

⁴⁷³ *Id.*, ¶ 175, page 49.

⁴⁷⁴ First Witness Statement of Minor Arce, ¶¶ 18-26.

⁴⁷⁵ Claimants’ Post-Hearing Brief, ¶¶ 520-522, pages 242-244.

⁴⁷⁶ First KECE Expert Report, ¶ 53, page 13.

518. Based on the KECE Expert Report findings, the Tribunal concludes that the conditions in the Las Olas Project site in the period of question allow for a determination that a “forest” existed within the definition of the Forestry Law.

(e) Does the Developer have the Burden of Disclosing the Existence of Wetlands and/or Forests?

519. In their Memorial, Claimants acknowledged that in order to commence development of a real estate project in Costa Rica, it was necessary to apply to several different ministries and government authorities for a number of different permits⁴⁷⁷, and submitted a list of the permits required and the agencies that administer them⁴⁷⁸. As would be expected in any jurisdiction, the number of procedures and permits is extensive; in this case, the permits exceeded thirty. The permits range from drinking water availability to fire management approval.
520. Of concern in this arbitration, the most important of the permits that the Claimants identified, is the Environmental Viability Permit issued by SETENA. Respondent agreed.
521. Claimants described the documents that were required to support a D1 Application or “environmental assessment document” to SETENA: (a) a duly signed D1 form; a (b) basic engineering survey; (c) a basic archaeological survey; and (d) a basic geological survey. In the event that a proposed project is located in or close to an environmentally fragile area (*area ambientalmente frágil*)⁴⁷⁹ then a basic biological survey was also required. An environmental fragile area is defined in Exhibit 3 to the EIA Provisions and includes wetlands that are not designated as part of a Wildlife Protected Area (*área silvestre protegida*), areas covered by a forest, and the maritime terrestrial zone.
522. In order to submit a D1 Application form, Claimants added that it was also necessary to submit a number of authorizations obtained from other agencies, including a certification from SINAC - the National System of Conservation Areas - stating that the proposed project area is not within a WPA⁴⁸⁰. Once SETENA verifies the information in the D1 Application, SETENA shall then determine the type of environmental impact assessment

⁴⁷⁷ Claimants’ Memorial, ¶ 51, page 18.

⁴⁷⁸ Exhibit C-202.

⁴⁷⁹ Claimants’ Memorial, ¶ 58, page 20.

⁴⁸⁰ *Id.*, ¶ 54, page 20.

it requires from the developer to complete; this may be an Environmental Impact Study, an Environmental Management Plan, or a Sworn Declaration of Environmental Commitments⁴⁸¹.

523. Respondent has essentially agreed on the process and the requirements⁴⁸², but adds a significant amount to detail to the process. It described how the D1 Application is a pre-established *Excel* matrix where the developer fills out the characteristics of the development, and the matrix automatically calculates the points of environmental relevance; the more points the project has, the higher the impact the project will have on the environment. Also, if the area where the project is located contains an “environmental fragile area”, such as forests or wetlands, then the score can increase significantly. If the score is above 1,000, the developer needs to submit an Environmental Impact Study (“EIS”) which constitutes the most complex environmental evaluation instrument, which the developer must submit in relation to an activity, work or project, prior to its execution. Its objective is to predict, identify, evaluate and correct the environmental impact which certain action could cause the environment and define the environmental feasibility (permit) of the project, work or activity the object of the study.
524. There is no conflict among the Parties that the support documents that should have accompanied the D1 Application by Claimants were submitted. Respondent confirmed that an application was submitted to SETENA by the firm of Mussio Madrigal on November 8, 2007 for the Condo Section, and the following information/ documents were made part of the application:
- a). Form D1;
 - b). An Environmental Management Plan prepared by Empresa Geoambiente S.A.;
 - c). A Geotechnical Survey performed by Mr. Roger Esquivel on behalf of TecnoControl S.A.⁴⁸³;

⁴⁸¹ Claimants’ Reply Memorial, ¶ 206, page 73.

⁴⁸² Respondent’s Counter-Memorial, ¶¶ 135-137, page 36.

⁴⁸³ It was noted during the December Hearing that the TecnoControl S.A. Geotechnical Survey that was part of the file and submitted as Exhibit R-13 was not in reality a study that pertained to the Las Olas Project, but rather to a different site, unconnected to the Claimants. The Parties had failed to identify this error during the arbitration, despite the relevance of the document. At the request of the Tribunal, Claimants indicated in their Post-Hearing Brief that this was surely a mistake; that they had originally submitted the correct document to SETENA, and that

- d). A Physical Environmental Protocol prepared by Mr. Eduardo Hernandez Garcia;
- e). An Archeological Survey conducted by a consultant, Ms. Tatiana Hidalgo, that concluded there was no archeological evidence on the Project Site; and
- f). An Anthropic Risk Certification from Mr. Edgardo Madrigal Mora that certified that there were no sources of anthropic risk within the site.

525. Where there is dispute among the Parties is that Respondent alleges that Claimants failed to: (i) identify the ecosystems the land held (i.e. the presence of wetlands and forests); (ii) conduct a biological survey to identify the great number of species that lived in those ecosystems; and (iii) propose measures to protect those species from the impacts of the development. According to Respondent, this omission was an undeniable failure on the part of Claimants – on whom the responsibility rested, in accordance with Costa Rican law⁴⁸⁴. Respondent has alleged that the Claimants should have disclosed information that had been gathered during the process of carrying out the studies that would be attached to the D1 Application.
526. This issue has a direct impact on whether or not there is a burden of proof imposed under Costa Rican law on the party that wishes to develop a real estate project and a duty to disclose any sensitive environmental area or potential damage to environment. If the answer is in the affirmative, then the question is whether or not this was complied with by Claimants.
527. This includes whether there is a duty to disclose in a D1 Application situations or facts known to applicant that, in carrying out the development these could affect the environment, and whether there is a burden of proof on the applicant to evidence that there will be no adverse environmental impact. Whereas Claimants have taken the opposite position, Respondent has repeatedly argued that the burden of proof exists on applicant, and closely ties it to the so-called “precautionary principle”.

the SETENA Resolution 1507-2008 that granted the Condo Section Environmental Viability refers to the proper report; otherwise, SETENA would not have been able to issue its decision. Respondent did not comment. Whether or not the proper document was submitted by Claimants is not for the Tribunal to decide, primarily because Respondent has not challenged that the environmental viability was procured on the basis of the failure to make proper disclosures as to the existence of wetlands.

⁴⁸⁴ Respondent’s Counter-Memorial, ¶¶ 158, page 43

528. Claimants’ position is that the Respondent fundamentally misconstrues the “burden of proof” standard of Article 109 of the Biodiversity Law which only applies, they argue, in a formal adversarial legal proceeding involving environmental protection, and that Respondent erroneously applies the standard to any environmental procedure, including the submission of the D1 Application to secure an Environmental Viability, which is not an adversarial proceeding⁴⁸⁵. Because the D1 Application is not an adversarial legal proceeding to which the Article 109 “burden of proof” applies, Claimants add, the Respondent’s *post-hoc* claim that the Claimants had the burden of disproving any and all of the Respondent’s hypothetical environmental challenges fails⁴⁸⁶. Claimants cite the interpretation given by Respondent’s counsel during Mr. Mussio’s cross examination at the December Hearing, describing a provision falling under Chapter IX of the Biodiversity Law entitled “Procedures, Processes, and Penalties in General” (*Procedimientos, Procesos y Sanciones en General*), pertaining to adversarial proceedings brought against the developer in administrative or regular courts⁴⁸⁷, and also the response provided by Dr. Jurado, who indicated that in a legal proceeding, the burden of proof applies to determine whether or not there is a damage to the environment.
529. Respondent, on the other hand, places the utmost relevance to this particular issue. It argues that any applicant submitting a D1 Application to secure an Environmental Viability has the burden to identify wetlands, or any other fact that may be relevant to the D1 Application⁴⁸⁸. Although Respondent agrees that the provision that gives rise to this obligation is inserted in Chapter IX of the Biodiversity Law, it argues that not only does a proper interpretation of the law not support the conclusion of Claimants, but further that Claimants’ own advisors have acknowledged and accepted Respondent’s position. Assuming, Respondent adds, that there was a proceeding commenced in connection with a possible penalty to be imposed, then the relevant party would need to be able to show that, at the time, before they were about to develop the land, there were no wetlands. Since it is incumbent on Claimants to be able to show there were no wetlands before they started to develop the Las Olas project, this placed the burden on Claimants at the time they were

⁴⁸⁵ Claimants’ Post-Hearing Brief, ¶ 346, page 168.

⁴⁸⁶ *Id.*

⁴⁸⁷ Exhibit C-207, page 44.

⁴⁸⁸ Respondent’s Post-Hearing Brief, ¶ 156-157, page 30.

planning their development, to be sure there was no wetland⁴⁸⁹. The D1 Application process clearly imposed on Claimants an obligation to disclose all elements and facts of relevance that may impact the environment.

530. The Tribunal notes that the project development advisor at the time the D1 Application was submitted was the firm of Mussio Madrigal. Mr. Mussio indicated in his Witness Statement that when a project such as Las Olas is to be carried out, it is required to, *inter alia*, undertake various visits to the land along with professionals specializing in the different areas, according to the needs and type of project, which might include: geologists, forestry experts, land surveyors, biologists, agronomists, archaeologists, hydrologists and sociologists, among others, as well as coordination with government entities, with regulatory competencies in environmental and urban development matters, responsible for carrying out the legal and technical project feasibility analyses. He added that when the property might have environmentally sensitive areas, then one or more visits to the property are necessary, with whatever experts are necessary, in order to finally conclude whether or not these exist, and then the relevant governmental authorities must be informed⁴⁹⁰.

531. Mr. Mussio stated in his Witness Statement that his experience in wetlands was “broad” and that he was “familiar with the characteristics of a wetland”, and whenever he noticed a sensitive area, his firm would act in accordance with their internal procedures, i.e., contract a suitable professional to prepare a concluding report on the subject⁴⁹¹. Thus, he acknowledged that “... in cases in which we have identified an area that might be classified as a wetland or any other protected wildlife zone, in my capacity as consultant director, I coordinate with the technical experts that may be required to draft technical reports following the visits to the area, in order to present such reports to the various government entities seeking to obtain a definitive reply when there are any doubts on the matter”⁴⁹².

⁴⁸⁹ *Id.*, ¶¶ 164-166, page 31-32.

⁴⁹⁰ Mussio Witness Statement, ¶¶ 12-13, pages 5-6.

⁴⁹¹ *Id.*, ¶ 13.

⁴⁹² *Id.*, ¶ 14.

532. His firm was responsible for coordinating the different specialized studies and engaging the relevant firms but not responsible for the preparation of the actual studies and reports for the D1 Application. The specialized studies were carried out by third parties. Mr. Madrigal, Mussio's partner, was closely involved and actually executed some statements of the application. Further, it is clear from the record that they then engaged Geoambiente – a consulting firm, who, in turn, contracted other specialists, including TecnoControl, S.A., who then engaged at least another. This appears to be customary for similar projects in Costa Rica. Several firms were involved in the preparation and completion of the application and the preparation of reports. Not all were engaged directly by Claimants.
533. During the process of getting the D1 Application together, Tecnocontrol entrusted the firm Geotest, S.A. to prepare a geological and hydrogeological report on the property to be developed. This report was prepared by Mr. Roberto Protti Q., and delivered to Tecnocontrol in July of 2007. In his report, Mr. Protti identified that the land where the development was to be undertaken showed good drainage conditions but in the central portion of the land there were “swamp-type flooded areas” (*areas anegadas de tipo pantanoso*) with poor draining⁴⁹³. Respondent placed significance on this report, which has been referred to by Respondent as the “Protti Report”⁴⁹⁴. And the interest in the report is because it contains, according to Respondent, findings on the existence of potential wetlands. The statement on the swamp type flooded areas with poor drainage was a clear indication in respect to the existence or potential existence of wetlands in the property. However, neither this so-called “Protti Report” nor its findings were made a part of the D1 Application that was eventually submitted to SETENA. Years later, it was subsequently submitted by Mr. Aven, long after the Environmental Viability had been issued, as will be examined below.
534. The question arises, what is or was the relevance of this so-called Protti Report? Was there a deliberate omission in keeping it from SETENA? Respondent has alleged that even though it had not been evident to them during their examination of the property that wetlands existed, the findings in such report should have given Claimants sufficient knowledge from an expert as to the potential existence of wetlands in the area, but that

⁴⁹³ Section 3, page 2 of the report.

⁴⁹⁴ Exhibit R-11.

Claimants decided to ignore such information and intentionally omitted disclosure to SETENA. The Tribunal agrees with the allegation that Claimants should have at least examined the situation in more detail.

535. As indicated above, in his Witness Statement, Mr. Mussio clearly identified that internal procedures in his architectural firm directed that they should contract a suitable professional to prepare a concluding report on the subject to determine whether wetlands existed, and if so, the governmental authorities must be informed. But neither were additional studies undertaken nor appropriate authorities informed. On the contrary, the D1 Application was submitted without reference as to whether wetlands or potential wetlands existed, even though the purpose of such an application is precisely to assess the environmental impact based on the information and documentation attached.
536. Respondent's position regarding the legal burden on the applicant of a permit to evidence, among others, that no harm will be done to the environment derives from article 109 of the Biodiversity Law. It was surprising to the Tribunal to listen to Mr. Mussio acknowledge during the December Hearing that he was not familiar with the provision⁴⁹⁵ because, even though his firm is primarily of architectural discipline, they act as project coordinators, including of environmental specialists, and they signed several of the statements and reports in the D1 Application. Naturally, even if they are not to be expected to be specialists in Costa Rican law, if they have the overall responsibility for the project, they cannot be unaware of the terms of this provision. Even if his firm did not actually make the ministerial filings to SETENA, they were the coordinators; arranged specialists, prepared their own reports and delivered the package to Mr. Aven.
537. This is especially surprising in light of the affirmation in his witness statement transcribed above in respect to his firm's internal procedures of engaging a suitable professional to prepare a concluding report "... in cases in which we have identified an area that might be classified as a wetland or any other protected wildlife zone ..."⁴⁹⁶, as well as acknowledging his unawareness as to whether the D1 Application that was

⁴⁹⁵ Transcript 411:1-6.

⁴⁹⁶ First Witness Statement of Mauricio Martín Mussio Vargas, ¶ 14.

submitted to SETENA for Las Olas Project for the Condo Section identified or not the sensitive areas⁴⁹⁷.

538. Respondent has supported its position not only with the testimony of Dr. Jurado, but also that of Mr. Ortíz⁴⁹⁸, Claimants' witness on local law; Mr. Gerardo Barboza Jiménez⁴⁹⁹, Claimants' wetlands expert, and Mr. Bermúdez⁵⁰⁰, the environmental regent for the project, all of whom accepted the application of this principle.
539. Mr. Esteban Bermúdez, the Environmental Regent designated by Claimants for the Condo Section of the Las Olas Project, acknowledged during cross-examination at the December Hearing that the responsibility to submit all necessary studies is shared by the developer and the environmental consultant to prove the absence of pollution, unauthorized degradation or impact, and that this was in line with the "precautionary principle" embodied in Article 109 of the Biodiversity Law. He even acknowledged that such principle applies even if there is no scientific certainty; it would still be necessary even if one had only had reason to suspect the existence of a wetland⁵⁰¹. Likewise, Mr. Barboza stated that if the existence of a possible wetland was known during the preparation of a D1 Application, a precise, qualitative and quantitative site visit would be merited prior to filing.
540. But in any case, Respondent added that the D1 Application itself contains language to the effect that the applicant is submitting information that is current and truthful, as a "sworn affidavit". Indeed the form reads "... Based on the data provided, SETENA could make decisions regarding the Environmental Viability of the activity, work or project proposed, so in the event that false or erroneous information is provided, the signatories will not only be responsible for this offense, but also for the consequences of the decisions that SETENA has incurred in when relying on that data".

⁴⁹⁷ Transcript 416:16-22, 417:1-5.

⁴⁹⁸ Transcript, 1329:20-22; 1330:1-6.

⁴⁹⁹ Transcript, 1639:6-12.

⁵⁰⁰ Transcript, 535:22; 536:1-7, 538:19-22; 539:1-15 and 607:14-22; 608:1-5.

⁵⁰¹ Transcript 538:13-22, 329:1-10.

541. Respondent complements that the duty of “transparency and good faith” also supports the need to place the burden on the applicant⁵⁰².
542. Accordingly, there was a burden on Claimants (like any other D1 applicant) to ensure that information was not only accurate⁵⁰³ but also not misleading.
543. Although Claimants accept that a developer has the obligation to submit complete and accurate information when filing a D1 Application to secure an Environmental Viability, they add that the failure to do so may give rise to an action by MINAE or SETENA to annul an Environment Viability previously issued through the “*lesividad*” administrative process⁵⁰⁴. But, they argue, there has been no annulment proceeding has been initiated by Respondent in this case.
544. After the D1 Application is filed with SETENA, along with the required documents, SETENA may determine whether there is additional information that is required and, if so, request same from applicant.
545. This gives rise to another area of controversy among Claimants and Respondent which relates as to whether, once a D1 Application has been filed, SETENA has the duty to inspect the site or whether it simply has the option to carry out such inspection.
546. Claimants have argued the obligation of SETENA to duly review and examine the information submitted by a D1 applicant, and to control for its accuracy and that, to do so, SETENA cannot decline the exercise of the powers nor can delegate them to someone else. This entails the duty to inspect the site for which the Environmental Viability is requested. They cite in support of this position the testimony of Mr. Ortíz, their witness on Costa Rican law, and Mr. Bermudez, the Environmental Regent. SETENA, they add, has the responsibility to review and assess the information submitted and identify and request any missing documents; if it fails to make an inspection, this should not affect the developer⁵⁰⁵.

