

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

**Between:**

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

v

**THE REPUBLIC OF COSTA RICA (Respondent)**

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**CLAIMANTS' MEMORIAL**

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## GLOSSARY

- (i) “**AAF**” means an environmentally fragile area
- (ii) “**ACOPAC**” means the relevant SINAC conservation area for the Las Olas project
- (iii) “**ADI**” means an Area of Direct Influence
- (iv) “**CADEXCO**” means the Costa Rican exports chamber
- (v) “**CINDE**” means the Costa Rican Investment Promotion Agency
- (vi) “**CONAC**” means the National Council of Conservation Area, a branch of SINAC
- (vii) “**CORAC**” means the Regional Council, a branch of SINAC
- (viii) “**DEPPAT**” is a Costa Rican environmental consultancy company
- (ix) “**DR-CAFTA**” means the Dominican Republic Central America Free Trade Agreement
- (x) “**EDSA**” means a Florida-based land planner (who developed a design concept for the project)
- (xi) “**EIA**” means Environmental Impact Assessment
- (xii) “**FET**” means fair and equitable treatment
- (xiii) “**FP&S**” means full protection and security
- (xiv) “**INGEOFOR**” is a Costa Rican environmental consulting company
- (xv) “**INTA**” means the national Institute for Agricultural Innovation and Technology Transfer, Costa Rica
- (xvi) “**MINAE**” means the Ministry of the Environment, Costa Rica; also referred to as MINAET
- (xvii) “**MINAET**” means the Ministry of the Environment, Costa Rica; also referred to as MINAE
- (xviii) “**NAFTA**” means the North American Free Trade Agreement
- (xix) “**PA**” means the Project Area
- (xx) “**PROCOMER**” means Foreign Trade Promotion Corporation
- (xxi) “**SETENA**” means the *Secretaría Técnica Nacional Ambiental*, or the National Technical Environmental Secretariat, a specialist branch of the Ministry of the Environment, Costa Rica
- (xxii) “**SINAC**” means the National System of Conservation Areas, Costa Rica, a branch of the Ministry of the Environment, Costa Rica

- (xxiii) “**TAA**” means the *Tribunal Ambiental Administrativa* or contentious administrative court, a branch of the Ministry of the Environment, Costa Rica
- (xxiv) “**VCLT**” means the Vienna Convention on the Law of Treaties
- (xxv) “**WACC**” means weighted average cost of capital
- (xxvi) “**WPA**” means a Wildlife Protected Area

## **I. INTRODUCTION**

1. In accordance with Annex A to Procedural Order No. 1 dated September 10, 2015, the Claimants (or the “**Investors**”) respectfully submit this Memorial in support of their claims against the Republic of Costa Rica (“**Costa Rica**” or the “**Respondent**”) arising under the Dominican Republic Central America Free Trade Agreement (“**DR-CAFTA**”), to which the Respondent and the Claimants’ home state, the United States of America, are signatories.
2. This Memorial is submitted further to the Claimants’ Notice of Intent to Submit a Claim to Arbitration dated September 17, 2013 (the “**Notice of Intent**”) and their Notice of Arbitration dated January 24, 2014 (the “**Notice**”).
3. In support of their claim, the Claimants rely on the witness statements of:
  - (b) David Richard Aven, Carolyn Jean Park, Eric Allan Park, Jeffrey Scott Shioleno, David Alan Janney and Roger Raguso, all investor Claimants;
  - (c) Jovan Dushan Damjanac, Sales and Marketing Director of the Las Olas project;
  - (d) Esteban Bermúdez Rodríguez, Environmental Regent for the Las Olas project;
  - (e) Minor Arce Solano, a forestry engineer;
  - (f) Nestor Morera Viquez, Mr Aven’s criminal attorney;
  - (g) Manuel Enrique Ventura-Rodríguez, Mr Aven’s Costa Rican attorney;
  - (h) Fernando Zumbado, ex-Housing Minister for Costa Rica; and
  - (i) Robert and Patricia Dull, purchasers of Lot 155 at Las Olas.
4. The Claimants also rely on the expert statements of:
  - (b) Dr Manuel Abdala of Compass Lexecon, expert on quantum; and
  - (c) Gerardo Barboza Jimenéz, biologist and expert on wetlands.
5. The Claimants also rely on the exhibits and legal authorities listed in the hyperlinked indexes attached hereto.