⁵⁰² Respondent’s Post-Hearing Brief, ¶ 174, page 33, ¶¶ 276-278, page 71.

⁵⁰³ *Id.*, ¶ 175-176, page 34.

⁵⁰⁴ Claimants’ Reply Memorial, ¶ 232, page 81.

⁵⁰⁵ *Id.*, ¶¶ 235-236, page 82.

547. Respondent rejects the position taken by Claimants, and argues that the inspection by SETENA is an option, and therefore the failure to carry out such inspection should not trigger any consequence as suggested by Claimants.
548. During the cross examination of Dr. Jurado during the December Hearing, he was quite clear to the effect that there is no legal obligation on SETENA to conduct such an inspection, stating that it would be “absurd” to expect the authority to conduct an inspection to the site for each application submitted⁵⁰⁶. Under the relevant law, he added this constitutes an option on the part of SETENA, rather than an obligation. The system, “... has been organized so that the developer provides information, biological studies, hydrological studies; all studies required are provided by the developer, and the ... Administration accepts them under a relationship of trust. Now, if they think there is some information that’s not true, then they would make an inspection”⁵⁰⁷.
549. It would appear that the above issue is moot, because SETENA did carry out an inspection to the Condo Section of the Las Olas project on January 10, 2008 prior to issuing the Environmental Viability on June 2, 2008 (Resolution No. 1597-2008-SETENA). It is not moot, however, insofar as the implications of the argument in this case go further. If there was an obligation to carry out the inspection, the conclusion could be that any information deficiently reported or described by applicant would be cured. The Tribunal shall examine this issue below.
550. The Tribunal notes the terms of article 84 of the Organic Law on the Environment which provides the competencies of SETENA, and within those there is section (d) which states that SETENA has as a junction to “carry out the corresponding in situ inspections before issuing its resolutions”⁵⁰⁸. The Claimants have argued that the words “*funciones*” which is included in said provision reflect the “duties” of SETENA, and these include the obligation to perform visits after a D1 Application is submitted. Respondent claims, on the other hand, that it describes the competencies; in other words, that SETENA may carry out the various activities, but is not bound to do so.

⁵⁰⁶ Transcript, 1431:9-13.

⁵⁰⁷ Transcript, 1432:11-18.

⁵⁰⁸ The Spanish text is “d) *Realizar las inspecciones de campo correspondientes antes de emitir sus acuerdos*”, (C-184).

551. Respondent acknowledges that SETENA and other competent authorities may have overlooked the existence of wetlands, or determined that none existed when they did carry out an inspection. But, it adds, this is incidental to the conclusions reached by its agencies, because the permits were obtained unlawfully, since Claimants were responsible to search for, identify, and disclose the existence (or even the “possible existence”) of wetlands⁵⁰⁹.
552. The Tribunal sides with Respondent and finds a duty on an applicant for an Environmental Viability to advise the competent authority in matters that affect any impact to the environment, and that this duty arises under the Biodiversity Law and is confirmed under the precise terms of the statement made as an oath in the D-1 Application. The reading of the provision imposes the duty on those “requesting a permit” or those “accused of having caused an environmental harm”. Hence, even though Claimants are correct in stating that Article 109 of the Biodiversity Law⁵¹⁰ applies in a formal adversarial legal proceeding involving environmental protection, where they are wrong is that this is not exclusive. It applies also in respect of those who request an approval or, permits, or request access to biodiversity.
553. Thus, this duty transfers the burden of proof to the applicant of a permit. And the burden is to evidence the “absence of non-permitted pollution, degradation or affectation”, all of which the Tribunal acknowledge are broad concepts. Thus, at the time the Claimants filed their D1 Application, the burden was on Claimants to evidence that no such adverse impact on the Las Olas Project site was to occur as a consequence of the development. The duty evidently carries a strong component of conducting oneself in good faith which, in turn, implies not only the duty to disclose existing conditions known to, or suspected by the applicant, but also the same duty as was expressed by Mr. Mussio in his witness statement as a “protocol” of his firm in situations similar to those of this project. Faced with the potential existence of wetlands, the duty is to entrust those additional studies as may be required to ascertain whether or not such wetlands exist and, regardless of

⁵⁰⁹ Respondent’s Post-Hearing Brief, ¶¶ 11-12, page 2.

⁵¹⁰ Exhibit C-207. The text of this Article 109 provides “The burden of proof...” (*La carga de la prueba, de la ausencia de contaminación, degradación o afectación no permitidas, corresponderá a quien solicite la aprobación, el permiso o acceso a la biodiversidad o a quien se le acuse de haber ocasionado el daño ambiental*”).

whether there is a report affirming the existence of wetlands or not, disclose the information that is relevant to the authority (SETENA, in this case) so that the authority can carry out further studies it deems appropriate before issuing the Environmental Viability to the relevant project.

554. This duty cannot be relieved, as Claimant intends, by shifting the burden to Respondent's agencies to verify the accuracy of the information disclosed by Claimants in the D1 Application. The application not only relies on the burden of proof that is incorporated into Costa Rican law, but also involves the general principle of good faith because it presupposes that the applicant himself will be acting in good faith and does not withhold any information that may be relevant.
555. This responsibility is further strengthened by the language incorporated into the D1 Application, which the Tribunal translates from the Spanish original⁵¹¹:

The undersigned represent under oath that all of the information supplied and is included in this application is accurate and current and is provided in accordance with the technical knowledge available. The foregoing [representation is made] under the penalties established under law for the crimes of perjury and false statements and aware of the following Environmental Liability Clause”.

The environmental consultant and the developer who sign the D-1 Application shall be directly liable for the technical scientific information that they supply therein. Therefore, the National Environmental Technical Secretary (SETENA), as environmental authority of the Costa Rican State, shall review that this document has met with the technical guidelines established for the completion, and if these are satisfactory will accept the information presented as accurate and truthful, as a sworn statement. Based on the data provided, SETENA could make decisions regarding the Environmental Viability of the activity, work or project proposed, so in the event that false or erroneous information is provided, the signatories will not only be responsible for this offense, but also for the consequences of the decisions that SETENA has incurred in when relying on that data. (Emphasis added)

556. Accordingly, there was a burden on Claimants (like any other D1 applicant) to ensure that information was accurate⁵¹². Applicant represents to SETENA (and this is what Claimants did) that it may rely on the information supplied, which information is represented to be “accurate and current”. When the form stated that liability leads to

⁵¹¹ Exhibit R-13.

⁵¹² Respondent's Post-Hearing Brief, ¶ 176, page 34.

decisions to be made in reliance to the information, the Tribunal is clear that a further duty underlies: to act in good faith and to not be misleading.

557. This language in the D1 Application in the form of a “sworn affidavit” leaves no doubt as to the duty of an applicant to submit information that is both current and truthful. Considering this, there is little doubt that SETENA is empowered to rely on the information as “accurate and current” in order to carry out its “desktop examination” of the information without being required to verify the accuracy thereof on site, as is suggested by Claimants. If one were to construe the terms of Article 84 of the Organic Law on the Environment to mean that SETENA is obligated to perform a site visit to the project site this would render the representations made under oath by the applicant useless. Although Claimants have argued that SETENA has the shared obligation to make an examination and verify the information submitted by the developer, and failure to carry out such inspection should not affect the developer, the Tribunal takes the opposite position. The Tribunal believes that it is an option of SETENA to perform site visits after an application is submitted, and not an obligation, and that under the limited financial and human resources of SETENA its efforts need to be concentrated in those cases where risks to the environment have been expressed in an application.
558. If Claimants had submitted in their D1 Application the information relating to the existence of potential wetlands as described in the so-called Protti Report, it is more likely than not that SETENA would have exercised its powers and verify the conditions on site prior to issuing the Environmental Viability and perhaps SETENA would have subject the Las Olas Project to some limitations in its development to protect the potential wetlands identified. In such instance, the real estate development would likely have proceeded to conclusion, albeit with some additional costs, but the Parties would not be involved in this case.
559. Since Claimants had the duty to advice SETENA at the time they filed their D1 Application of the existence of the “swamp-type flooded areas with poor draining” or potential wetlands, and Claimants failed to do so, they thus cannot now attempt to shield their omission on the alleged failure of SETENA to inspect the property to verify the existence of wetlands.

(f) Fragmentation

560. Fragmentation of land through the use of easements is permitted in Costa Rica⁵¹³, and this is precisely what Claimants allege they carried out, completing all of the process and allowed the Municipality to take into account a consultative process to verify and issue a land use certification based on the Municipality's regulatory plan. Claimants have further argued that these permits are "final acts" which have inherent effects on third parties and grant lasting rights and obligations upon which the Claimants could rely⁵¹⁴. Claimants have indicated that they secured these even before they obtained an Environmental Viability for the condominium section of the Las Olas Project.
561. Claimants have also stated that, even though Respondent has argued that the fragmentation of the land, was illegally undertaken in light of Article 94 of the Biodiversity Law which provides that an Environmental Impact Assessment for a single project must be done "*globally*", i.e., in its entirety, despite the project being carried out in different stages, that Costa Rica's agencies never raised this issue before in a proceeding, either to challenge the issuance of the construction permits for the Easements, or to challenge the "*illegal fragmentation*" of the Easements Section from the rest of the property. The Respondent's failure to apply its law in good faith, they add, breached DR-CAFTA Article 10.5's prohibition against the frustration of the Claimants' legitimate expectations by illegally shutting down the project through sustaining interim injunctions indefinitely⁵¹⁵. According to Claimants, the proper venue to have brought that process is in Costa Rica administrative courts, at the time of the alleged infraction, through a principal procedure to annul the EVs or the construction permits⁵¹⁶.
562. Respondent has challenged the argument of Claimants to the effect that no Environmental Viability was necessary to develop the Easement Section, and cited Articles 2 and 3 of the General Regulations on the Procedures for Environmental Impact Assessment (2004) which specify that work that is segregating urban projects must still seek EV approval,

⁵¹³ Under the Regulations for the National Control of Fragmentation and Urbanization issued by the INVU (R-409). Also applicable is the Land Use Methodology set forth in Executive Decree No. 20501-MAG-MIRENEM (R-401).

⁵¹⁴ Claimants' Post-Hearing Brief, ¶ 154, page 75, ¶ 160, page 77.

⁵¹⁵ *Id.*, ¶¶ 420-421, pages 203-204.

⁵¹⁶ *Id.*, ¶¶ 426, page 205.

and referenced the Siel Siel Report from Ms. Priscilla Vargas⁵¹⁷, who testified during the December Hearing that exemptions contemplated do not apply to the case⁵¹⁸.

563. Costa Rica has indicated further that Mr. Bermúdez, the Environmental Regent appointed by Claimants, informed the Municipality of Parrita, as part of a report that was required to be submitted before construction could commence in the area, that an EV had already been issued for the overall project that covered the Easements Section as well, misrepresenting the authority⁵¹⁹. Mr. Bermudez admitted during his examination at the December Hearing that he never corrected this report⁵²⁰, and therefore the Municipality had been misinformed all along.
564. The record shows that the Las Olas Project - the investment carried out by Claimants - was originally conceived as a single project, albeit composed of several stages and uses (such as the beach concession, the condominium site and the commercial zone). It was not until years later that the easement section was devised as a separate unit of development. Therefore, the Tribunal deems that the same should follow in respect of the permits and approvals. Permits should have been requested as if the project was one, without distinctions as to sections— whether easements or others.
565. It follows that, for purposes of the Claim, the investment itself (i.e., the Las Olas Project) should equally be treated as one.
566. Respondent also challenged the allegations of Claimants in respect to the fact that construction permits were timely issued for easements 8 and 9 in the Easement Section, and the fact that these were likely lost within the Municipality’s records due to flooding occurring. The Municipality of Parrita itself rejected the idea that such permits had been issued⁵²¹, and provided a communication dated November 14, 2016, stating that no such permits had been issued for the easements 8 and 9 in 2008 or 2009⁵²².

⁵¹⁷ Siel Siel Report, ¶¶ 83-90, pages 157-158, attached as Appendix “F” to the Second KECE report.

⁵¹⁸ Transcript, 1828:17-22, 1829:1-22, 1830:1-13.

⁵¹⁹ Respondent’s Post-Hearing Brief, ¶¶ 294-303, pages 59-60. The Environmental Contingencies Plan for Land Movements, dated July 22, 2010, Exhibit R-42.

⁵²⁰ Transcript, 574:1-7.

⁵²¹ Respondent’s Post-Hearing Brief, ¶¶ 308-340, pages 61-66.

⁵²² Exhibit R-521.

567. The relevance of these specific topics is because the location of one of the wetlands – that identified as Wetland No. 1– is precisely located within easements 8 and 9.
568. There are three issues that arise from this past debate. The first two deal with the legality of the manner in which the Easements Section was created and work was carried out within, and the third examines whether wetlands were illegally damaged. The Tribunal will first analyze whether the easements were developed with a significant business purpose other than avoiding the EV’s for that section of the Las Olas Project; second, assuming that no EV’s were even required under Costa Rican law for the easements as Claimants argue, whether the Claimants had proper construction permits, and finally, whether the works carried out in easements 8 and 9 illegally covered one of the wetlands sites identified by Respondent.
569. In respect of the first issue, the Tribunal finds that the easements were developed by Claimants as a separate project without any apparent reason beyond the avoidance of the EV for such area. It is evident from the information submitted in the arbitration that Claimants did not consider a development with an easements section until 2007, but even then, they nonetheless continued to view the Las Olas Project to be one single project. In his First Witness Statement, Mr. Aven described one project, comprised of five phases of development⁵²³ (i) the Easements, (ii) the beach club, (iii) the Condo Section; (iv) the hotel across the beach in the Concession Site, and (v) the commercial/condo time shares. This was confirmed in various marketing efforts for the Las Olas Project.
570. This was not only the view of the developers, but also of the environmental consultants to the project. DEPPAT, the Environmental Regent submitted in July 2010 on behalf of Claimants an Environmental Contingencies Plan for Land Movement⁵²⁴, a document prepared to describe the works to be undertaken in the Easements Section, and mitigation measures to be adopted. In this document, DEPPAT describes the Las Olas Project (then referred to as Villas La Canícula) as a whole, and considered the Easements Section only as “one of the components”⁵²⁵. As a separate matter this document also refers to the fact that “...the project as a whole has the respective environmental viability granted by

⁵²³ First Witness Statement of Mr. Aven, ¶¶ 53-60, pages 17-22.

⁵²⁴ Exhibit R-42.

⁵²⁵ *Id.*

SETENA...” which Respondent has alleged is clearly a misrepresentation and which the Tribunal coincides. At the time it was filed, the project as a whole did not have an Environmental Viability. Although during his examination at the December Hearing Mr. Bermudez testified that he was somewhat confused because he was not familiar with the Condo Section of the Las Olas Project⁵²⁶, this is hardly credible because he had been appointed since 2006 as the “Environmental Regent” for the project as a whole, and had been involved in the various stages of the project since. It is relevant to note, however, that in a response made to a question from Arbitrator Siqueiros he confirmed that at the time he understood the easements to be part of the whole project⁵²⁷.

571. Determining whether it is one project or not, will allow the Tribunal to define whether it is even possible to argue that no environmental viability is required for an easement that meets the criteria expressed by Claimants. Taking aside the defense from Respondent that the easements required not only a construction permit, but also an EV as part of the permitting process (which Claimants dispute), what is acknowledged by the Parties is that if the Las Olas Project was deemed as a whole, then the Environmental Viability would have required to be secured also as a whole. The Tribunal recalls that Article 94 of the Biodiversity Law⁵²⁸ provides expressly that “The environmental impact assessment as it relates to biodiversity shall be undertaken in its entirety, even when the project is programmed to be developed in stages”. This means that the Environmental Viability needs to consider the whole of the project so that the governmental authority can assess it in its entirety. During his examination at the December Hearing, Mr. Bermúdez, the Environmental Regent, also acknowledged this interpretation, and confirmed that it is the developer who determines the scope of a project⁵²⁹, and that a project, even though it is developed in stages, needs to be examined as a whole. He further testified that the Easements Section was not covered by the Condo Section Environmental Viability⁵³⁰.

572. When asked during the December Hearing on the business rationale of the fragmentation of the Easements Section, Mr. Aven indicated that it was his attorney, Juan Carlos

⁵²⁶ Transcript, 571:13-17.

⁵²⁷ *Id.*, 609:9-22, 610:1-7.

⁵²⁸ Exhibit C-207.

⁵²⁹ Transcript, 567:4-15.

⁵³⁰ *Id.* 572:21-22, 573:1-4.

Gavridge Pérez, who suggested that these be developed because the properties could be developed fairly quickly without need of going through an extensive permitting process “...and you don’t have to be concerned with the EV because it is along the main road”⁵³¹. Mr. Aven acknowledged this was his motivation, based upon legal advice from his attorney.

573. The Tribunal believes that a project that was to be built in stages, as Claimants also acknowledged in the Memorial of Claims, cannot be then fragmented so as to avoid securing the environmental viability. But this is precisely what Claimants did.
574. Taking advantage of certain benefits or relief granted by the law is not unlawful, but what may be is to structure an investment and carry out a development in such manner as the effect is to avoid having to request permits, procedures or consents that involve steps or disclosures which would trigger the need for scrutiny or subsequent studies, permits or conditions by simply applying the terms of law taken out of context. The full context must be considered in such instances.
575. The Siel Siel Report presented by Ms. Priscilla Vargas evidences how the SETENA alleged exemptions do not apply. Although Mr. Luis Ortiz testified⁵³² that there were three resolutions issued in 2004 and 2008⁵³³, whereby SETENA excluded certain kinds of activities from obtaining an Environmental Viability, because they have very low potential environmental impact, Ms. Priscilla Vargas identified that these did not apply to the Las Olas Project insofar as there was an environmentally fragile⁵³⁴ area containing wetlands, there were easements that constituted not individual homes, but rather a group

⁵³¹ Transcript, 935:4-19. His testimony on what one of his attorneys - Juan Carlos Gavridge Pérez said to him “... Look, you got road frontage all around the Project. [...] And the law in Costa Rica is if you’re on a road that you can get access to, you don’t--you don’t need to get--to do extensive permitting processes with--with EV--EV process. But you can, you know, just come off of the main road, put a--put a--get a permit for that for whatever reason you want to get and--and build. [...] So that was the--that was the motivation for that. It was--but it was based upon legal advice from an attorney. And as far as--as far as I was told, it was perfectly legal. So that’s why it was done. Because it was easy to get to along the main road, you could have access to these various lots. And you could--and the business plan was that you could develop these things fairly quickly because according to Costa Rican law now--you know, again, I want to stress that we followed the law.”