## **II. FACTS**

### **A. The Claimants Establish Their Investments in Costa Rica**

6. The Claimants submit their claims to arbitration (i) on their own behalf under DR-CAFTA Article 10.16(1)(a) and (ii) on behalf of enterprises incorporated in Costa Rica that the Claimants directly or indirectly own or control (the “**Enterprises**”) under DR-CAFTA Article 10.16(1)(b).

#### **(a) The Claimants**

##### **(i) The Investors**

7. The following individual investors are Claimants in this arbitration:

#### **(a) Mr David Richard Aven (“Mr Aven”)**

U.S. Passport Number 496038727

11 E. Washington Street, #12A

New Castle, PA 16101

#### **(b) Mr Samuel Donald Aven (“Mr S. Aven”)**

U.S. Passport Number 483575127

3979 Berwick Farm Drive

Duluth, GA 30096

#### **(c) Ms Carolyn Jean Park**

U.S. Passport Number 426498473

306 E. Fairmont Avenue

New Castle, PA 16105

#### **(d) Mr Eric Allan Park**

U.S. Passport Number 426487189

306 E. Fairmont Avenue

New Castle, PA 16105

(e) **Mr Jeffrey Scott Shiolen**

U.S. Passport Number 498443019

5105 W. Cleveland Street

Tampa, FL 33609

(f) **Mr David Alan Janney**

U.S. Passport Number 474275663

500 S. Semoran Boulevard

Orlando, FL 32807

(g) **Mr Roger Raguso**

Expired U.S. Passport Number 046591410 (Mr Raguso does not hold a current passport)

111 Holiday Lane

Canadaigua, NY 14424

8. As evidenced by copies of their passports, the Claimants are all nationals of the United States of America and each of them qualifies as an “*investor of a party*” pursuant to DR-CAFTA Article 10.28.<sup>1</sup> Further, as explained by Mr Aven in his First Witness Statement, although he is also an Italian national, he has never lived there and has no personal, financial or business connections to Italy.<sup>2</sup>

**(ii) The Enterprises**

9. The Claimants also bring this claim under DR-CAFTA Article 10.16(1)(b) on behalf of the following Enterprises:

(b) Las Olas Lapas Uno, S.R.L.;

(c) 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.);

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<sup>1</sup> Exhibit C3, Copies of Claimants’ passports filed with Notice of Arbitration

<sup>2</sup> See David Aven Witness Statement, ¶ 4



- (d) La Estación de Esterillos, S.A. (formerly Iguanas de Esterillos, S.A.);
  - (e) Bosques Lindos de Esterillos Oeste, S.A.;
  - (f) Montes Development Group, S.A.;
  - (g) Cerros de Esterillos del Oeste, S.A.;
  - (h) Inversiones Cotsco C & T, S.A.; and
  - (i) Trio International Inc.
10. As regards the Enterprises' ownership and legal status, the Claimants rely on the statements given by the duly appointed secretaries (and in the case of Las Olas Lapas Uno, S.R.L., which is a limited partnership corporation, the duly appointed manager) of each of the Enterprises in July 2013, prior to submission of the Notice of Arbitration.<sup>3</sup>
11. Further, by agreement dated August 3, 2014 by and between David Richard Aven and Giacomo Anthony Buscemi, Mr Buscemi transferred his interest in the Las Olas project to Mr Aven.<sup>4</sup> As a result, Mr Buscemi is no longer a Claimant in this arbitration.
12. By way of summary therefore, the Claimants' respective ownership shares in the Enterprises are as follows:
- (b) David Richard Aven – 28%;
  - (c) Samuel Donald Aven – 44% ;
  - (d) Carolyn Jean Park – 10% ;
  - (e) Eric Allan Park – 10%;
  - (f) Jeffrey Scott Shioleno – 2%;
  - (g) David Alan Janney – 1%; and

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<sup>3</sup> Exhibit C4, Documentation of the Enterprises' Legal Status and Ownership; Exhibit C5, Documentation of the Enterprises' Title to Portions of the Las Olas Project

<sup>4</sup> Exhibit C168, Agreement between Giacomo Buscemi and David Aven, August 3, 2014

(h) Roger Raguso – 5%.