⁵³² Witness Statement of Luis Ortiz, ¶ 34, page 24.

⁵³³ Resolutions No. 2370-2004 dated December 7, 2004, No. 583-2008 dated March 13, 2008, and No. 2658-2008 dated September 23, 2008.

⁵³⁴ During her presentation at the hearing she made clear reference to how the advisors for Claimants had identified environmentally fragile areas, specifically in Mussio Witness Statement, ¶ 30. Transcript 1835-16-17.

of 72 lots without services available and requiring the construction of new roads, all of which are not contemplated under said SETENA resolutions⁵³⁵.

576. The second issue to address is whether Claimants had valid permits to work on easements 8 and 9, which are located in the southernmost portion of the Easements Section. It does not become necessary to examine permits for any other of the easements, as the allegation of the existence of wetlands in these two easements makes it sufficient for the Tribunal to determine whether actions undertaken in those two were or were not lawful⁵³⁶.
577. Claimants have stated that permits were received but were lost by the Municipality of Parrita. The Tribunal finds it hard to believe that permits presumably issued both in 2008 and 2009 were lost in the “Alma” storm, as alleged by Claimants. Especially since the storm occurred in May of 2008⁵³⁷. But also because it is hard to fathom that from all the various files corresponding to the Las Olas Project that are available to the Claimants and the Municipality, all documents are available and only the alleged construction permits have been lost. The coincidence is extreme. But assuming, for the sake of analysis, this was the case then it shows the lack of diligence by the owner and/or contractor in safeguarding documents that are critical for any development, and this would be revealing of the diligence with which the legal aspects of the development were being handled.
578. There is no evidence that work that was undertaken by Claimants in said easements 8 and 9 was validly authorized by construction permits issued by the Municipality, or approved plans for those easements from INVU, or the National Cadastre or the National Registry.
579. From the foregoing analysis, the Tribunal concludes that the fragmentation made by Claimants did not have a business purpose in and for itself, and that by doing so

⁵³⁵ Siel Siel Report, and Transcript, 1832:11-22; 1833:1-11.

⁵³⁶ Whether or not an EV is required in an instance where an easement is created from a fragmentation of a larger property is debated among the Parties. Ms. Priscilla Vargas, expert testifying on behalf of Respondent stated that the exemptions contemplated under local laws and regulations do not apply, in contrast to the position taken by Mr. Ortíz, expert on behalf of Claimants. But the Tribunal believes that it is unnecessary to examine this issue, insofar as there is no dispute on the application of article 94 of the Biodiversity Law and that that a project needs to be examined in its entirety from an environmental standpoint. And the Las Olas Project was definitely one single project, divided into five phases.

⁵³⁷ https://en.wikipedia.org/wiki/Tropical_Storm_Alma.

Claimants evaded improperly the need to secure an EV precisely in the area where a wetland has been confirmed to have existed. Since the Las Olas Project was deemed to be a single development project, Easement Section should have been part of the D1 Application as well.

(g) Were Wetlands and Forests Damaged at the Las Olas Project Site

580. There have been allegations and expert reports submitted by Respondent as to the existence of wetlands in other sites of the Las Olas Project, but also strong allegations to the contrary on the part of Claimants.
581. During his presentation during the December Hearing, Mr. Kevin Erwin confirmed that of the seven wetlands found in the Las Olas Project site, Wetland # 1 contained hydric soils and was an impacted wetland that had been drained and filled.
582. There is clear evidence to the fact that the location of the wetland is precisely in the Easement Section – in easements 8 and 9, and works were undertaken precisely in that site. The evidence includes not only the reports prepared by SINAC, but also aerial photography and the KECE Report that performed the drills to confirm the existence of hydric soils in the areas where road work and other works were carried out.
583. The Parties agree that one of the elements that define a wetland is the existence of hydric soils. Regardless of whether there are such conditions in other areas within the property, it is an accredited fact to the Tribunal that these existed at the time the Las Olas Project was being developed and, more importantly, at the time works were carried out.
584. The report submitted by KECE contains aerial photographs that show (i) the wetland area in 2005, the area of activity and construction work carried out in 2009 and 2010 by Claimant⁵³⁸, and the situation of such area in 2016. There is no dispute among the Parties that such photographs show the area corresponding to easements 8 & 9 during the periods identified by the expert witness. Further, the KECE Report identifies the location of the

⁵³⁸ Figure 10, Second KECE Report.

bore holes made in their analysis⁵³⁹, and it is precisely in those locations that they found the existence of wetlands that had been drained and filled.

585. The Tribunal determines that such wetland was indeed impacted by works undertaken by Claimants, and that the reaction taken by Respondent as a consequence was merited under the laws of Costa Rica, which are not inconsistent with international law. Further, that the actions taken by the Respondent are not arbitrary nor in breach of the obligations under DR-CAFTA.
586. Forests were also impacted. This is clearly identified in the KECE Report aerial photographs that were attached to the Report comparing the forest canopy in 2005, 2010, 2011 and 2016⁵⁴⁰.
587. As to whether a construction permit was secured where Wetland # 1 was located, the Tribunal concludes that the works performed in the easements 8 and 9, where Wetland #1 is located, were undertaken without a permit.

2. Whether the Prosecutor's Office of Respondent failed the Claimants

(a) The Claimants' Position

588. In their submissions, Claimants expressed the alleged breach on the part of Respondent to its obligations under Article 10.5 DR-CAFTA by carrying out actions which constitute abuse of rights under customary international law, or the failure to undertake a good faith, criminal investigation of the bribes allegedly solicited from Claimants⁵⁴¹, or conducting the criminal prosecution below the customary international law minimum standard as reflected in the prohibition against arbitrariness⁵⁴².
589. Claimants have stated that the conduct of Prosecutor Martínez with regard to "... the criminal investigation, prosecution, and trial of Mr. Aven epitomizes arbitrary and discriminatory treatment in every respect"⁵⁴³. They add that 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 only conclusion

⁵³⁹ *Id.* Figure 3.

⁵⁴⁰ *Id.* Figures 6,7,8 and 9.

⁵⁴¹ Claimants' Reply Memorial, ¶¶ 366, 371, 379, pages 123-127.

⁵⁴² Claimants' Memorial, ¶¶ 369-380, pages 128-132.

⁵⁴³ Claimants' Post-Hearing Memorial, ¶ 208, page 104.

that can be drawn is that Mr. Martínez intentionally targeted Mr. Aven due to reasons that had nothing to do with actual criminal culpability”⁵⁴⁴.

590. They contend that once the investigation regarding the criminal charges was commenced, Mr. Aven was fully cooperative, and met with Mr. Martínez, the prosecutor, approximately three weeks after the SETENA April 2011 Injunction⁵⁴⁵, whereby further works on the site under the 2008 Environmental Viability Permit were prohibited⁵⁴⁶. Mr. Martínez then instructed, as has been described above in Section VI, additional environmental reports from INTA (asking to take soil samples from the site of the alleged wetland at Las Olas in order to determine, in accordance with the legally applicable criteria, whether the soil was characteristic of a wetland), and from MINAE. Although the INTA report of May 5, 2011 indicated that there were no wetlands on the property, the report issued by MINAE (ACOPAC-CP-081-11), reached the opposite conclusion and determined that the Las Olas Project site did contain wetlands.
591. According to Mr. Aven and Mr. Damjanac, Mr. Martínez then conducted a site visit on May 13, 2011 in search of the alleged wetlands referenced in the MINAE report, and during the site visit Mr. Martínez also accused them of unlawfully cutting down trees in violation of Costa Rican forestry laws. They have argued that two forestry experts later confirmed through expert reports and testimony offered at trial that the cutting of the type of trees identified was not prohibited under the laws of Costa Rica⁵⁴⁷.
592. Claimants have argued that despite the fact that under Costa Rican law criminal liability requires proof of intent to commit a crime, and that Mr. Martinez’s criminal investigation revealed overwhelming evidence that Mr. Aven and Mr. Damjanac did not intend to commit crimes – but rather that they had been diligent in seeking an Environmental Viability from SETENA and construction permits from the Municipality of Parrita and in enlisting the support of qualified experts such as their Environmental Regent to ensure that they were in compliance with Costa Rican law — Mr. Martínez not only failed to abandon his investigation and decline to file criminal charges, but formally filed criminal

⁵⁴⁴ *Id.*

⁵⁴⁵ Resolution 839-2011-SETENA dated April 13, 2011, (R-122).

⁵⁴⁶ Claimants’ Memorial, ¶ 174, page 48.

⁵⁴⁷ *Id.*, ¶ 178, page 50.

charges on October 21, 2011 against Mr. Aven and Mr. Damjanac with the Criminal Court of Aguirre and Parrita in the Second Judicial Circuit of Puntarenas⁵⁴⁸. Mr. Aven was charged with two crimes: (1) ordering the draining and drying of wetlands in violation of Article 98 of the Wildlife Conservation Law; and (2) invading a conservation area in violation of Article 58 of the Costa Rican Forestry Law, while Mr. Damjanac was charged with illegal exploitation of a forest in violation of Article 61 of the Costa Rican Forestry Law.

593. Claimants have argued before the Arbitral Tribunal that 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, where the crime of draining and filling a wetland carried an economic sanction of less than US\$500, rather than the possibility of a three-year prison sentence contemplated in the new law⁵⁴⁹. This, because the Wildlife Conservation Law was amended by the passage of Article 1 of Law 8689 on December 4, 2008, which did not come into effect until June 24, 2009, and did not have retroactive effect in accordance with Section 34 of the Costa Rican Constitution and Section 11 of the Costa Rican Criminal Code. This means, in addition, that 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 sanction⁵⁵⁰.
594. These allegations demonstrate that, in the view of Claimants, Mr. Martínez failed to consider the timeline of the alleged offenses of draining and filling of wetlands that took place in or around early 2009 when determining the criminal law that was applicable to Mr. Aven, and also failed to apply that law in good faith.
595. Claimants have also indicated that as Prosecutor, Mr. Martínez failed to follow the 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: (i) soil permeability; (iii) the presence of hydrophytic vegetation; and (3) a slope below or equal

⁵⁴⁸ Exhibit C-142.

⁵⁴⁹ Claimants' Post-Hearing Brief, ¶ 239, page 122.

⁵⁵⁰ *Id.*, ¶ 240, page 122.

to five percent⁵⁵¹. If the reports that Mr. Martínez 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 the guidelines from filing criminal charges⁵⁵².

596. The criminal complaint failed to provide credible evidence in the opinion of Claimants, who also alleged that they timely submitted the INTA May 2011 report⁵⁵³ concluding there were no wetlands, and a report from Mr. Minor Arce Solano, the Costa Rican forestry consultant, who conducted multiple site visits before concluding in a September 2010 report that the Las Olas property did not contain a forest⁵⁵⁴; and that findings from such report were consistent with a December 2011 report issued by INGEOFOR, a Costa Rican environmental consulting company which – after reviewing the findings of MINAE mentioned above disagreed and also determined that the Las Olas Project site did not contain a forest, but largely consisted of a cattle pasture⁵⁵⁵.
597. Besides the above allegations, Claimants have argued that under Article 7 of the Wildlife Conservation Law, until September 2009, wetlands were required to be created and delimited by Executive decree, and have cited a series of criminal court cases that in their belief are particularly relevant to this point. Three of four cases addressing wetlands before Resolution 14288-2009 of Constitutional Chamber of September 9, 2009, concluded that such decree was necessary because this would presuppose a process of expropriation and payment of compensation in dealing with an affectation of private property⁵⁵⁶. Thus, prior to September 2009, in the absence of an Executive decree, a wetland did not exist for the purposes of the Wildlife Conservation Law.
598. The record shows that the criminal court scheduled a preliminary hearing in Mr. Aven and Mr. Damjanac's case on June 19, 2012, at which time the judge had the opportunity to determine whether the prosecutor had enough evidence to take a case to trial; if not, the judge might dismiss certain charges or the prosecutor might choose not to pursue

⁵⁵¹ Claimants' Post-Hearing Brief, ¶ 230, page 118.

⁵⁵² *Id.*, ¶ 233, page 119.

⁵⁵³ DE-INTA-255-2011 (C-124).

⁵⁵⁴ Minor Arce Solano Forestry Report, September 2010 (C-82).

⁵⁵⁵ INGEOFOR Forestry Report, December 2011 (C-148).

⁵⁵⁶ Claimants' Post-Hearing Brief, ¶ 242, pages 123-124.

certain charges. Mr. Aven has alleged he presented the relevant environmental permits and reports, including the INTA May 2011 report and the INGEOFOR report, while the government attorneys presented no additional evidence. In Claimants' view, despite the "overwhelming evidence" presented in support of Mr. Aven's case, the judge determined that three of the charges should proceed to trial⁵⁵⁷.

599. The criminal trial of Mr. Aven and Mr. Damjanac began on December 5, 2012. According to Claimants, the defense strategy proved to be effective in exposing the multiple flaws in the prosecution's case, but due to the application of an obscure procedural rule, it did not lead to a favorable outcome for Mr. Aven or Mr. Damjanac. Claimants described the inconsistencies found by the Judge in the proceeding, Mr. Rafael Solis Gullock, and the fact that the prosecution's witnesses repeatedly made unsubstantiated and contradictory assertions that severely damaged their credibility, while the defense presented extensive documentary evidence demonstrating that there were no wetlands or forests on the property and that the Las Olas Project had properly obtained the necessary government permits and approvals⁵⁵⁸.
600. Taking the above into account, Claimants contend that 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 treatment⁵⁵⁹. Specifically, Respondent has breached the Article 10.5 fair and 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 the prosecutorial guidelines for the alleged "draining and filling of a wetland." Mr. Martínez lacked, they add, any basis to prosecute a crime premised on the assumption that a wetland existed at Las Olas⁵⁶⁰.
601. Claimants have argued against the application of the so-called "ten-day rule" found under Article 336 of the Costa Rican Criminal Code, which provides that if a criminal trial has been suspended for ten days or more, the proceedings must be discontinued and the trial

⁵⁵⁷ Claimants' Memorial, ¶ 187, page 53.

⁵⁵⁸ *Id.*, ¶¶ 188 - 197, pages 54-57.

⁵⁵⁹ Claimants' Post-Hearing Brief, ¶ 209, page 106.

⁵⁶⁰ *Id.*, ¶ 210, page 107.

must start over; a re-trial is generally automatic under Article 336 after the ten-day lapse, unless the Parties agree to proceed with the trial despite the ten-day interruption. As the trial was about to close, it was “abundantly clear that the prosecution had failed to meet its burden, and had committed a series of drastic missteps in regard to its witnesses and lack of documentary evidence”⁵⁶¹. The proceedings were suspended because of the December Holidays of 2012, and scheduled to resume in mid-January 2013. Then, upon the closing of arguments to be made by Mr. Aven’s counsel and the prosecutor several days later, Judge Solis was required to take a leave for a medical condition, which provoked an extension of days that triggered a suspension of more than ten days. Although Mr. Aven’s counsel sought to obtain the consent of the Prosecutor (Mr. Martínez), Claimants argue that he unjustifiably refused to waive the rule. As a consequence, “... all of the evidence presented by the defense, including the all of the expert reports, expert testimony, government permits, and resolutions, would have to be presented in their entirety a second time at a new trial. In addition, the prosecution would unfairly have the opportunity to study the contradictory and un-substantiated statements made by its own witnesses to ensure that this did not happen a second time”⁵⁶².

602. Despite the allegations and statements from Respondent in its defense, Claimants confirmed in their Post-Hearing Brief that the parties in the criminal case were entitled to agree to waive the ten-day rule and wait until Judge Solis was prepared to return so that the trial could resume. They alleged that, Mr. Aven’s attorney offered to enter into such an arrangement with Mr. Martínez, but the latter refused.
603. There were two other matters alleged by Claimants on unfair treatment and denial of proper judicial protection. The first relates not only to the unfair criminal prosecution of Mr. Aven on the part of Respondent, but also the failure to investigate and act on the formal complaint and charges filed by Mr. Aven against Mr. Bogantes for the alleged bribery attempt which Mr. Aven states to have occurred⁵⁶³. Mr. Aven has no reason to believe that his complaint was ever even considered, as it was arbitrarily dismissed, without any notice to Mr. Aven, based on a “lack of evidence.” There was a failure on

⁵⁶¹ *Id.*, ¶ 198, page 57.

⁵⁶² *Id.*, ¶ 201, page 59.

⁵⁶³ Criminal complaint against Christian Bogantes, September 16, 2011 (C-139).

the part of Costa Rica as a host State to “properly to investigate, or punish, credible complaints by a foreign investor about corruption”, and how 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 this constitutes a “failure to honour the due diligence obligation to provide “protection and security” under customary international law”⁵⁶⁴.