**(iii) The Claimants' 49% ownership interest in La Canícula**

13. In addition, the Claimants together own a 49% interest in La Canícula, S.A. (“**La Canícula**”), as is evidenced by the attached statement dated August 2, 2013 given by Mr Aven as duly elected company secretary of La Canícula.<sup>5</sup>
14. The Enterprises’ and La Canícula’s ownership of the Las Olas project site, including the beachfront concession (the “**Concession**”) is described in further detail below.
15. The Claimants’ respective ownership shares in La Canícula are as follows:
- (b) David Richard Aven – 13.72%;
  - (c) Samuel Donald Aven – 21.56%;
  - (d) Carolyn Jean Park – 4.9%;
  - (e) Eric Allan Park – 4.9%;
  - (f) Jeffrey Scott Shioleno – 0.98%;
  - (g) David Alan Janney – 0.49%; and
  - (h) Roger Raguso – 2.45%.
16. Further, as Mr Aven explains in his Witness Statement, he at all times controlled La Canícula, which company owns the Concession, acting on his own and the other Claimants’ behalf and any profits from the project that were attributable to la Canícula would be for the Claimants.<sup>6</sup> The remaining 51% share of La Canícula is owned by a Costa Rican national<sup>7</sup> who had no day-to-day involvement in, or control over, the development of the Las Olas project or the Concession. The need for a Costa Rican national to hold 51% of the shares in La Canícula was dictated by the fact

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<sup>5</sup> Exhibit C7, Documentation of La Canícula’s Legal Status and Ownership

<sup>6</sup> See David Aven Witness Statement ¶ 26; Exhibit C65, La Canícula Agreement, May 10, 2010

<sup>7</sup> Exhibit C7, Documentation of La Canícula’s Legal Status and Ownership

that under Costa Rican law, concessions cannot be awarded to a corporation unless at least half of the shares in that corporation are Costa Rica owned.<sup>8</sup>

**(b) The Environment for Foreign Investment in Costa Rica**

17. The Costa Rican government has consistently sought to attract foreign direct investment, particularly to promote its tourism industry and increase exports. Foreign investors and foreign direct investment is seen as a significant contributor to Costa Rica's economic growth.<sup>9</sup>
18. Costa Rica actively courts foreign direct investment through its Foreign Trade Promotion Corporation, known as PROCOMER, as well through the Costa Rican Investment Promotion Agency, CINDE. Together, these organizations lead Costa Rica's investment promotion efforts and provide a wealth of information to potential and actual foreign investors. These companies, along with CADEXCO, the Costa Rican exports chamber, have positioned themselves as the 'go-to' organizations to assist foreign investors when entering Costa Rica.
19. CINDE has officially been named the promoter of the country to foreign investors and plays an advisory role to foreign investors who want information on starting business in Costa Rica. In fact, to assist its promotion of the country as a desirable place for foreigners to invest, CINDE has established an office in New York City. CINDE boasts that Costa Rica was voted among the 'top 10 Best to Invest' countries in the world. It has also been stated that Costa Rica is the preferred location in Latin America for 'quality, efficiency, experience and growth opportunities in the most reliable and safe environment.'
20. As mentioned above, Costa Rica actively seeks out foreign direct investment. In 2010, a Stanford University study entitled *Incentives for Retirement & Investment in Costa Rica* was prepared by Leland Baxter-Neal for the Center for Responsible Travel (a non-profit research organization) as part of a wider project on "The Impact of Tourism Related Development along Costa Rica's Pacific Coast."<sup>10</sup> The study was

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<sup>8</sup> Exhibit C221, *Ley Sobre la Zona Maritimo Terrestre No 6043* [1977]

<sup>9</sup> Exhibit C169, *Costa Rica Attracts Over \$2 billion in Foreign Direct Investment in 2014*, The Tico Times, December 20, 2014; Exhibit C172, *www.costarica.com Direct Foreign Investment*, June 24, 2015

<sup>10</sup> Exhibit C63, *Incentives for Retirement & Investment in Costa Rica* prepared by Leland Baxter-Neal for the Center for Responsible Travel, April 2010

compiled on the basis of interviews with retirement and investment experts in Costa Rica with direct knowledge of Costa Rica's policies regarding retirement and investment incentives for foreigners. The information gathered through interviews was supplemented with data collected from other sources, including the relevant laws, government documents and websites specializing in information on retirement and investment in Costa Rica.