604. Secondly, Mr. Aven has alleged that he, along with Mr. Damjanac, received email threats to his life and security⁵⁶⁵, and was also the victim of a shooting incident while driving in a Costa Rican highway⁵⁶⁶. When Mr. Aven reported the incident to proper local police authorities, Claimants argue that authorities failed to take action⁵⁶⁷. It was in light of these circumstances and context that they decided to leave Costa Rica and not return to face the new trial and risks.
605. But this came at a huge cost to Mr. Aven, because he was unable to stand trial in Costa Rica when his trial was rescheduled. Given his decision to leave Costa Rica, a warrant for his arrest was issued and Costa Rica issued an INTERPOL Red Notice, by way of which all INTERPOL member countries were advised that the extradition of Mr. Aven was sought. Claimants have argued that given the nature of the alleged offense, this action represented an enormous overreaction by the Respondent⁵⁶⁸, and Mr. Aven has testified that he suffered financially, physically and emotionally during the period the Red Notice was in place, and continues to have adverse effects because of the stress resulting from the above incidents⁵⁶⁹.

(b) The Respondent’s Position

606. Respondent flatly rejects the claims submitted on this issue. It has stated that Costa Rica has the right to investigate environmental crimes and that, upon filing of criminal complaints by Mr. Steve Bucelato – the neighbor to the Project Site - on February 2,

⁵⁶⁴ Claimants’ Reply Memorial at ¶¶ 370-371, page 124, and Claimants’ Post-Hearing Brief, ¶ 252, page 128.

⁵⁶⁵ Email messages from an unknown person, exhibits C-164, C-165 and C-166.

⁵⁶⁶ David Aven First Witness Statement, ¶¶ 232-233, page 71.

⁵⁶⁷ Claimants’ Memorial, ¶¶ 206-211, pages 60-61.

⁵⁶⁸ *Id.*, ¶¶ 213-211, pages 61-62.

⁵⁶⁹ Mr. Aven First Witness Statement, ¶ 248 page 75.

2011, and the report issued by SINAC on January 3, 2011⁵⁷⁰, and the instruction to ACOPAC (through Mr. Picado Cubillo) of January 28, 2011 to file criminal charges⁵⁷¹, such case was assigned to Mr. Martínez, who had already been involved in criminal charges filed against Mr. Aven because of the alleged Forged Document.

607. As described earlier, once the criminal complaints were filed the Prosecutor requested SINAC to confirm the existence of wetlands at the Project Site. SINAC in turn requested that (i) the PNH – the specialized agency in wetlands that is under its jurisdiction — to provide an official determination as to whether there were wetlands located at the Las Olas Project site, and (ii) INTA to provide a soils study. Based on the studies performed on site by PNH and INTA on March 16, 2011, they issued their respective reports. Respondent indicates that PNH issued the report on March 18, 2011, concluding that there were wetlands that had been affected by works being carried out at the site, and INTA found on May 5, 2011 that although the land presented hydrological characteristics, it did not meet the typical criteria of a wetland. In view of the conclusions, the Prosecutor ordered further studies from PNH, which were carried out on May 13, 2011, to delimit the extension of the wetland. Subsequent reports from SINAC on July 7, 2011, and from ACOPAC on October 3, 2011, confirmed damages to the ecosystem and found alleged illegal felling of trees, respectively. It was at this point that the Prosecutor concluded that there was sufficient evidence to file criminal charges⁵⁷².
608. Respondent recalled that Mr. Martínez’ duty was to enforce Costa Rica’s environmental laws and apply the *in dubio pro natura* principle, and testified as to the analysis he undertook of the INTA Report and his rationale for relying on the PNH Report on wetlands rather than the INTA Report. Specifically, because (i) INTA has no competence to determine the existence of wetlands in Costa Rica, as it is a body dependent on MAG (the Ministry of Agriculture and Livestock) and charged with the improvement and sustainability of the agricultural and livestock sector in Costa Rica, not focused on the environment; (ii) the methodology that Mr. Cubero relied on to carry out his survey

⁵⁷⁰ SINAC site visit report (ACOPAC-CP-003-11) requesting, among others, that a criminal complaint be filed in light of the damage to the wetlands, felling of trees and the alleged Forged Document. Exhibit 5 to the Barboza Expert Report.

⁵⁷¹ ACOPAC-CP-015-11-DEN dated January 28, 2011 (R-66).

⁵⁷² Respondent’s Counter-Memorial, ¶ 206-211, pages 60-61.

constitutes an agricultural instrument rather than a hydric soils specialized instrument; and (iii) the findings of Mr. Cubero were undermined by his conclusion that “the soils in the area were not typical of a wetland” since Martínez never requested from INTA a report on whether there was a wetland or not on the Project Site, and Mr. Cubero exceeded his competence by concluding that there was not a wetland on the site⁵⁷³.

609. On the allegation by Claimants that they suffered a “systemic miscarriage of administrative justice, which involved multiple agencies (whilst apparently excluding others) over a span of two years that has few analogues in modern arbitral practice”⁵⁷⁴, Respondent argues that the Claimants’ entire argument on the alleged “arbitrariness” of Costa Rican officials is based on the alleged conduct of ONLY one individual- the Prosecutor, Mr. Martínez⁵⁷⁵. But at the same time, Respondent contends that since Claimants assert the existence of “chronic problems with the Costa Rican criminal justice system”, it therefore requested that their claim be considered pursuant to international law under the test for “denial of justice” because it is obvious that Claimants’ case is based on the conduct of the judiciary⁵⁷⁶. If this is the case, Respondent then argued that for an investor to allege a violation under the denial of justice standard, it is necessary that all the available judicial remedies have been exhausted. As the tribunal in *Pantehniki v. Albania* held⁵⁷⁷, “Denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole. ...This is a matter of a simple hierarchical organization of civil-law jurisdictions: first instance/appeal/cassation. One cannot fault Albania before having taken the matter to the top.” However, as stated above, Claimants rejected that they brought a denial of justice claim⁵⁷⁸.

610. In response to the allegations of Claimants regarding the December 2012 trial of Messrs. Aven and Damjanac, Respondent addressed these, pointing to the strength of the case and

⁵⁷³ Respondent’s Post-Hearing Brief, ¶ 941, pages 203-204, and citing ¶¶ 78 and 98 of First Witness Statement of Mr. Luis Martínez.

⁵⁷⁴ Claimants’ Memorial, ¶ 367, page 128.

⁵⁷⁵ Respondent’s Counter-Memorial, ¶ 522, page 126.

⁵⁷⁶ *Id.*, ¶¶ 567, page 139.

⁵⁷⁷ *Id.*, ¶ 568, page 139. RLA-36, *Pantehniki S.A. Contractors & Engineers v. Albany*, ICSID Case No. ARB/07/21, 30 July 2009, ¶ 96; 102.

⁵⁷⁸ Claimants’ Post-Hearing Brief, ¶¶ 430-434, pages 206-209.

the witnesses presented by the prosecution. In his testimony⁵⁷⁹, Mr. Martínez confirmed his request to the criminal court to suspend the case because of scheduling issues and to renew within ten days. The fact that the Judge was not able to resume the trial within such period meant that any judgment rendered, in breach of Article 336 of the Criminal Code, could be subject to annulment on appeal, because the 10-day rule is a guarantee to the defendant and therefore a right that cannot be waived. Mr. Martínez researched the current state of the law (at the time), consulted with his supervisor, and jointly agreed with the representative of the Attorney General's Office not to waive the rule because the most recent case law at the time of the events pointed to a nullification of the proceedings if the ten-day rule was waived⁵⁸⁰.

611. Respondent claims that the case that was brought against Messrs. Aven and Damjanac was not groundless, but rather was diligently handled. Mr. Martínez had collected substantial evidence supported by documents, results from technical studies he commissioned, numerous witnesses, and had first-hand knowledge of the damage caused by Claimants to the environment because he visited the Project Site⁵⁸¹ on several occasions. In its Post-Hearing Brief, Respondent provided value to the fact that Mr. Martínez was also accompanied by Mr. Jorge Gamboa from the National Wetlands Program (PNH) on both visits to the Las Olas Project Site, who was able to provide reference to the vegetation, water conditions and soils⁵⁸².
612. Respondent has also alleged that the experience of the criminal counsel engaged by Messrs. Aven and Damjanac – Mr. Néstor Morera, was primarily in the intellectual property field as reflected not only in his bio but also acknowledged during the cross-examination at the hearing, highlighting the discrepancies between Mr. Morera's allegations and the realities of Costa Rican law. In its Post-Hearing Brief, Respondent presented a table purporting to show what it alleges to be serious flaws in his knowledge and experience⁵⁸³.

⁵⁷⁹ First Witness Statement Luis Martínez Zúñiga, ¶¶ 120-121, page 28.

⁵⁸⁰ Respondent's Post-Hearing Brief, ¶¶ 957-958, pages 208-209, citing the Cross Examination of Luis Martínez, Day 4 Transcript, 1121:5-14.

⁵⁸¹ *Id.*, ¶ 589, page 144.

⁵⁸² *Id.*, ¶ 915, page 194.

⁵⁸³ *Id.*, ¶ 920, pages 195-197.

613. Although Claimants allege different violations and the fact that under Article 1 of Law 8689, any alleged offenses for draining and filling a wetland predating the date it came into effect (June 24, 2009) carried just an economic sanction of less than US\$500, Respondent first argued that this argument was newly brought by Claimants at the December Hearing, but further that despite such allegation, the argument fails to take into account the existence of “continuing crimes” (*delito continuo o de efectos permanentes*) prescribed in Article 32 of Costa Rica’s Criminal Procedure Code, pursuant to which the commission can take place during a continuing period of time (i.e. the refilling of a wetland). In the “statement of facts” of the criminal complaint against Mr. Aven and Mr. Damjanac filed by Mr. Martínez, he described the facts upon which he based the criminal complaint as beginning in or around April 2009 and continuing until February 2011⁵⁸⁴.
614. In response to the argument that there was no evidence of intent because Mr. Aven was acting under the presumed authority of SETENA’s Environmental Viability Permits and construction permits, and therefore he lacked the intent required to have committed the crime⁵⁸⁵, Respondent points to the fact that Mr. Martínez’s discretion “allowed him to decide that he had sufficient evidentiary elements to show Mr. Aven’s intent to commit the crime”, and that the record showed that there were a series of irregularities during the operation of the Las Olas Project that were documented which allowed a finding of intent on the part of Mr. Aven⁵⁸⁶.
615. On the subject of the Claimants’ allegations that Mr. Martínez supposedly failed to apply the Prosecutor Guidelines for the Prosecution of Environmental Crimes of 2010—which Respondent alleges Claimant introduced for the first time at the cross-examination of Mr. Martínez, Respondent indicated that the prosecutor’s underlying evidence under the Guidelines is a visual inspection of the site, preferably accompanied by a hydrogeologist or any other specialist in wetlands. Further, the lack of documentation regarding the existence of the wetland before drainage works began can be supplemented with testimony from people who knew the site before the event, and that the contradiction

⁵⁸⁴ Attached as Exhibit C-142, page 4, and quoted in Respondent’s Post-Hearing Brief, ¶ 934, page 201.

⁵⁸⁵ Respondent indicated that at the December Hearing Mr. Morera conceded that his “most powerful argument was the lack of intent. The lack of the demonstration of the intent by the disregarding of the objectiveness principle” rather than violations of constitutional rights, quoting Redirect Examination of Néstor Morera, Transcript, 776:14-16.

⁵⁸⁶ Respondent’s Post-Hearing Brief, ¶ 921, page 197.

between the requirements contained in the Guidelines and those established in the MINAE Decree No. 35803 regarding the three basic requirements for a wetland to exist— (i) soil permeability; (ii) hydric vegetation; and (iii) a slope of no less than or equal to 5%—, can easily be resolved through the application of the hierarchy of laws principle, which would determine that the MINAE Decree has a higher standing⁵⁸⁷.

616. But, Respondent argues, it was ultimately for the judge assigned to Mr. Aven’s case to rule on his criminal liability and not Mr. Martínez; the latter’s duty was to present to the judge a hypothesis based on probability and it was for the judge to balance the evidence presented by both Parties to decide whether Mr. Aven could be found guilty⁵⁸⁸.
617. As described previously, when the new trial was set for December 2013, and counsel to Mr. Aven advised that his client would not be attending the hearing because Mr. Aven had left the country of fear for his life, a trial hearing was re-scheduled for January 13, 2014. The Court then issued the INTERPOL Red Notice since Mr. Aven did not appear to face trial.
618. Respondent has advised that the Court held re-trials only against Mr. Damjanac, acquitting him by judgment dated February 5, 2014. The decision was appealed by the Attorney General Office, however, and the Court of Appeals reversed the lower court’s ruling and ordered a new trial. Therefore, a new trial against Mr. Damjanac is currently pending⁵⁸⁹.
619. On the subject of the complaint on the alleged bribery attempts by Mr. Bogantes (the SINAC officer who allegedly solicited a bribe from Mr. Aven) that occurred in July and August of 2010, Respondent first questions the motivation of filing the charges a year later (in September 2011) once Claimants’ project had already been suspended by a series of injunctions issued by SETENA, SINAC and the TAA and the criminal proceedings against Mr. Aven had already been initiated⁵⁹⁰. In any case, Respondent added that the

⁵⁸⁷ *Id.*, ¶¶ 960-965, pages 209-211.

⁵⁸⁸ *Id.*, ¶ 927, page 199.

⁵⁸⁹ *Id.*, ¶ 586, page 143.

⁵⁹⁰ Respondent’s Counter-Memorial, ¶¶ 597-600, page 146.

investigation did not actually advance because of a lack of cooperation and lack of interest by Mr. Aven⁵⁹¹.

(c) The Tribunal's Analysis

620. The Tribunal has examined the allegations and the record of the criminal case, and believes that the Prosecutor (Mr. Martínez) had sufficient elements under the laws of Costa Rica to file charges against Messrs. Aven and Damjanac. These were initially based on the SINAC January 2011 report containing its conclusions and recommendations after its multiple visits to the Las Olas Project site in December 2010, which were later confirmed by SINAC. The Prosecutor then commenced his own investigation and gathered evidence through interviews with SINAC and Municipality officials, personal visits to the site, including interviews with workmen carrying out construction work and Mr. Aven, neighbors' complaints, and reports issued by different agencies to determine the existence of wetlands, and the damages to the ecosystem in the Las Olas Project.
621. Although Claimants expressed during the December Hearing an argument that Mr. Aven was charged under Article 98 of the Wildlife Conservation Law with a crime that did not exist prior to September 2009, because the provision was amended on December 4, 2008 with the passage of Article 1 of Law 8689, and therefore that Mr. Aven should not be charged retroactively, the Tribunal deems that the Prosecutor had reasonable grounds to treat such conduct as a continued crime (*delito continuo o de efectos permanentes*) under the Code of Criminal Procedure of Costa Rica. Indeed, during the December Hearing Judge Chinchilla, expert witness on criminal law for Costa Rica submitted by Respondent, explained that refilling of a wetland falls within the category of a continuing crime contemplated in Article 98 of such Code because its commission can take place during a continuing period of time⁵⁹². The Tribunal notes that in the factual background of the of the criminal complaint against Mr. Aven and Mr. Damjanac, Mr. Martínez described the facts upon which he based the criminal complaint as “beginning in or around April 2009 and continuing until February 2011”.

⁵⁹¹ *Id.*, ¶ 601, page 146.

⁵⁹² Transcript, 1582:4-22 and 1583: 1-4.

622. Whether or not the conduct of Mr. Aven could be considered as a “continued crime” or not, and whether the evidence gathered by Mr. Martinez was sufficient to proceed into trial, is not for this Tribunal to determine. This is an issue that would need to be decided by the criminal judge taking knowledge of the case in Costa Rica. At the time, the criminal judge had access to arguments and evidence from both the prosecution and the defense to weigh whether there were elements, including intent to commit the crime, i.e., refilling the wetland. And based on that evidence and arguments, he determined that the matter should proceed to trial.
623. This means that the fact that the Prosecutor filed charges based on what he believed to be supported by local regulations and sufficient factual elements did not, *per se*, immediately affect Messrs. Aven and Damjanac. Both were provided the opportunity to be represented by counsel of their choice and were subject to the laws and procedures available in Costa Rica.
624. The record in this arbitration shows that a trial was properly scheduled, but holidays and a medical circumstance involving the Judge at Parrita subsequently arose, which events triggered the need to have a new trial based on the so-called “ten-day rule” that has been challenged by Claimants and discussed above. None of these events can be deemed to be attributable to a deficiency on the part of Respondent, nor the fact that the new trial has not been commenced and concluded.
625. The laws of Costa Rica do contemplate the so-called “ten-day-rule” for the protection of a defendant in a criminal case. Article 336 of the Code of Criminal Procedure⁵⁹³ provides that a trial hearing must be continuous and may be suspended for not more than ten days. If it is delayed, then there needs to be a new trial.
626. There is no evidence to the effect that such rule was improperly applied in this case. Although Claimants have strongly argued that the Prosecutor failed to agree to waive such rule at the request made by Mr. Aven through his attorney, and that decision was unjustified, the Respondent has argued the risk that accepting such a request had been deemed by courts in Costa Rica, including the Supreme Court of Costa Rica through its

⁵⁹³ Código Procesal Penal, Law No. 7594.

Constitutional Chamber to be a direct and immediate cause for a mistrial, since the immediacy is part of a due process.

627. The evidence presented by the Parties in respect of this point is not consistent, and each has submitted conflicting precedents in each direction⁵⁹⁴. Claimants, to the effect that the waiver agreed by the defendant and the prosecution is to be respected, while Respondent with the contrary position. Some court precedents cited by each of the Parties are also in conflict, and these have not been resolved. However, it is to be noted that the prevailing position at the time of the decision of the Prosecutor (January 2013) indeed risked an annulment of the criminal proceedings. Judge Chinchilla confirmed this in her expert report⁵⁹⁵, indicating that the criminal system was amended in 2012 and therefore the valid legal precedents to be taken into account rise afterwards, and that the most recent case at the time was in support of the Prosecutor's position. She made reference to the terms of the current Criminal Code which clearly provides that certain defects in the proceeding cannot be cured, even with the agreement of the parties involved.
628. The Tribunal takes note that the criminal trial in first instance found Mr. Damjanac not guilty of having committed a crime. Although the sentence was subsequently reversed and a final outcome is pending because of the filing of this claim by Claimants, no final judgment has been rendered.
629. There have also been allegations to the effect that the Prosecutor, Mr. Martinez, was not open to settling the case in a manner satisfactory to the parties involved. Both Claimants and Respondent acknowledged that prior to the trial there was a settlement offer. Mr. Morera, the attorney engaged by Mr. Aven, further indicated that even the judge overseeing the case promoted the idea, when in Mr. Morera's belief this is not normal or the ordinary course during the trial stage. But this was not pursued, primarily because Mr. Aven was not interested. During his cross-examination at the December Hearing, Mr. Morera indicated "And at that moment [Mr. Aven] said he was not interested because it was already a matter of--of a personal thing, a matter of pride to wipe out his name, to clean his name before he, his family, and his investors and the society because David

⁵⁹⁴ See First Witness Statement of Gerardo Martinez, ¶ 125, and Exhibits C-231, C-234.

⁵⁹⁵ Expert Report of Judge Rosaura Chinchilla, 71, ¶¶ 69-71, pages 27-29.

Aven was already an investor and with other investments in Costa Rica with other businesses”⁵⁹⁶.

630. Thus, the Tribunal believes that there is no evidence that the Prosecutor or the judicial system in Costa Rica acted or failed to take actions that are not in accordance with its internal laws.
631. Claimants’ position on the issuance of an INTERPOL Red-Notice equally fails. They also rely on the arguments regarding the amendments to the Wildlife Conservation Law, and that the amendment did not apply retroactively; however, the Tribunal has deemed that the charges brought were reasonably supported and when Mr. Aven failed to appear to the new trial, there was justification on the part of the Respondent to issue such Red Notice. Perhaps the use discretion could have suggested that a different action be taken by Respondent considering the fact that the crime allegedly committed by Mr. Aven was not for a more serious offense, but the discretion validly resided on Respondent.
632. On the subject of the first of the other two allegations dealing with actions or inaction taken by the authorities in Costa Rica, Claimants have taken the position that the Municipality and other authorities took action against the Las Olas Project based on accusations found in the complaints submitted by Mr. Bucelato, which accusations were unsubstantiated, baseless accusations⁵⁹⁷ expressed because of a “personal vendetta” of Mr. Bucelato- who meddled through a “campaign” to cancel the Las Olas Project.
633. As has been argued by Respondent in the case, under the laws of Costa Rica individuals have the right to submit complaints in respect to environmental projects⁵⁹⁸, and authorities have the duty to investigate and take action⁵⁹⁹. Thus, the fact that the Municipality, the Defensoría de los Habitantes and other authorities took action based on those complaints was justified under applicable laws, and the principle of citizen participation recognized by Costa Rican administrative courts. Besides, the complaints were supported. There were allegations related to the felling of trees and the construction works in wetlands areas, which have been evidenced to have occurred. Further, the

⁵⁹⁶ Transcript 762:3-9.

⁵⁹⁷ Claimants’ Post-Hearing Brief, ¶¶ 18 and 19, page 17.

⁵⁹⁸ First Witness Statement, Luis Martínez Zúñiga, ¶ 9.

⁵⁹⁹ Expert Report of Rosaura Chinchilla, ¶. 56; First Witness Statement of Luis Martínez, ¶¶. 9 and 16.

Tribunal noted that it was not only Mr. Bucelato who filed complaints, but their various other neighbors in Esterillos Oeste also signed the various complaints.

634. The argument of Claimants that the investigation by Mr. Martinez of the criminal complaint filed by Mr. Bucelato against Mr. Aven on the grounds of damages to the wetlands and forest, as well as the forgery of official documents, was unjustified and that he could have sought a higher burden of proof and examine the background of prior complaints made by Mr. Bucelato, is equally without merit. It is a matter of record that Mr. Martinez found no evidence that Mr. Aven had prepared the alleged Forged Document, and this supports the position of Respondent as to his independence and investigation. It is clear to the Tribunal that there was a reciprocal animosity among Mr. Aven and Mr. Bucelato. Mr. Aven himself filed criminal charges for defamation against Mr. Bucelato in October of 2009⁶⁰⁰, which charges were not subsequently supported, ratified or followed.
635. Regarding the alleged inaction on the part of the prosecutor's office to take action on the filing of a criminal complaint against the alleged bribes solicited by Mr. Bogantes, the Tribunal also finds that there are no merits to the allegations on "abuse of authority" expressed by Claimants. Although the solicitation of bribes is indeed a punishable crime in Costa Rica, and should not be tolerated under any jurisdiction, there is no corroborating evidence to the fact that there was such a solicitation except for the statement made by Mr. Damjanac. Even though in their Notice of Arbitration, Claimants stated that "The Investors have in their possession a tape recording of the solicitation of this bribe"⁶⁰¹, such supposed tape recording was never produced as evidence during the arbitration. There is also no evidence that there was retributory action against Claimants for having failed to comply and pay the bribe. Quite the contrary; the Tribunal notes that one day before the date of the alleged bribe solicitation (on August 29 or 30, 2010), Mr. Bogantes had responded to Defensoría de los Habitantes, as head of the Subregional Office for Aguirre and Parrita of SINAC, confirming that, based on the SINAC Report of July 2010, there were no wetlands in the Las Olas Project site⁶⁰². How could he have

⁶⁰⁰ Exhibit C-89.

⁶⁰¹ Claimants' Notice of Arbitration, ¶ 31, page 10.

⁶⁰² Exhibit C-80.

solicited a bribe one day later from Mr. Damjanac? It doesn't make sense. There were subsequent reports indeed issued by Mr. Bogantes as an employee of SINAC as to the existence of wetlands; but rather than these having turned to be incorrect – which could allow an outside observer to understand why a bribe could be solicited as a means of extortion, the existence of wetlands has been supported by evidence in this arbitration. Finally, the Tribunal notes that neither Mr. Damjanac nor Mr. Aven filed any charges of the alleged attempt to receive a bribe until one year later - on September 16, 2011. Although Claimants were within their rights to file at any time prior to any statute of limitations, the fact that they did so until after Mr. Aven and Mr. Damjanac were the subject of investigation creates uncertainty in motive. For the above reasons, the Tribunal equally rejects this claim.

636. Claimants do not meet the standard for bringing a denial of justice claim. Rephrased as part of their case in chief, the Tribunal finds that the Claimants have not carried their burden. Mr. Aven made a choice to leave Costa Rica and not return for his re-set trial. This inexorably set in motion the machinery about which he chiefly complains and the courts of Costa Rica were not given any opportunity to fix the problems he alleged existed.

XI. DAMAGES

A. The Claimants' Position on Damages

637. In their Post-Hearing Brief, Claimants indicate that their 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 process⁶⁰³, and then attempt to argue that their damages have been incurred as provided under Article 10.16 (1)(a)(ii) of the DR-CAFTA which places a burden on 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 10.7.⁶⁰⁴

⁶⁰³ Claimants' Post-Hearing Brief, paragraphs 552-583, pages 255-267.

⁶⁰⁴ *Id.*, ¶ 604, page 277.

638. Claimants argue that the theoretical basis for Dr. Abdala’s approach on quantum is both clear and not really disputed by Mr. Hart. Recognizing that prior investment-treaty Tribunals have found fault with applying a pure discounted cash flow (“DCF”) valuation to a pre-operational asset, Dr. Abdala combined the DCF approach and the appraisal approach⁶⁰⁵. Claimants believe this approach provides an excellent means of valuing pre-operational assets and overcomes previous Tribunals’ reluctance to adopt the DCF methodology in cases such as this one.

1. **Using this modified combined approach, the Claimants’ backgrounds are irrelevant to valuation.**

639. Claimants believe that Respondent’s quantum expert incorrectly focuses on the backgrounds of the Claimants and is overly critical of their approach to the management of the Las Olas Project⁶⁰⁶. Claimants noted that this irrelevant theme continued during the February Hearing, when Mr. Hart continued to make disparaging assessments about the individual Claimants’ prior business dealings and lack of prior successful resort business experience.

640. Claimants believe the irrelevance of Mr. Hart’s testimony was shown during Respondents’ cross-examination of Dr. Abdala. Dr. Abdala showed that as a general matter of valuation, the Claimants’ characteristics are relevant, but only to a very limited extent:

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]⁶⁰⁷.

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 stage⁶⁰⁸.

641. Thus, in the view of Claimants Dr. Abdala made it clear that in his view that there are really only two potentially relevant issues: (i) the price at which the willing seller would

⁶⁰⁵ *Id.*, ¶ 625, page 284.

⁶⁰⁶ *Id.*, ¶ 627, page 285.

⁶⁰⁷ Transcript, 2153:15-19.

⁶⁰⁸ Transcript, 2155:7-12.

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)⁶⁰⁹.

642. Accordingly, as Dr. Abdala argued, the skill or lack thereof of the seller is simply not relevant because the underlying assumption of his valuation exercise is that the whole project is sold to a buyer who would take over the management of the project. Claimants contend that Mr. Hart conceded that this was the relevant benchmark for the valuation exercise because Mr. Hart admitted that the objective of the quantum exercise in this case is to assess the fair market value of the project. However, as the Claimants noted in their oral closing, after appearing to agree with Dr Abdala, Mr. Hart then ignored fair market valuation methodology by testifying that the only appropriate valuation method for a pre-operational asset is a sunk costs valuation – the provable sunken costs are equivalent to “fair market value” for pre-operational assets according to Mr. Hart⁶¹⁰.

643. In summary, while Claimants believe that both experts agreed on the fundamental theoretical basis for valuation: a transaction between a willing seller and a willing buyer, Claimants note that Respondent never produced any such expert opinion meaning that the Tribunal was presented with only one correct economic evaluation – Dr. Abdala’s⁶¹¹. Claimants then contrast this with the many inaccuracies present throughout Mr. Hart’s reports and testimony. For example, Claimants note that Mr. Hart claimed that “Las Olas is not a beachfront property. The property has 150 meters of beachfront that you walk through a property they don’t own onto a concession area”⁶¹². Claimants say this is a reference to the hotel site⁶¹³ and that this part of the Project Site was owned by the Claimants in May 2011, the proper date of valuation. Claimants admit that while this property was sold subsequently for a fraction of its true value -- because it was subject to

⁶⁰⁹ Claimants’ Post-Hearing Brief, paragraph 630, pages 285.

⁶¹⁰ *Id.*, ¶¶ 633-634, page 288.

⁶¹¹ *Id.*, ¶¶ 635-636, page 289.

⁶¹² Transcript, 2245:8-11.

⁶¹³ The section of the Las Olas Project site 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. Claimants’ Post-Hearing Brief, paragraph 640, pages 290-291.

the injunction prohibiting construction -- this attempt to mitigate the losses caused by Costa Rica's unlawful acts cannot affect the valuation of its fair market worth because they did still own the land at the date of valuation. In sum, Claimants assert that the Respondent's argument 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 factually incorrect⁶¹⁴. And they point to other substantial inaccuracies in Mr. Hart's evidence that 77 lots were sold before May 2011⁶¹⁵.

644. The Claimants contend 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 the sales. On the basis of the data in Annex II, only 22 lots were sold before May 2011 (analyzed by the date of inscription, which is the only form of date provided in Annex II).

645. Again, Claimants argue that Post-May 2011 sales have no relevance whatsoever to the fair market 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 should be deducted from the total valuation damages figure⁶¹⁶. Dr Abdala explained in his opening presentation that he has done just that exercise in his model⁶¹⁷. Claimants finally note that an additional 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.

646. In summary, the Claimants' position⁶¹⁸ in respect of ownership of the physical land is:

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;

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

⁶¹⁴ *Id.*

⁶¹⁵ *Id.*, ¶ 642, page 291.

⁶¹⁶ *Id.*, ¶ 647, page 293.

⁶¹⁷ Transcript, 2139:8-2143:2.

⁶¹⁸ Claimants' Post-Hearing Brief, ¶ 648, pages 293-295.

both cases the lots remain part of the Claimants' investment for the purposes of this arbitration;

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;

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;

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;

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.); and

Sales post-May 2011 were made in a distressed situation, with the prohibition on construction work in place and the dispute with Costa 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.

647. Claimants also contend that the position in respect of the Concession Site is a legal question to be resolved by the Tribunal, and not one for the quantum experts to determine.

2. Claimants contend that Mr. Hart's methodology is inappropriate and does not assess the fair market value of the Project.

648. Having agreed on a fair market valuation, Claimants note that Mr. Hart focuses on an entirely different methodology: an analysis of what he calculates to be the sums spent by the Claimants on the Project⁶¹⁹. Claimants say this cost approach has no basis in economic theory, or in common sense contrary to Mr. Hart's testimony that his approach is "*commonly used in real estate valuations*"⁶²⁰.

649. Claimants note⁶²¹ that Mr. Hart's method has several major flaws:

⁶¹⁹ *Id.*, ¶ 672, page 306.

⁶²⁰ Second Expert Report, Timothy Hart, ¶ 217, page 110.

⁶²¹ Claimants' Post-Hearing Brief, ¶ 673, pages 306-307.

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;

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;

His only attempt at providing support for the use of the “cost” approach is based on the report issued by HVS Consulting and Valuation Services (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);

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; and

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).

650. Claimants respond that it is quite clear that the historic sums spent do not necessarily bear any relation to the sums required to replace the full value of the asset as at May 2011⁶²². 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 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.
651. 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.

⁶²² *Id.*, ¶ 676, page 307.

3. Interest

652. Both parties agree that interest is recoverable as damage. The 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 bonds⁶²³. Claimants respond that 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 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 rate⁶²⁴.
653. Claimants note that Article 10.7.3 DR-CAFTA provides that in the case of a lawful expropriation, interest is to be paid at a “commercially reasonable rate”. 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 in the view of Claimants Mr. Hart’s proposal does not accord with the requirements imposed by the DR-CAFTA⁶²⁵.
654. 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 actions⁶²⁶. This is a commercially reasonable rate, they add, 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.

4. Moral Damages

655. The issue of moral damages was not addressed in much detail during the hearings; however, Claimants insist it is an important part of their case. The Reply Memorial

⁶²³ *Id.*, ¶ 700, page 318.

⁶²⁴ *Id.*

⁶²⁵ *Id.*, ¶ 701, page 319.

⁶²⁶ *Id.*, ¶ 702, page 319.

considered in detail the justifications for Mr. Aven's claim for moral damages⁶²⁷. In short, Claimants say 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 other 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 List⁶²⁸.

656. Claimants strongly argue that 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 alleged crimes. 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 Memorial⁶²⁹.

657. According to Claimants, 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 attest. 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 Google⁶³⁰.

5. Prejudgment Interest

658. Claimants acknowledge that one issue which was not addressed in any real detail during the February Hearing is the question of pre-judgment interest. Claimants thus note that the Respondent does not dispute that, if the Claimants are awarded damages as of May

⁶²⁷ Claimants' Reply Memorial, Section IV.D(2), pages 138 – 143.

⁶²⁸ Claimants' Post-Hearing Brief, ¶ 703, page 319.

⁶²⁹ *Id.*, ¶ 704, page 320.

⁶³⁰ *Id.*, ¶ 705, page 320.

2011, the Respondent ought also to pay interest on those damages from May 2011 until payment of the Award⁶³¹.

6. Consequential Damages

659. On this topic Claimants argue that Mr. Aven and the Las Olas Project sold lots to buyers on the basis that the Project would proceed to conclusion. 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 and 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 completed⁶³².
660. 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 options⁶³³.
661. As a result, Claimants request that 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.

B. The Respondent's Position on Quantum

662. In the event that the Tribunal considers that Respondent should be held liable due to the violations of standards of protection under DR-CAFTA, it is Respondent's position that (i) the quantification of Claimants' damages should be based on a cost approach method, and (ii) Mr. Aven is not entitled to moral damages⁶³⁴.
663. Respondent adds that Claimants have presented a damages claim that is grossly inflated. The property was acquired for a mere fraction of the total amount claimed and has not been developed. There is no evidence whatsoever that there is a track record of any

⁶³¹ *Id.*, ¶ 710, page 322.

⁶³² *Id.*, ¶ 711, page 322.

⁶³³ These figures are set out in the table on page 10 of Mr. Aven's First Witness Statement.

⁶³⁴ Respondent's Post-Hearing Brief, ¶ 1039, page 228.

profits, as there are no structures or infrastructure on the Las Olas Project Site. Therefore, Claimants' damages claim is an exercise of pure speculation⁶³⁵.

664. Investment arbitration is not the realm in which pure speculation can or should occur. It is the forum to redress loss. There is no evidence of loss by Claimants. A theoretical concoction of a potential project that bears no relation to what exists at the Las Olas Project Site today is not evidence⁶³⁶.
665. The investment is a plot of land. Although, admittedly, in a lovely location and relatively close to the coast, the mere location does not, however, convert it into a US\$100 million profitable project.
666. Dr Abdala's report projects sales that have never existed. He projected construction that had never begun. Dr Abdala projected interest from buyers that never manifested itself. He projected successful purchases by wealthy and persistently keen timeshare owners that never showed up.
667. In reality, the Claimants are amateur investors with little to no clue on how to develop resorts, let alone one in Costa Rica. Moreover, Dr Abdala's report relies on a methodology never before seen in investment arbitration. Claimants and Dr Abdala have no authority or basis to invent a previously never-seen cash flow. Dr Abdala ultimately tries to hedge his overly creative theory by introducing some kind of risk factor - to arbitrarily reduce the number claimed based on the likelihood of success - a likelihood grounded in US practice, but the US is as irrelevant to this case as any other country.
668. At the time of submission of its Post-Hearing Brief, Respondent argued that Claimants continued to own the land (as much as the evidence showed they do), and it has not been expropriated. Therefore, according to Claimants, if they overcome the environmental challenges they currently face and start developing the project as they seemingly wish to do (and could be entitled to do), they would then be set to make the US\$ 100 million Dr. Abdala insists they could make, having already pocketed US\$100 million from the Republic of Costa Rica in this arbitration⁶³⁷.