21. Although the study notes that there are no specific incentives or benefits offered to foreign retirees in Costa Rica, it highlights the country's popularity not just as a vacation destination but also as a place for retirees to live. The report goes on to state that although Costa Rica has not expressly offered incentives for coastal tourist developments, government officials have given special attention to certain projects by, for example, appearing at ribbon cutting ceremonies, and in one case declaring of national interest a large scale development featuring a hotel, golf course and coastal homes.
22. It is clear from the above that in 2002, when the Claimants acquired interests in the parcels of land that comprised the Las Olas project site and the Concession site, Costa Rica was actively promoting itself as an attractive place for foreigners to invest and it viewed projects such as Las Olas as benefitting the local economy.
23. Further, Costa Rica does not operate a specific screening program for foreign investment. Foreign investments are expected to comply with the applicable local laws and regulations. Foreigners and foreign companies are able to own property in the same way as Costa Rican nationals, with the exception of the Concession as outlined above. As such, the Claimants were not required, in establishing their investment, to comply with any laws and regulations above and beyond those applicable to all Costa Rican nationals and companies.<sup>11</sup>
24. In the Claimants' case therefore, in establishing their investments, they were required to comply in the first instance with Costa Rican law and procedure relating to the acquisition of title to land and the granting of the Concession by the Municipality, which they did. Thereafter, the Claimants were required to comply with the laws and

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<sup>11</sup> Exhibit C154, US Department of State 2012 Investment Climate Statement - Costa Rica, June 2012 <http://www.state.gov/e/eb/rls/othr/ics/2012/191132.htm>

regulations applicable to real estate development, which include a lengthy and rigorous permitting approval process, as described in more detail below.

**(c) Establishment of the Investments**

**(i) Decision to Invest**

25. The Claimants were all known to one another long before they came to invest in Costa Rica. After much research and several exploratory trips to Costa Rica, a decision was taken to invest in the Costa Rican real estate market together. David Aven, Sam Aven and Carol Park are siblings, Eric Park is Carol's husband and Roger Raguso is first cousin to Mr Aven and his siblings. Mr Janney, Mr Shioleno and Mr Buscemi are all long term friends of Mr Aven. As a result, the investment was largely run as a family affair, with little formality in the recording of the project's operations, as Mr Aven explains in his Witness Statement.<sup>12</sup>
26. The decision to invest in the Costa Rican real estate came about as a result of Mr Aven's extensive experience in the real estate market in general, and his increasing knowledge – by virtue of his friendship with Mr Janney, an experienced real estate developer from Florida whom Mr Aven met in the late 1980s – of the Costa Rican real estate market.
27. In the late 1990s and early 2000s, Mr Janney was making frequent trips to Costa Rica for humanitarian work, where he observed a booming real estate market.<sup>13</sup> Starting from around 2000, he persuaded Mr Aven to travel to Costa Rica to investigate, with a view to taking advantage of the investment opportunities it afforded at the time.
28. Over the coming years, convinced of the potential for a very good return on any investment in the Costa Rican real estate market, Mr Aven made several further exploratory trips to Costa Rica, in search of an investment property.
29. At the time, the Costa Rican real estate market was booming. American and Canadian tourists were travelling there in their droves for vacations and to retire. Costa Rica was favored as a destination by virtue of the country's proximity to the United States

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<sup>12</sup> See David Aven Witness Statement ¶ 28

<sup>13</sup> See David Janney Witness Statement ¶ 13

and Canada, its favorable climate, pristine beaches and the comparatively low cost of living.<sup>14</sup>

30. As a result, there was a lot of construction going on in Costa Rica at the time and foreign investors played a large part in this. As the former Housing Minister for Costa Rica, Mr Zumbado, explains in his Witness Statement, it was important to the Costa Rican economy to attract and retain such foreign investment, given its valuable contribution to the local economy.<sup>15</sup>

**(ii) Acquiring Land for the Las Olas Project**

31. Once Mr Aven had identified the Las Olas site and the Concession as the ideal location for his investment, he set about acquiring each parcel through the Enterprises and La Canícula.