⁶³⁵ *Id.*, ¶ 1040, page 232.

⁶³⁶ *Id.*, ¶ 1041, page 232.

⁶³⁷ Respondent's Post-Hearing Brief, ¶ 1048, page 229.

1. **The quantification of Claimants' damages should be based on a cost-approach method**

669. Respondent points out that both quantum experts have agreed that in order to calculate Claimants' damages they have to determine the fair market value (the "FMV") of the Las Olas Project⁶³⁸ and the nature of the Las Olas Project as a pre-operational project⁶³⁹.
670. Nevertheless, both experts disagree on the method to determine the FMV of a pre-operational project company: while Dr. Abdala proposes a hybrid, combined approach based on a DCF method and the market approach, Mr. Hart considers that the cost approach to be the most appropriate method because the Las Olas Project cannot be considered a going concern. Claimants, in effect, admitted in December 2010 -- very close to May 2011, the date of valuation -- that the Project was raw land, in a dead market, with almost no sales⁶⁴⁰. This is not a going concern.
671. In attempting to calculate the potential damages under the cost method, Dr Hart had to base his calculations on Claimants' disorganized accounting. He was able to identify a total of US\$1,840,385 in costs which seem to be legitimately related to the Las Ola Project, plus US\$1,647,000 for the original purchase price of the entire property⁶⁴¹.
672. Nevertheless, Dr Hart had to reduce this figure in light of the fact that Claimants did not own all of the lots that comprised the Las Olas property⁶⁴². Because Claimants have not provided detailed costs per lot, Dr Hart estimated that the damages must be reduced by at least 22% based on the proportion of the square meters of these non-Claimants owned lots. Therefore, his final estimation of total damages is US\$2,720, 160⁶⁴³.
673. Respondent stands by Dr. Hart's reports as to the determination of valuation day (May 2011) and interest (pre-award at the 10-year U.S. Treasury Rate or the 6-month LIBOR+2)⁶⁴⁴.

⁶³⁸ Transcript, 2125:17-18; Transcript 2241:21.

⁶³⁹ Transcript, 2123:8-11; Transcript 2256:17-18.

⁶⁴⁰ Respondent's Post-Hearing Brief, ¶ 1056, page 230.

⁶⁴¹ Second Hart Report, ¶¶ 230-231, page 115; Exhibit 12 to Second Hart Report (C-27).

⁶⁴² Second Hart Report, ¶ 232, page 116; Exhibit 6 to Second Hart Report, Map of Las Olas Property showing lot ownership.

⁶⁴³ Second Hart Report, ¶ 233, page 116.

⁶⁴⁴ Respondent's Post-Hearing Brief, ¶ 1062, page 232.

2. Dr Abdala's approach is entirely speculative

674. Respondent contends that Dr. Abdala's methodology is completely inappropriate to estimate the damages in this case, and it does not resemble a valuation that would be used by a real-life buyer or seller⁶⁴⁵. Dr. Abdala says he based his novel approach in literature, but the only scholar quoted is Professor Damodaran⁶⁴⁶. Dr. Abdala has not provided any example, Respondent adds, in which the proposed model was applied in the real world, or by any other investment arbitration tribunal.
675. The "hybrid" model proposed by Dr. Abdala can be summarized as follows⁶⁴⁷:
- [Value of the project as a going concern (based on a DCF model) * a supposed success rate] + [supposed value of the land with existing permits and partial construction (based on pre-existing appraisal) * supposed failure rate] - Value of the land under its restricted used (based on a comparable approach)
676. Since Dr Abdala could not purely rely on a DCF model (due to the acknowledged pre-operational character of the Las Olas Project), he mixed two valuation approaches for each component of the calculation: income approach (DCF) and market approach (pre-existing appraisal and comparables)⁶⁴⁸.
677. Respondent further argues that although the DCF model is introduced as an element of his complex analysis, the largest portion of damages is based on the value of the project as a going concern, which has to be calculated using a DCF, a model that cannot be applied to this case from any perspective. DCF is not applicable because Las Olas has never been a going concern. There are minimal sales in order to extrapolate certain future cash flows. Even worse, Claimants did not even provide the necessary supporting documentation for these minimal sales⁶⁴⁹.
678. DCF is also not applicable because there are no historical figures upon which to base critical inputs such as sales volume, net sales prices, construction costs, and operational costs. This was recognized by Dr. Abdala during the Hearing⁶⁵⁰.

⁶⁴⁵ *Id.*, ¶ 1063, page 232.

⁶⁴⁶ First Abdala Report, ¶ 54, page 31 (CLEX-041).

⁶⁴⁷ As cited in Respondent's Post-Hearing Brief, ¶ 1064, page 233.

⁶⁴⁸ *Id.*, ¶ 1065, page 233.

⁶⁴⁹ *Id.*, ¶¶ 1066-1067, page 233.

⁶⁵⁰ *Id.*, ¶ 1069, page 234, citing the cross-examination of Dr. Abdala, Transcript, 2202:16-22; 2203: 1-6.

679. Consequently, any amount derived from Dr. Abdala’s estimation calculation is inflated and uncertain, since each of the inputs of the key drivers that Dr Abdala used to calculate the value of Las Olas as a going concern (lots, houses, condos, timeshares, and hotel) are totally speculative⁶⁵¹.
680. Respondent includes in its Post-Hearing Brief a table detailing how the comparables used by Dr Abdala as part of the market approach calculation are based on inappropriate and unrealistic data which does not relate to the Las Olas Project at all⁶⁵²:

| | Component of calculation | Data on which Dr. Abdala relies | Criticism |
|--------------------------|---------------------------------|--|---|
| Value as a going concern | Lots | <ul style="list-style-type: none"> • Prices from Remax website in 2015 • Prices from E-mail from El Mistico in 2015 | <ul style="list-style-type: none"> • Prices are not from 2011 • No adjustments for any changes in the real estate market • El Mistico is not similar to Las Olas |
| | Hotel | Profit margin based on hotel sale transactions in Panama, Mexico and Central America | Not clear how these hotels are comparable to a hotel in Costa Rica |
| | Condos | <ul style="list-style-type: none"> • Prices from Remax website in 2015 • Prices from E-mail from El Mistico in 2015 | <ul style="list-style-type: none"> • Prices are not from 2011 • El Mistico is not similar to Las Olas |
| | Houses | <ul style="list-style-type: none"> • Buyers would have held the properties 10 years before selling, and 90% of the properties will be sold after that period, based on statistics from the National Association of Realtors investment and vacation home buyers | The survey only includes data for US households, not comparable to Costa Rica |
| But for expected value | Probability of success | <ul style="list-style-type: none"> • Statistical evidence of survivorship from the Bureau | <ul style="list-style-type: none"> • US data is not comparable to data for business in Costa |

⁶⁵¹ Second Hart Report, Section 7.2.

⁶⁵² Respondent’s Post-Hearing Brief, ¶ 1071, page 234.

| | | | |
|---|--|---|--|
| | | of Labor and Statistics <ul style="list-style-type: none"> • Successful comparable resorts such as Los Sueños, El Mistico, Residencias Málaga and Costa del Sol | Rica <ul style="list-style-type: none"> • The resorts are not comparable |
| Residual Value (Value of the Land in its current state) | | <ul style="list-style-type: none"> • Prices from Remax website in 2015 • Three comparable properties | <ul style="list-style-type: none"> • Prices are not from 2011 • No adjustments for any changes in the real estate market • No detailed listings associated with the three comparable properties |

681. Respondent alleges that these examples show that Dr Abdala’s calculation is based on information which does not relate to the Las Olas Project, it is too uncertain, subjective, and dependent upon contingencies⁶⁵³. Respondent adds that tribunals have been understandably reluctant to rely on this type of information, suggesting that extreme caution is required in assessing any claim for compensation under the DCF methodology when the project does not have a record of profitability. In *Siag v. Egypt*, where Dr. Abdala also acted as an expert, the Tribunal held:

Mr Abdala of LECG was asked by the Tribunal a question concerning the differences in valuing the future profits of a business which has been operating for several years, as compared to a "business opportunity "which is still in the development phase. Mr Abdala very candidly acknowledged that there is one particular difference and this is that "... in the [case) that you have a track record of profitability you could say that you have a higher degree of certainty as to what to expect of the performance of the business in the future.

[...]

682. Points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for “young” businesses lacking a long track record of established trading. In all probability that reluctance ought

⁶⁵³ *Id.*, ¶ 1072, page 235.

to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has no trading history at all⁶⁵⁴.

683. In other words, a DCF would be perfectly applicable to a scenario of an ongoing project because the prospective buyer would estimate the cash flows and discounts to the valuation date, applying a discount rate that accounts for the various types of risks that cash flows are subjected to, as well as the time value of money⁶⁵⁵.
684. However, the future cash streams of a project must be estimated with a reasonable degree of certainty, which does not exist in this case. The Las Olas Project cannot qualify as an ongoing project when it has generated only 16 sales in 9 years⁶⁵⁶.
685. Respondent then concludes that, in light of the pre-operational character of Las Olas (no historical figures upon which to base critical inputs such as sales volume, net sales prices, construction costs, and operational costs), that the most appropriate method to calculate any damages is the cost approach method suggested by Dr. Hart⁶⁵⁷.

3. Mr. Aven is not entitled to moral damages

686. Respondent emphasizes that the claim made by Claimants to the effect that a finding of the Tribunal of a bribery solicitation "would be worthy of sanctions and moral damages would be one of the options to [provide] that sanction"⁶⁵⁸ is a totally unsupported statement⁶⁵⁹. Respondent notes that in the only case where a Tribunal awarded moral damages to the claimant, the tribunal found that the claimant was exposed to physical duress and the state's breach of the treaty was deemed malicious⁶⁶⁰. Respondent adds that the facts of *Desert Line v. Yemen* certainly cannot be applied to the case at hand

⁶⁵⁴ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 19, 2009, ¶¶ 567 and 570 (RLA-173); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, May 20, 1992, ¶ 189 (CLA-38).

⁶⁵⁵ Second Hart Report, ¶ 106.

⁶⁵⁶ Exhibit C-98.

⁶⁵⁷ Respondent's Post-Hearing Brief, ¶ 1091, page 239.

⁶⁵⁸ Claimants' Opening Statement, Day 1 Transcript, 115:21-22.

⁶⁵⁹ Respondent's Rejoinder Memorial, ¶¶ 1106-1129, pages 276 - 281.

⁶⁶⁰ *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008 (CLA-85).

where Claimants have not even brought clear and convincing evidence to support the alleged bribe solicitations⁶⁶¹.

687. Respondent concludes that the other two cases that Claimants rely on were decided *ex aequo et bono* or had as applicable law domestic rules so their reasoning cannot support a finding of moral damages under international law⁶⁶².

C. The Tribunal's Analysis

688. Considering that the Tribunal has determined that Respondent has not breached its obligations under DR-CAFTA, whether under Article 10.5 and Annex 10-B, or Article 10.7(1) and Annex 10-C,⁶⁶³ the Tribunal equally concludes that there are no damages or other compensation due to Claimants.

XII. RESPONDENT'S COUNTERCLAIM

A. Respondent's Position: Claimants are Liable for Environmental Damage and therefore must Restore the Las Olas Ecosystem

689. During its submissions, Respondent has argued that Claimants undertook works that adversely impacted the Las Olas Project Site considerably, affecting the environment⁶⁶⁴. The evidence rendered supports Respondent's counterclaim, and hence, the Tribunal should order Claimants to repair the damages caused by their activity noting that (i) the Tribunal has jurisdiction over counterclaims under DR-CAFTA; (ii) Respondent has proven the existence of damages to the Las Olas ecosystem⁶⁶⁵.

1. The Tribunal has jurisdiction over counterclaims under DR-CAFTA

690. Respondent argues that the Tribunal has jurisdiction over the counterclaim raised by Respondent since (i) the text of the DR-CAFTA envisages the possibility for respondent states to bring counterclaims against investors for misconduct for which they

⁶⁶¹ Respondent's Post-Hearing Brief, ¶ 1093, page 240.

⁶⁶² Respondent's Rejoinder Memorial, ¶ 1106.

⁶⁶³ See Section X.E.585 above.

⁶⁶⁴ Respondent's Counter-Memorial, ¶ 647-655; Respondent's Rejoinder Memorial, Section XI.

⁶⁶⁵ Respondent's Post-Hearing Brief, ¶ 1095, page 241.

are liable, and (ii) reasons of procedural economy and efficiency justify that the claim and its counterclaim shall be resolved in the same proceeding⁶⁶⁶.

2. **The text of the DR-CAFTA envisages the possibility for respondent states to bring counterclaims against investors**

691. To determine whether an investment tribunal has jurisdiction over counterclaims, the Tribunal has to look at the text of the Treaty. DR-CAFTA neither excludes nor prohibits an investment tribunal to exercise its jurisdiction over counterclaims under Chapter 10. The relevant provisions provide as follows:

Section B: Investor-State Dispute Settlement

Article 10.15: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.

[...]

Article 10.16: Submission of a Claim to Arbitration

In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) **the claimant, on its own behalf**, may submit to arbitration under this Section a claim

- (i) that the **respondent has breached**
 - (A) an obligation under Section A,
 - (B) an investment authorization, or
 - (C) an investment agreement;

and

(ii) that **the claimant** has incurred loss or damage by reason of, or arising out of, that breach; and

(b) **the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly**, may submit to arbitration under this Section a claim

- (i) that the **respondent has breached**

⁶⁶⁶ *Id.*, ¶ 1096, page 241.

- (A) an obligation under Section A,
- (B) an investment authorization, or
- (C) an investment agreement.

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach." (Emphasis added).

692. These provisions are completely neutral as to the identity of the claimant or respondent in an investment dispute arising between the parties, allowing a State Party to sue an investor in relation to a dispute concerning an investment in that country. Accordingly, Respondent believes that the text of the DR-CAFTA encompasses counterclaims by respondent States within the jurisdiction of the Tribunal.
693. Furthermore, the only provision referring to "counterclaims" in contained in Article 10.20.7 of DR-CAFTA, clarifies that:

A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

694. It follows that, except for a counterclaim by a respondent State alleging that "claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract," Respondent's right to counterclaim under the Treaty is contemplated and falls within the scope of jurisdiction of a tribunal constituted under the Treaty⁶⁶⁷.

3. Reasons of procedural economy and efficiency justify that the claim and its counterclaim shall be resolved in the same proceeding.

695. Respondent's counterclaim is based on the damages suffered by Costa Rica as result of Claimants' operation of the Las Olas Project, and thus, the relationship between the claim and the counterclaim is direct. Therefore, reasons of procedural economy and efficiency

⁶⁶⁷ *Id.*, ¶ 1100, page 242.

justify that the groundless claim put forward by Claimants and this counterclaim be adequately resolved by this Tribunal in the same proceeding⁶⁶⁸.

696. In this sense, the tribunal in *Urbaser v. Argentina* found that because Argentina's counterclaim was related to the investment and related to the same concession, there was enough support to establish a connection between the investor's claim and the counterclaim. The tribunal held:

The Tribunal observes that the factual link between the two claims is manifest. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the Counterclaims well. The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimants' failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT. It would be wholly inconsistent to rule on Claimants' claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome⁶⁶⁹.

697. Respondent also points to *Burlington v. Ecuador* – a recent decisions in the field in addition to *Urbaser v. Argentina*, where Tribunals have admitted jurisdiction to hear counterclaims brought by respondent states for violations of human rights and environmental damage⁶⁷⁰. In this case, the Tribunal imposed an award of US\$ 39.2 million on the investor for environmental damage. This trend is likely to continue and shows that investment tribunals are ready to hear counterclaims when dealing with investor wrongdoing⁶⁷¹.

⁶⁶⁸ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Separate Opinion of Michael Reisman, November 28, 2011 (hereinafter *Spyridon Roussalis v. Romania*) (RLA-99).

⁶⁶⁹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016 (hereinafter *Urbaser v. Argentina*), ¶ 1151 (RLA-174).

⁶⁷⁰ *Urbaser v. Argentina* (RLA-174); and *Burlington Resources Inc v. The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, February 7, 2017 (hereinafter *Burlington v. Ecuador*) (RLA-175).

⁶⁷¹ Respondent's Post-Hearing Brief, ¶ 1104, page 243.

4. **Respondent has proven the existence of damages to the Ecosystems on the Project Site.**

698. Respondent requests that, after the Tribunal asserts jurisdiction to adjudicate Respondent's counterclaim under the Treaty, the Tribunal should find that (i) Claimants unlawfully impacted a wetland, which caused environmental damage to the Project Site; and therefore, (ii) Claimants ought to repair the damage caused to the ecosystem⁶⁷².

5. **Claimants unlawfully impacted a wetland, which caused environmental damage to the Project Site.**

699. To develop the Las Olas Project, Claimants assumed investment obligations which gave rise to *bona fide* expectations by Costa Rica that their investment would indeed be made ensuring the protection to the environment. By failing to make their investment appropriately, Claimants violated domestic provisions as well as the obligation under customary international law to respect the environment. Such obligation is binding not only upon sovereign States, but also upon legal and natural persons such as Claimants:

The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune **from becoming subjects of international law**. (Emphasis added)

700. Furthermore, the text of DR-CAFTA supports such understanding when it allows investors to invoke rights resulting from international laws:

If the BIT therefore is not based on a corporation's incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.

701. Accordingly, Claimants' conduct shall be analyzed under the concept of international responsibility:

[t]o the extent that international organizations and other legal and natural persons may also be subjects of international law, the concept of "state

⁶⁷² *Id.*, ¶ 1105, page 243.

responsibility" may also inform the principle of the liability of other international persons under the rules of public international laws.

702. Thus, Claimants' unlawful works which caused environmental damage to the Project Site entail a wrongful act on their part under the rules of international responsibility which has to be repaired.
703. Respondent has proven that Claimants unlawfully impacted a wetland by filling and drainage works, causing environmental damage to the Project Site. Recalling that Claimants allege that Respondent has not shown causation between Claimants' conduct and the damage to the ecosystem⁶⁷³, Respondent argues that the requirement of causation is in direct connection with the burden of proof that Claimants must bear on environmental matters under Costa Rican law. Under the precautionary principle, Respondent added, the burden of proof showing no environmental harm always falls on the developer.
704. This was also recalled in *Burlington v Ecuador* in the context of a counterclaim on environmental damage. Although the Tribunal had to apply domestic law, the principles to be applied were similar -if not the same- as in the case at hand:

Applied to the present case, the rule contained in Article 397(1) means that once Ecuador has made a showing of the existence of environmental harm reasonably related to the Consortium's risky activities, for example by way of the IEMS sampling exercise, **Burlington then carries the burden of demonstrating that there is no harm or, if there is harm, what its limits are**⁶⁷⁴. (Emphasis added)

705. Therefore, when it comes to the environment, proof of causation is not required by the party alleging it. The precautionary principle reverses the burden of proof on the developer and causation is presumed:

While the Tribunal will revert to the issue of successive tort liability, **it disagrees with Burlington's position that Ecuador must prove that the harm was caused during the time of the Consortium's operations. Indeed, proof of causation is not required. Causation is presumed**, with the result that liability ensues from the mere exercise of a risky activity and the occurrence of harm that is plausibly connected to such activity as far as the type and location of the harm is concerned⁶⁷⁵. (Emphasis added)

⁶⁷³ Claimants' Reply Memorial, ¶ 449, page 146.

⁶⁷⁴ *Burlington v. Ecuador* (RLA-175), ¶ 227.

⁶⁷⁵ *Id.*, ¶ 232.

706. Even though it was Claimants' burden to evidence their lack of liability regarding the damage to Las Olas, Respondent has conclusively shown that Claimants are liable for the refilling of Wetland No. 1 and the consequential environmental damage caused to the ecosystem. Respondent relies on the First and Second KECE Reports as well as the Green Roots Report's conclusive findings.
707. During the Hearing, Claimants tried to blame the Municipality for the works that impacted Wetland No. 1. As described in Section X, those assertions are baseless because the Municipality at all times undertook works off-site and Claimants' own construction logs show that drainage works were carried out by Claimants' employees onsite⁶⁷⁶.
708. As Respondent has demonstrated in this proceeding, Claimants unlawfully impacted a wetland by refilling and draining works, breaching imperative norms of environmental protection in several respects. Respondent has also shown -although it did not have the burden to do so- how Claimants impacted the biodiversity and the ecological conditions of the Project Site, causing environmental damage.

6. Claimants ought to repair the damage caused to the ecosystem

709. Having demonstrated Claimants' wrongful act, it is a well-established principle under international law that a wrongful act involves responsibility, as recognized in Article 1 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001). The obligation to make reparation has been developed by the Permanent Court of International Justice in the *Chorzow Factory* case⁶⁷⁷, and the approach has been reaffirmed, in the environmental context, by the International Court of Justice in the Case Concerning the Gabčíkovo-Nagymaros Project⁶⁷⁸.
710. DR-CAFTA envisages that reparation of an injury caused by an international wrongful act shall take the form of compensation and/or restitution:

⁶⁷⁶ Minute of Inspection #2, April 4, 2011 (R-509); Minute of Inspection #3, April 12, 2011 (R-510); Minute of Inspection #4, April 18, 2011 (R-511); Minute of Inspection #6, May 2, 2011 (R-512).

⁶⁷⁷ *Case Concerning the Factory of Chorzów (Germany v. Poland)*, Claim for Indemnity, Merits, Judgment No. 13, PCIJ, September 13, 1928, p. 21 (RLA-53); *In Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 682 (RLA-52).

⁶⁷⁸ *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Judgment, September 25, 1997, p. 149 (RLA-176).

Article 10.26: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest;
- (b) **restitution of property**, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. (Emphasis added)

711. Restitution is aimed at re-establishing or restoring the situation which existed before the wrongful act was committed, provided and to the extent that it is not materially impossible⁶⁷⁹. In effect, restoration of environmental harm has been upheld by international investment tribunals⁶⁸⁰.

712. Thus, under international law principles for reparation and Article 10.26(b) of the Treaty, the Tribunal should order Claimants to repair the damage caused to Respondent by restoring the ecosystems' natural conditions.

713. In the case at hand, Annex C of the First KECE Report contains a feasible restoration plan that can be put into place to restore the environmental damage caused to Wetland No. 1. This includes:

- Remove all fill placed in Wetland No. 1;
- Plug and/or backfilling drainage ditches in Wetland No. 1;
- Re-grade terraced hills in those areas within the project site that were once forested and have been cleared;
- Remove unpermitted roads that have significantly affected the condition of the wetlands and forests on the Las Olas Site;
- Plant and/or direct seed a ground-cover of native, herbaceous plant species in order to accelerate vegetative cover in the restored wetland and to stabilize the re-graded; and
- Plant a specified number and species of native forest trees as seedlings to accelerate the recovery of the forest, rehabilitate and stabilize the soils, as the last phase of the restoration.

⁶⁷⁹ Philippe Sands, *Principles of International Environmental Law* (CUP 2003, 2 Ed) 883 (RLA-37).

⁶⁸⁰ *Burlington v. Ecuador* (RLA-175).

714. Mr Erwin reminded the Tribunal during the Hearing of the possibility of restoring the Las Olas Project Site:

So, what's actually required to restore this site and put the ecosystem back together is basically to reverse the existing drainage where the roads are cut into the hillsides with ditches, where ditches have been constructed across a wetland, like in Wetland Number 1, removing at least some amount of the fill in Wetland Number to make it--to make it whole again⁶⁸¹.

715. Based on the above, without prejudice to Respondent's jurisdictional and admissibility objections, in light of the damage caused to the Las Olas Ecosystem, and the feasibility of restoration of the land, Respondent respectfully requests that the Tribunal order Claimants to pay damages to Respondent in order to restore "the situation that existed prior to the occurrence of"⁶⁸² Claimants' wrongful impact of the Project Site.

B. The Claimants' Position

716. In their Reply, Claimants argue that the counterclaim is not grounded in law or in fact, and should be dismissed. They state that dispute settlement under Chapter 20 of the DR-CAFTA is exclusively limited to disputes involving Parties to the Agreement. It is thus impossible for a "respondent," as the term is used in Article 10.26, to be anything other than a host State⁶⁸³.

717. Claimants also contend that even though DR-CAFTA Article 10.20(7) seems to contemplate the existence of some sort of counterclaim ("A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation ...") the provision's counterclaim reference is general in application, intended to cover any potential rights of counterclaim, set-off, or the like under municipal law or indeed any other potential for a, and that this type of clause has been included in every US Model BIT since the beginning of the program in the early 1980s⁶⁸⁴.

⁶⁸¹ Transcript, 1887:15-22.

⁶⁸² Articles on State Responsibility, p. 213 (CLEX-273).

⁶⁸³ Claimants' Reply Memorial, ¶ 447, page 145.

⁶⁸⁴ *Id.*, ¶ 448, page 145.

718. Finally, they claim that Respondent has failed to show (beyond mere assertion by Mr Erwin in his Expert Report) that the Claimants have caused damage to the environment at Las Olas, resulting in loss to the Respondent.

C. The Tribunal's Analysis

719. Respondent's Counterclaim against the Claimants was originally introduced in its Counter Memorial⁶⁸⁵ based on the findings listed in Annex C of the First KECE Report, according to which there are man-made activities on the Las Olas Project Site, summarized as follows:

[C]learing of forest, terracing hill slopes, constructing roads, excavating drainage ditches, installing culverts and inlet structures and the construction of one single-family residence in a filled wetland⁶⁸⁶.

720. Costa Rica charges the Claimants with the alleged considerable environmental damage caused by them. Those charges include: a) The construction of the roads, excavation of ditches, placement of culverts and the removal of the vegetative strata of the forest; b) the increasing of soil sedimentation; c) the filling and draining of wetlands.

721. Costa Rica asserts that the Claimants were aware of the ecological sensibility of Las Olas site through the Protti Report, but they decided to disregard it and failed to disclose the report to the competent authorities. They omitted to describe crucial elements of the ecosystems onsite, and fragmented their EV application to avoid communicating to SETENA an assessment of the full project site. In the Respondent's view, such conduct breached imperative norms of environmental protection so the Claimants must be liable for it.

722. Regarding the evidence of the alleged infractions by Claimants, Respondent basically refers to the KECE Expert Report. For the purpose of reparation, Respondent enunciated the steps for the site restoration as per the KECE Report⁶⁸⁷. Regarding the quantum of damages, Costa Rica observed that:

The cost of restoration can only be quantified upon review of an appropriate restoration plan to be prepared by Claimants and presented for approval to a

⁶⁸⁵ Respondent's Counter-Memorial, ¶¶ 647-662 pages 160-164.

⁶⁸⁶ First KECE Report, Annex C.

⁶⁸⁷ Respondent's Counter-Memorial, ¶ 657 page 162.

competent authority in Costa Rica. Moreover, quantification of such restoration plan would require a dedicated site visit. That notwithstanding, Mr Erwin anticipates that the restoration required for the Las Olas Ecosystem would be unlikely to be quantified at less than USD 500,000 to USD 1,000,000⁶⁸⁸.

723. In its Rejoinder, Costa Rica ratified its position. Regarding the evidence, it added that “the First and Second KECE Reports speak from themselves as to damage caused to the Project Site by Claimants”⁶⁸⁹ and “that there is not more conclusive proof than the findings on the actual conditions of the Project Site”⁶⁹⁰. With respect to the reparation, Costa Rica merely stated that:

Since Claimants did not advance any argument regarding the reparation approach under international law nor the Restoration plan, Respondent stands by the arguments developed in this regard in its Counter Memorial⁶⁹¹.

724. In its Post-Hearing Brief, Costa Rica further detailed its Counterclaim. In addition it submitted several photos and graphics, and for the first time advanced its views on causation and burden of proof on environmental damages. On this issue, Costa Rica stated:

The requirement of causation is in direct connection with the burden of proof that Claimants must bear on environmental matters under Costa Rican law. Under the precautionary principle, the burden of proof of the inexistence of environmental harm always falls on the developer⁶⁹².

725. In the same direction, Costa Rica concluded, “it was for Claimants to demonstrate that no harm to the environment had occurred in Las Olas Project. They have failed to do so”⁶⁹³.

726. Claimants has challenged the Tribunal’s jurisdiction over counterclaims, as analyzed below, and criticized the terms of Costa Rica’s Counterclaim, observing that even in the case the Tribunal decides it holds jurisdiction on the issue,

...the Respondent has failed to show (beyond mere assertion by Mr Erwin in his Expert Report) that the Claimants have caused damage to the environment at Las Olas, resulting in loss to the Respondent. The Respondent has made no attempt to explain how any of the allegedly detrimental activities described by Mr Erwin in his Expert Report and repeated by the Respondent at paragraphs 647 and 648 of

⁶⁸⁸ *Id.*, ¶ 658.

⁶⁸⁹ Respondent’s Rejoinder Memorial, ¶ 1150 page 285.

⁶⁹⁰ *Id.*, ¶ 1154, page 286.

⁶⁹¹ *Id.*

⁶⁹² Respondent’s Post-Hearing Brief, ¶ 1110 page 244.

⁶⁹³ *Id.*, ¶ 1113, page 245.

its Counter Memorial can be attributed to the Claimants' actions, nor has it evidenced the alleged environmental harm as a result⁶⁹⁴.

727. Claimants consider that the Respondent did not make “real effort to substantiate its vague ‘damage’ claims”⁶⁹⁵. Regarding damages, Claimants observed

...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 caused⁶⁹⁶.

728. Regarding Respondent's Counterclaim, the first point this Tribunal needs to determine is whether it has jurisdiction to examine it. As indicated above, Respondent affirms the Tribunal's jurisdiction on three main grounds:

- On the interpretation of some articles of DR-CAFTA, which, in the opinion of Costa Rica, have no sense but because counterclaims are admitted. Particularly articles 10.26.1 and 10.26.8 are referred to “the respondent”, in general, and not to the host State, what would mean that the respondent might be the investor. Costa Rica also invokes article 10.20.7 because it refers to some issues that a “respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason...” what would mean *a contrario* “that counterclaims which do not fall within the exception are within the jurisdiction of the Tribunal”.
- On reasons of procedural economy and efficiency, as Professor Michael Reisman exposed in his Declaration in *Roussalis Case*.
- In the Post-Hearing Brief, Respondent invoked also some recent decisions of Investment tribunals, particularly in the *Urbaser Case*.

729. Claimants strongly challenge the jurisdiction of the Tribunal over counterclaims. For them, dispute settlement under 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”. Furthermore, the Claimants consider that in any case, the Treaty does not give the Tribunal any authority to award the restitution Respondent demands because if “the Parties to the DR-CAFTA intended respondent States to have the ability to pursue counterclaims, they would have specified

⁶⁹⁴ Claimants' Reply Memorial, ¶ 449, page 146.

⁶⁹⁵ Claimants' Post-Hearing Brief, ¶ 435, page 209.

⁶⁹⁶ *Id.*, ¶ 438, page 210.

the Tribunal’s authority in this regard in the same way as they did in the case of investors’ claims.”

730. Notwithstanding, the Claimants made a short reference to the merits of Respondent’s counterclaim:

Even if this Tribunal were to disagree with the Claimants on the question of admissibility of any counterclaim, the Respondent has failed to show (beyond mere assertion by Mr Erwin in his Expert Report) that the Claimants have caused damage to the environment at Las Olas, resulting in loss to the Respondent. The Respondent has made no attempt to explain how any of the allegedly detrimental activities described by Mr Erwin in his Expert Report and repeated by the Respondent at paragraphs 647 and 648 of its Counter Memorial can be attributed to the Claimants’ actions, nor has it evidenced the alleged environmental harm as a result⁶⁹⁷.

731. The Tribunal agrees that, in general, the dispute settlement under DR-CAFTA is conceived for claims against host States. According to Article 10.16 any claim must indicate that the respondent has breached an obligation under Section A. Further, in Article 10.28 “claimant” is defined as “an investor of a Party that is a party to an investment dispute with another Party” and “respondent” is equally defined as “the Party that is a party to an investment dispute”. There is no doubt as to what the Treaty Parties intended when they made reference to this terms in articles 10.26.1 and 10.26.8. By the same token, however, if only a State that is a Party to DR-CAFTA can be a “respondent”, then the Treaty Parties also contemplated the possibility of counterclaims.

732. In general, Section A of Article 10 sets out only State’s obligations, so it may be deducted that only States can be sued and that the investors cannot be respondents even in a counterclaim. It could be argued that Section A also contains, at least implicitly, some obligations to investors, especially with respect to the environmental laws of the host State. Article 10.9.3.c stipulates:

... paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

⁶⁹⁷ Claimants’ Reply Memorial, ¶ 449, page 146.

- (ii) necessary to protect human, animal, or plant life or health; or
- (iii) related to the conservation of living or non-living exhaustible natural resources.

733. In turn, Article 10.11 establishes that:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

734. Furthermore, Article 10.1 makes it clear that Article 10.11 covers all investments in the territory of the Party. A logical effect of Article 10.11 could be that the “measures” adopted by the host State for the protection of the environment should be deemed to be compulsory for everybody under the jurisdiction of the State, particularly the foreign investors. Therefore, following said interpretation the investors have the obligation, not only under domestic law but also under Section A of Chapter 10 of DR-CAFTA to abide and comply the environmental domestic laws and regulations, including the measures adopted by the host State to protect human, animal, or plant life or health. No investor can ignore or breach such measures and its breach is a violation of both domestic and international law, so that the perpetrator cannot be exempt of liability for the damages caused.

735. Thus, if it could be interpreted that these provisions impose affirmative obligations on investors, it is not impossible either *de facto* or *de jure*, that a foreign investor could be found to breach an obligation under Section A, by the violation the environmental domestic laws and regulations. Does it mean that host States may sue investors before an international arbitral tribunal under Section B of Article 10 of DR-CAFTA?

736. The answer to that question is not simple. Most international investment tribunals have not recognized jurisdiction over the counterclaims introduced before them in the absence of an explicit agreement between the parties to submit the counterclaim to the arbitral tribunal⁶⁹⁸. However, recently, although outside the scope of DR-CAFTA, some tribunals

⁶⁹⁸ In *Saluka*, an UNCITRAL tribunal asserted its *prima facie* jurisdiction on a counterclaim presented within the framework of the BIT between The Nederland and the Czech Republic, but eventually, on the ground of some particularities of that case, it decided it was “without jurisdiction to hear and determine the counterclaim put forward by the Respondent in its Counter-Memorial”. *Saluka Investments B.V. v. Czech Republic*, UNCITRAL,

have asserted their jurisdiction over a counterclaim, in particular the Tribunals of *Urbaser v. Argentina* and *Burlington v. Ecuador*, both within the framework of the ICSID Convention and of two BITs (Spain-Argentina and USA-Ecuador, respectively). In *Burlington*, the issue of jurisdiction was not at the stake, because the Parties reached an agreement where they “expressed their agreement and consent that this arbitration is the ‘appropriate forum for the final resolution of the Counterclaims arising out of the investments made by Burlington Resources and its affiliates in Blocks 7 and 21, so as to ensure maximum judicial economy and consistency’”⁶⁹⁹. Consequently the investor (Burlington) did not challenge the tribunal’s jurisdiction to decide the counterclaims. Additionally, in *Burlington*, the Tribunal mentioned Article 46 of ICSID Convention, which empowers ICSID tribunals to decide “counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre”. In that case, the consent of the Parties was explicit and unambiguous. So the *Burlington* jurisprudence is not indeed useful for this case, where there is no consent expressed in similar terms.