32. At the time, the land that was to be used for the Las Olas project comprised of five separate parcels, situated contiguously in the province of Puntarenas (the “**Project Lands**”). They were as follows:

- (b) Property No. 91765-000 (Survey Map No. P-0110308-93), with an area of thirty hectares, 5,520.14 square meters, held by La Canícula, represented by Carlos Alberto Monge Rojas;
- (c) Property No. 124625-000 (Survey Map No. P-741687-01), with an area of 7,722.56 square meters, held by Chicas Poderosas, S.A., represented by Carlos Alberto Monge Rojas;
- (d) Property No. 124626-000 (Survey Map No. P-741685-01), with an area of 6,432.15 square meters, held by Chicas Poderosas, S.A., represented by Carlos Alberto Monge Rojas;
- (e) Property No. 124627-000 (Survey Map No. P-741688-01), with an area of 6,331.40 square meters, held by Chicas Poderosas, S.A., represented by Carlos Alberto Monge Rojas; and

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<sup>14</sup> Exhibit C154, US Department of State 2012 Investment Climate Statement - Costa Rica, June 2012 <http://www.state.gov/e/eb/rls/othr/ics/2012/191132.htm>

<sup>15</sup> See Fernando Zumbado Witness Statement ¶ 23

- (f) Property No. 121678-000 (Survey Map No. P-733357-01), with an area of 61,013.31 square meters, held by Pacific Condo Park, S.A., represented by Mauricio Chaves Mesén.
33. Pursuant to the terms of an agreement dated February 6, 2002 between Mr Aven on the one hand and Carlos Alberto Monge Rojas, acting on behalf of La Canícula, and Mauricio Chaves Mesén, acting on behalf of Pacific Condo Park S.A. (together, the “**Sellers**”) on the other hand, Mr Aven acquired an option (i) for the acquisition of property rights in all five parcels and (ii) to assume the concession that would be granted to La Canícula by the Municipality of Parrita, all for US\$ 1,647,000.00 (the “**Option Agreement**”).<sup>16</sup>
34. It was a condition, amongst others, of closing of the Option Agreement that the Sellers would obtain confirmation from the Municipality of Parrita that La Canícula was the rightful concessionaire of the property located in the maritime zone that was adjacent to the Project Lands (Survey Map No. P-757329-2001, Property No. 6-001004-Z-000).
35. On March 5, 2002, a concession was issued by the Municipality of Parrita in favor of La Canícula for a renewable period of 20 years (the “**Concession**”).<sup>17</sup>
36. During the months of April and May 2002, following satisfactory completion of the conditions precedent by the sellers, Inversiones Cotsco C & T, S.A. (“**Inversiones Cotsco**”) acquired title to all five Project Lands, as follows:
- (b) On April 1, 2002, Inversiones Cotsco acquired property rights in a parcel of land held by La Canícula, for an amount of CRC 100,000;
  - (c) On April 1, 2002, Inversiones Cotsco acquired property rights in a parcel of land held by Pacific Condo Park, S.A., for an amount of CRC 1,000,000; and
  - (d) On May 22, 2002, Inversiones Cotsco acquired property rights in a parcel of land held by Chicas Poderosas, S.A., paying CRC 50,000 for each one.

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<sup>16</sup> Exhibit C27, Option Agreement for the Sale and Purchase of Properties, February 6, 2002

<sup>17</sup> Exhibit C28, Letter from Costa Rican Tourist Agency confirming approval of Concession, March 5, 2002

The purchase of all five Project Lands was recorded by the Notary Public, Juan Carlos Esquivel Favareto.

37. On September 16, 2005, Mr Aven, representing Inversiones Cotsco, applied to the National Registry of Costa Rica to consolidate and unite as one, the five Project Lands owned by this company. As a result, a new property was created and designated as No. P-142646, with Survey Map No. P-1021869-05 and with an area of 377,945.1 square meters.
38. Approximately two years later, on October 9, 2007, Mr Aven, acting on behalf of Inversiones Cotsco, segregated and created 15 new lots to the east of the public road to Esterillos Oeste, some of which were later sub-divided into yet smaller plots. The parcels of land that resulted from the October 9, 2007 sub-division and all subsequent sub-divisions are listed in Annex A to this Memorial. These transactions were recorded by Roman Esquivel Font, a Notary Public, and Gavridge Perez Porras, Mr Aven's then attorney.
39. On February 19, 2009, Mr Aven, acting on behalf of Inversiones Cotsco, transferred Property No. 142646-000, to Trio International Inc, S.A. ("**Trio International**"), as trustee. The latter was also represented by Mr Aven. The transfer was based on the Trust Agreement identified as "*001-INVERSIONES COTSCO*" and recorded by Sebastian Vargas Roldan, a Notary Public and Mr Aven's then attorney in Costa Rica.
40. Seven months later, on September 29, 2009, Mr Aven, on behalf of Trio International, appeared before Mr Vargas and created the "*Condominio Horizontal Residencial Las Olas Con Fincas Filiales Primarias Individualizadas.*" According to the deed that created that subdivision, the lots were all to remain as part of the Trust Agreement identified as "*001-INVERSIONES COTSCO,*" and Trio International would be maintained as trustee. The following 288 lots were thus created:
  - (b) Lot No. 2881-M-000; and
  - (c) Lot Nos. 79209-F through 79496-F.



**(iii) Description of the Las Olas project**

41. Once the Claimants had acquired ownership of the Las Olas project site and the Concession, Mr Aven, in consultation with the other Claimants, set about deciding how best to develop the land. As explained by Mr Aven in his Witness Statement, the Claimants did not have any firm plans for the development at the outset.<sup>18</sup> In view of the booming real estate market and the Las Olas site's location and topography, the Claimants recognized it as a jewel of a property and considered that, even if they just held onto it for a few years before selling it, they would make a considerable return.
42. The Las Olas site was made up of approximately 37 hectares of gently rolling hills overlooking one of the nicest beaches on the Central Pacific coast, in a small community, equidistant between two larger towns and connected by a highway which, when completed, would halve the drive time to San José.<sup>19</sup> Unlike a lot of the flat, swampy terrain in the area, Las Olas offered a prime opportunity to build. The hilly terrain meant an opportunity to maximize sea views. The fact that it was close to the beach and the amenities of Esterillos Oeste only served to increase its appeal and likely economic return.<sup>20</sup>
43. In 2004, on behalf of the Claimants, Mr Aven commissioned a combined marketing and land planning study for the project. Norton Consulting (“Norton”), a Florida based company, prepared the marketing side of the report, while EDSA, a Florida based land planner developed a design concept for the project. The combined study cost in the region of US\$ 175,000 and provided an overview of the development options for the project going forward.<sup>21</sup>
44. Once completed, the combined report provided the Claimants with a complete conceptual design for the project, including a variety of different lots at different price points. These included luxury beachfront villas, mid-range townhouses, smaller villas and a beach club to which all residents would have access. The combined report estimated gross sales for the project based on that design of approximately US\$ 155 million.