737. The *Urbaser* tribunal instead, based on Argentina-Spain BIT, ICSID Convention, international human rights law and general international law, including general principles of international law, concluded, “it has jurisdiction to deal with Respondent’s Counterclaim in accordance with Articles 25 and 46 of the ICSID Convention and Article X of the BIT”⁷⁰⁰. Some aspects of this decision may help to elucidate the issue of the admissibility of a counterclaim. In fact, environmental law is integrated in many ways to international law, including DR-CAFTA. It is true that the enforcement of environmental law is primarily to the States, but it cannot be admitted that that a foreign investor could not be subject to international law obligations in this field, particularly in the light of Articles 10.9.3, 10.11 and 17 of DR-CAFTA.
738. Under international law of investments, particularly under DR-CAFTA, the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host State when it breaches its international obligations on foreign

Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004.

⁶⁹⁹ *Burlington v. Ecuador* (RLA-175), ¶ 60.

⁷⁰⁰ *Urbaser v. Argentina* (RLA-174), ¶ 1155.

investment (Section A of Article 10 in DR-CAFTA). What about the investor's obligations arising of the investment according to international law? This Tribunal shares the views of *Urbaser* Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law⁷⁰¹. It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment. It is pertinent to recall the observation of the International Court of Justice regarding this kind of obligations: "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*"⁷⁰².

739. Under Article 10, Section A of DR-CAFTA, foreign investors have the obligation to abide by and comply with the measures taken by the host State to protect the environment. The claims subject to arbitration according to Article 10.16 must indicate that the respondent has breached an obligation under Section A. Normally it is the State who is in such position but, what happens if the foreign investor breaches an obligation that is deemed to have been imposed to it by Section A? Are foreign investors immune to be sued either directly or through a counterclaim before an arbitral tribunal established according to DR-CAFTA? There are no substantive reasons to exempt foreign investor of the scope of claims for breaching obligations under Article 10 Section A DR-CAFTA, particularly in the field of environmental law.
740. Moreover, Article 10.15 is referred in general to "an investment dispute" while Article 10.16 is applicable when an "investment dispute cannot be settle by consultation or negotiation", which covers the disputes giving rise to counterclaims. The language of Articles 10.15 and 10.16 of DR-CAFTA is in principle wide enough to encompass counterclaims and that Article 10.16 does not imply that it applies only to disputes in which it is an investor which initiates claims.
741. Additionally, the admission of counterclaims has several practical advantages on procedural economy and efficiency, for the benefit of both the host State and the foreign

⁷⁰¹ *Id.*, ¶ 1195.

⁷⁰² ICJ, *Barcelona Traction, Light and Power Company, Limited*, Report, 1970, ¶ 33.

investor, as Professor Reisman has highlighted in his vote in *Spyridon Roussalis v. Romania Case*:

It is important to bear in mind that such counterclaim jurisdiction is not only a concession to the State Party: Article 46 works to the benefit of both respondent state and investor. In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal – which was, in fact, selected by the claimant – perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law⁷⁰³.

742. Consequently, the Tribunal does not find any reason of principle to declare inadmissible a counterclaim in which the Respondent State claims that the foreign investor has breached obligations falling within the scope of Article 10, Section A DR-CAFTA. Thus, the Tribunal has *prima facie* jurisdiction over the counterclaim filed in by the Respondent.
743. The foregoing notwithstanding, the Tribunal finds two issues that need to be addressed prior to examining the merits of the counterclaim. First, the Tribunal believes that the language of articles Article 10.9.3.c and 10.11 seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, but they do not -in and of themselves- impose any affirmative obligation upon investors. Nor do they provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty which could be the basis of a counterclaim.
744. Secondly, counterclaims are also subject to the UNCITRAL Arbitration Rules whose Article 21 establishes that “the provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim...” In turn, Article 20 reads as follows:

Article 20

....

2. The statement of claim shall include the following particulars:
 - (a) The names and contact details of the parties;

⁷⁰³ *Spyridon Roussalis v. Romania*, (Exhibit RLA-99).

- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought;
- (e) The legal grounds or arguments supporting the claim.

....

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contains references to them.

745. A counterclaim is a separate claim, autonomous with respect to the respondent's statement of defense, although it is usual that materially it is a part of that statement. As such, the counterclaim must satisfy by itself the requirements Articles 20.2 and 20.4 of the UNCITRAL Arbitration Rules, in the same way that the main claim does. In the Tribunal's opinion, Costa Rica did not meet such requirements. In its Counter Memorial (statement of defense under Art. 21 of the UNCITRAL Arbitration Rules) as well as in its Rejoinder, Costa Rica only made a general reference to environmental damages in the Las Olas Project site attributed to the Claimants' activity. There is no precise statement of the facts supporting the claims but rather a reference to expert reports attached to those pleadings. There is no specification of the relief sought but in very general terms and the quantification is much approximated, based only in the personal experience of an expert rather than any accurate method of valuation. Moreover, the evidence that Costa Rica has mentioned is diluted in its statement of defense, without specifying clearly and precisely the facts to be proved within the counterclaim, particularly the evidence that the Claimants are the perpetrators of all environmental damages.
746. In the Post-Hearing Brief, Costa Rica was more thorough and tried to amend to some extent those failures, specifying certain evidence and including several photos and graphics. However, it happened out of time, because the Post-Hearing Briefs were submitted simultaneously so the Claimants had no opportunity to challenge the late assertions of Costa Rica. Except the allegations raised at the Hearing, the Tribunal does not see any valid reason for Costa Rica to wait until the Post-Hearing Brief to clarify the facts supporting the claim and its legal ground on some relevant issues as the burden of the proof or causation. Such delay deprives the Claimants of their right to control the

evidence and new reasoning submitted by the Respondent, according to due process in law. Therefore, the statement on counterclaim introduced for the first time in the Respondent's Post-Hearing Brief is not admitted.

747. The Tribunal therefore concludes that the Counterclaim filled in by the Respondent does not meet the requirements of Articles 21 and 20 of the UNCITRAL Arbitration Rules and should be dismissed.

XIII. COSTS

A. The Claimants' Cost Submissions

748. In its submission on costs⁷⁰⁴, the Claimants argued that the Respondent should bear the total arbitration costs incurred by Claimants, including legal fees and expenses totaling US\$8,856,433.53 Dollars, broken down as follows: (a) US\$5,276,096.55 in respect of Vinson & Elkins' fees and disbursements; (b) US\$563,937.71 in respect of Mr Weiler's fees; (c) US\$535,033.24 in respect of Batalla's fees; (d) US\$76,581.51 in respect of witness costs and expenses; (e) US\$1,299,784.52 in respect of expert fees and expenses; and (f) US\$ 1,105,000.00 in respect of advances towards Tribunal and ICSID administrative fees. In addition, Claimants seek the Tribunal to order the Respondent to pay interest at 8% per annum on all sums awarded in respect of costs, from the date of the Award until payment is received by the Claimants.
749. The Claimants make their claim on the basis of Article 10.26(1) DR-CAFTA and Article 40 of the UNCITRAL Arbitration Rules, which allow the Tribunal to award costs and attorney's fees⁷⁰⁵, and argue that it "... has been extensively demonstrated in the arbitration, Costa Rica acted in an intentional and unlawful way that resulted in the destruction of the Claimants' investment. The Claimants were forced to resort to arbitration under DR-CAFTA in an effort to recover their investments. The cost of doing so ought to be borne by Costa Rica, since Costa Rica is the guilty party that has breached the terms and conditions of the Treaty⁷⁰⁶".

⁷⁰⁴ Claimants' submission of March 15, 2018.

⁷⁰⁵ *Id.*, page 2.

⁷⁰⁶ *Id.* ¶ 9, page 3.

B. The Respondent's Cost Submissions

750. In its submission on costs⁷⁰⁷, the Respondent submits that the Claimants should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling US\$2,461,747.58 Dollars, broken down as follows: (a) US\$899,914.00 for advances towards Tribunal and ICSID fees; (b) US\$230,000.00 for Credibility Consulting LLC (Mr Tim Hart); (c) US\$295,000 for Kevin Erwin Consulting Ecologist (Mr Kevin Erwin); (d) US\$17,080.00 for Green Roots Consultants S.A. (Drs Johan M Perret and B.K. Singh); (e) US\$6,300.00 for Siel Siel Asesores Ambientales (Ms. Priscilla Vargas); (f) US\$970,000.00 for Herbert Smith Freehills New York LLP fees, and (g) US\$43,543.58 on account of allowances and costs of the witnesses and representatives of the government of Respondent. Respondent also requests that Claimants pay any interest at a reasonable commercial rate applicable from the date of the award is rendered until the date costs are paid in full.
751. The Respondent argues that costs are reasonable to the extent that: (i) Costa Rica had to reply to voluminous presentations submitted by Claimants; (ii) Respondent had to carry out extensive work considering the complexity of the case; and (iii) Claimants' conduct during the proceedings aggravated the costs by prolonging the process unnecessarily⁷⁰⁸.

C. The Tribunal's Decision on Costs

752. Article 10.26(1) of DR-CAFTA provides that "A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules". Considering that the applicable rules are precisely the UNCITRAL Arbitration Rules, the Tribunal notes that Article 42 defines the standards for cost allocation, as follows:

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or Parties. However, the arbitral tribunal may apportion each of such costs between the Parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

⁷⁰⁷ Respondent's submission dated March 15, 2018.

⁷⁰⁸ *Id.*, page 3.

753. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.
754. Article 40 (2) defines "costs" to include specified list of items as follows:
- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
 - (b) The reasonable travel and other expenses incurred by the arbitrators;
 - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.
755. In order to ascertain the meaning of the text of Article 42(1), the Tribunal must interpret the words "in principle." The Oxford English Dictionary (3rd edition 2007) defines "in principle" as "theoretically; in general, but not necessarily in individual cases." Thus, one may interpret article 42(1) of the UNCITRAL Arbitration Rules as providing that in general the unsuccessful party is to bear the reasonable costs of the arbitral proceeding but not necessarily in the individual case where a tribunal determines that "circumstances" exist to apportion them in some other way between the parties. As already the *Thunderbird* Tribunal has observed⁷⁰⁹, the difference between the two paragraphs of Art 42(1) is that the first paragraph sets forth a rule with an exception to that rule, whereas the second paragraph gives an arbitral tribunal unfettered discretion to deal with that exception
756. Therefore, the general principle is that the unsuccessful party must pay the successful one all the costs. The principle "loser pays" may be inferred from the rule of customary international law requiring "full reparation" to the party injured by a breach of an international obligation. The underlying concept is the *restitutio in integrum*, since the

⁷⁰⁹ *International Thunderbird Gaming Corporation v. Mexican United States*. NAFTA/UNCITRAL Case. Award of 26 January 2006, ¶ 213 (hereinafter *Thunderbird v. Mexico*) (CLA-70).

winning party suffered damages when having to finance its defense that proved to be useless and unnecessary and that would have been avoided if the defeated party had recognized the prevailing rights of the other to avoid litigation. To deny the successful party recovery of costs incurred pursuing its case would have the effect of denying that party's "full reparation" as required by international law. As stated the tribunal in the *SD Myers, Inc. v. Government of Canada*,

The logical basis for this policy appears to be that a "successful" claimant has in effect been forced to go through the process in order to achieve success, and should not be penalised by having to pay for the process itself. The same logic holds good for a successful respondent, faced with an unmeritorious claim⁷¹⁰.

757. On the other hand, the rule "loser pays" plays also a dissuasive roll pointed to avoid either reckless or frivolous claims or defenses.
758. The Tribunal observes that both Parties have claimed, from their first written submissions, that the other party be ordered to pay the totality of the costs, including the costs of representation and legal assistance and those caused by payments to ICSID⁷¹¹. Those requests were ratified in their Costs Submissions of March 15, 2018. Therefore, any of them can expect this Tribunal to decide the apportionment of such costs. However, the Tribunal has the duty to assess "the circumstances of the case" (Rules, Art. 42.1) and the reasonability of the costs (Rules, Art. 40.2), in order to determine to depart from the application of the rule *loser pays* and that the apportionment of costs is reasonable.
759. The Rules do not specify what "the circumstances of the case" may be, but they give the Tribunal discretion to identify such circumstances and to decide the apportionment of costs.
760. The Tribunal considers that a first set of circumstances results from a party has succeeded on the merits of the case, while the other one has been successful with respect to some specific issues decided in that case. Here, both parties are to some extent unsuccessful so it can be argued that the meaning of "unsuccessful party" is not completely clear. The rate of success of each party has been considered as an objective benchmark for the

⁷¹⁰ *SD Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL Case, Final Award on Costs, 30 December 2002, ¶15. Also, PCA Case No. 2010-17, *European American Investment Bank Ag (Austria) v. The Slovak Republic*. Award on Costs, 20 August 2014, ¶ 41.

⁷¹¹ Claimants' Memorial, ¶ 501(IX), Respondent's Counter-Memorial, ¶ 720.6.

apportionment of costs⁷¹². In this case, the Claimants are unsuccessful regarding the merits, but the Respondent is unsuccessful on the Counterclaim so the Tribunal shall take into account such “circumstance of the case” in order to decide on the apportionment of costs.

761. Other potential factor for consideration among the “circumstances of the case” is the conduct of the Parties⁷¹³. The Tribunal recognizes that, in general, the Parties acted properly during the proceedings. Nevertheless, the Claimants included in the Claim 67 lots that were registered in favor of another owner for the date of the Notice of Arbitration (see Section VIII.C., above), which is a reprehensible fact. The inclusion in the Claim of real state not owned by Claimants lacks any reasonable excuse. Claimants had to know that those 67 lots did not belong to them. It is a matter of manifest negligence and disregard of their duties and burdens as a Party to the arbitral proceeding. Doing so, Claimants harmed the Respondent who, for example, paid for a valuation based on wrong information furnished by the Claimants, on facts they know or had to know.
762. The complexity of the issues may be considered as another potential factor of particular “circumstances of the case”. The Tribunal thinks that the issues that were submitted to its judgment, although showing some technical complexity, by themselves are not especially complex from a legal point of view. The complexity of this case arises rather from the actions and omissions of the parties than from the litigated issues. The Tribunal already has observed above (Section VI. Background, above) it is clear that there are inconsistencies in documents and contradictions among various Costa Rica’s authorities during the period comprised between the dates Claimants decided to make the investment and the time at which injunction was issued and criminal charges were brought against Mr. Aven and the Marketing and Sales Director, Mr. Damjanac. Costa Rica also brought before this Tribunal some alleged wrongdoings of Claimants regarding the Concession and the development of Las Olas itself, but the State omitted the application of domestic law to such situations. Moreover, the complexity of environmental legislation and the number of agencies enabled to apply it can explain the contradictions mentioned above,

⁷¹² *Thunderbird v. Mexico* (CLA-70), ¶ 213. Also, David Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2d Ed. 2013), pp. 870-71.

⁷¹³ Caron and Caplan, *op. cit.*, pp. 871-73.

but also can misguide the people dealing with environmental issues. All this confusion has been, to some extent, an invitation to litigate.

763. The Claimants on the other hand lacked transparency in their development of Las Olas. They acted in order to avoid showing the features of the land that could disturb their business. They omitted the disclosure of the Protti Report (paragraph 111, above) and also fragmented the land in order to avoid the requirement of submitting a D1 Application to secure an EV permit for the easements (section X.D.1.(f), above). Such kind of actions not only undermined the Claimants' case, but also darkened its understanding.
764. Finally, the economic weakness of the unsuccessful investor may be taken into account when dealing with the apportionment of costs, on the general basis of considerations of access to justice. This issue is especially taken into consideration by the Tribunal, as the Claimants do not appear to be wealthy institutional investors, and have likely already risked a substantial amount of their own patrimony in attempting to develop the Las Olas Project.
765. In light of the foregoing analysis, the Tribunal resolves that Claimants should bear their, and Respondent's portion of the arbitrators' fees and expenses, as well as the ICSID administrative expenses, together with direct expenses of the arbitration. Each Party shall bear its own legal costs and expenses.
766. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD)⁷¹⁴:

⁷¹⁴ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account.

| | |
|--------------------------------|----------------------------|
| Arbitrators' fees and expenses | |
| President Siqueiros | 666,961.81 |
| Mr. Baker | 690,360.37 |
| Prof. Nikken | 446,450.43 |
| | |
| ICSID's administrative fees | 148,000.00 |
| Direct expenses ⁷¹⁵ | 230,037.6 |
| Total | <u>2,181,810.21</u> |

767. The above costs have been paid out of the advances made by the Parties in equal parts⁷¹⁶.
768. Accordingly, the Tribunal orders Claimants to pay Respondent USD 1,090,905.10 for the expended portion of Respondent's advances to ICSID.

⁷¹⁵ This amount includes charges relating to court reporting and interpretation, catering and courier, and estimated charges relating to the dispatch of this Award (courier, printing and copying).

⁷¹⁶ The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

XIV. AWARD

For the reasons set forth above, the Tribunal decides as follows:

- (1) The Tribunal has jurisdiction over certain Claimants' claims, as identified, and over Respondent's counterclaim;
- (2) Denies Claimants' claims under Article 10.5 DR-CAFTA and Annex 10-B;
- (3) Denies Claimants' claims under Article 10.7 DR-CAFTA and Annex 10-C;
- (4) Denies Respondent's counterclaim under Article 10 DR-CAFTA;
- (5) Orders Claimants to pay Respondent USD 1,090,905.10 for Respondent's portion of the advances paid by Respondent to ICSID on account of arbitrators' fees and expenses, ICSID administrative expenses, as well as direct expenses of the arbitration; and
- (6) Denies any other claim or request for compensation.

Made in London, United Kingdom, in English and Spanish, on September 18, 2018.

[Signed]

Mr. C. Mark Baker
Arbitrator

[Signed]

Prof. Pedro Nikken
Arbitrator

[Signed]

Lic. Eduardo Siqueiros
President of the Tribunal