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<sup>18</sup> See David Aven Witness Statement ¶ 21

<sup>19</sup> Exhibit C193, Las Olas Aerial Photographs

<sup>20</sup> Exhibit C192, Las Olas Photographs; Exhibit C193, Las Olas Aerial Photographs

<sup>21</sup> Exhibit C30, Norton and EDSA Report, September 2004

45. Upon receipt of the combined report, the Claimants decided to proceed with the development on the basis of that design. In addition, they developed plans for a vertically integrated project that would maximize the various revenue streams from the project. These different revenue streams would include sales proceeds from lots, revenue from the construction of villas on the lots, sales of townhouses and time-shares, the provision of mortgages to buyers, the provision of a rental program for villa and condo owners when their homes would be vacant, the provision of facilities management for the whole project and the rental of commercial space on the project site. As Mr Damjanac explains in his Witness Statement, the plan was to try and offer as many services as possible to any customer. This was a model he had seen work successfully on other developments.<sup>22</sup> A good description of the different revenue streams Mr Aven envisaged and their contribution to a more profitable return on investment for the Claimants can be found in a 2007 project overview, written by Mr Aven as project managing director.<sup>23</sup>
46. The Claimants were not the first to come up with this kind of approach in the area at that time. Norton and EDSA's combined report had identified ten comparable projects actively selling in Costa Rica at the time. Of these, Norton and EDSA considered the market leader to be Los Sueños, a very successful project around a 15-minute drive from the Las Olas site.<sup>24</sup> However, as noted by Norton in their study, the Las Olas site had a "*world-class surfing quality*" beach<sup>25</sup> – a clear advantage over Los Sueños. In the circumstances, the Claimants felt there were enough examples of successful similar projects in the immediate vicinity to make their design concept seem like a viable concept.
47. Mr Aven had also been talking to local expats in Costa Rica and, on the basis of those discussions and his increasingly frequent trips to the country became more and more confident in the likely success of the project. This confidence was shared by Mr Janney and Mr Raguso, both of whom were experienced developers and builders.<sup>26</sup>

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<sup>22</sup> See Jovan Damanjac Witness Statement ¶ 23

<sup>23</sup> Exhibit C39, Las Olas Analysis Report, 2007

<sup>24</sup> Exhibit C30, Norton and EDSA Report, September 2004, pp. 26-35

<sup>25</sup> *Id.*, p. 10

<sup>26</sup> See David Janney Witness Statement ¶ 6 and Roger Raguso Witness Statement ¶ 6

48. Based on the combined Norton/ESDA study, the success of Los Sueños and other similar resort projects in the immediate vicinity and the buoyant real estate market in Costa Rica at that time, the Claimants decided to move forward with the development and commission an architect and engineering firm to come up with a master site plan<sup>27</sup> as an important first step towards securing the necessary environmental and construction permits for the development.
49. Based on the market research they had already conducted and the combined real estate development, construction and sales and marketing experience of Mr Aven, Mr Raguso, Mr Janney and Mr Shioleno, the Claimants developed a vision for the project going forward. The plan was to create a mixed residential and commercial site that would offer luxury beachfront accommodation and ocean and land view condominiums for residential use, with all necessary amenities such as a spa, swimming pools, fitness center, restaurants, beach club, gasoline station and supermarket.
50. Once the master site plan had been commissioned, due to the scale of the project, the Claimants notionally divided the site into four areas, reflective of the different uses to which the land would be put. They were as follows:

(b) **The Concession**

This was the 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. The beach club would consist of 18 luxury hotel rooms, several condominium units and other important facilities that could be used by all Las Olas residents, such as a fitness center, spa and swimming pools. This was to be developed as part of phase two of the project, as it would help to attract potential buyers to the site. This part of the project was originally referred to as Hotel Colinas del Mar but the name was later changed to Las Olas Luxury Beach Resort.<sup>28</sup>

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<sup>27</sup> Exhibit C54, Master Site Plan, September 17, 2008

<sup>28</sup> Exhibit C189, Beach Club Site Rendering and Exhibit 190, Beach Club Rendering Aerial View



(c) **Easements and related lots**

The Claimants also planned to build small condominiums for residential use 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. Two lots would also front directly onto the main road. In total, there were 72 lots in this section of the project site.



(d) **Commercial and condominium areas**

As Mr Damjanac explains in his Witness Statement, these areas, mostly in the northwest and northeast corners of the site, were earmarked for commercial establishments, such as supermarkets, restaurants and possibly a gasoline station for the benefit of the Las Olas residents. There would also be a hotel on the lot directly behind the Concession. These would be the last areas of the project site to be developed.





(e) **Condominium Section**

The main part of the site would comprise of 288 individual lots on which condominiums would be built. Six of these 288 lots were larger and would consist of condominium parks, which would form part of the final phase of development. Renderings of these condo parks were prepared in 2010.<sup>29</sup> A series of internal roads would connect the condominiums with the public roads to the north, west and east of the site. As Mr Aven explains in his witness

<sup>29</sup> Exhibit C197, Condo Park Renderings

statement, the Claimants' plan was to develop this part of the site in three stages of a third each, starting with the third closest to the beach.<sup>30</sup>



## **B. Obtaining All Necessary Permits**

### **(a) The Costa Rican permitting regime for real estate development projects**

51. In order to commence development of a real estate project in Costa Rica, it is necessary to apply to several different ministries and government authorities for a

<sup>30</sup> See David Aven Witness Statement, ¶ 123

number of different permits. Details of each of the permits required and the agencies that administer them are set out in the table at Exhibit C202.<sup>31</sup>

52. The most important of these permits at the outset of the process is the environmental feasibility permit (the “**Environmental Viability**”), which is administered by SETENA, the National Technical Environmental Secretariat, a specialist branch of the Ministry of the Environment (“**MINAE**”).
53. MINAE is itself part of the Central Administration of the government of Costa Rica, consisting of other ministries, such as the Ministry of Health and the Ministry of Housing. As Ministry of the Environment, MINAE has overall responsibility for everything related to the environment, natural resources and energy.
54. SETENA, which falls under the auspices of MINAE, is responsible for issuing the Environmental Viability and subsequently monitoring compliance by the permit holder with any conditions attached thereto.<sup>32</sup>
55. The Environmental Viability regime is governed by a number of parliamentary acts, regulations and executive decrees, the most important of which are the Environmental Organic Act which establishes the requirement that every developer obtain an Environmental Viability<sup>33</sup> and the General Provisions for the Procedure of Environmental Impact Assessment (the “**EIA Provisions**”).<sup>34</sup>
56. In order to obtain the requisite Environmental Viability, a project must undergo a preliminary environmental assessment. Through the preliminary environmental assessment SETENA determines which type of Environmental Impact Assessment the proposed project must undergo.
57. According to the EIA Provisions, there are two types of preliminary environmental assessment – D1 for projects that are considered to have a high potential environmental impact and D2 for projects with a low potential environmental impact. Due to its scale, Las Olas was required to complete a Form D1.

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<sup>31</sup> Exhibit C202, Costa Rican real estate development permits

<sup>32</sup> Exhibit C184, Environmental Organic Act, 7554; Exhibit C208, Environmental Impact Assessment Provisions; Exhibit C214, SETENA Guideline Executive Decree N. 34522 - MINAE; Exhibit C215, SETENA Guidelines D1 Decree; Exhibit C212, Provisions about the Organisation of SETENA, Decree N. 36815.

<sup>33</sup> Exhibit C184, Environmental Organic Act, Articles 17-24, 43, 44 & 84

<sup>34</sup> Exhibit C208, Environmental Impact Assessment Provisions



58. The EIA Provisions, together with Executive Decree No. 34522-MINAE<sup>35</sup> establish the documents required to support a D1 application to SETENA. They are:
- (b) a duly signed form D1;
  - (c) a basic engineering survey;
  - (d) a basic archaeological survey;
  - (e) a basic geological survey; and
  - (f) a basic biological survey in the event that a proposed project is located in or close to an environmentally fragile area (AAF).
59. An AAF is defined in Exhibit 3 to the EIA Provisions and includes wetlands not being part of a Wildlife Protected Area (“WPA”), areas covered by a forest and the maritime terrestrial zone.<sup>36</sup>
54. In order to submit form D1, it is also necessary to submit a number of authorizations obtained from other agencies, including a certification from the National System of Conservation Areas or “*Sistema Nacional de Areas de Conservación*” (“SINAC”) that the proposed project area is not within a WPA, further details of which are given below.
60. Once SETENA has gathered all of the requisite information, it assesses the likely level of environmental impact of the project and determines what type of Environmental Impact Assessment instrument the developer must submit. The different Environmental Impact Assessment instruments include an Environmental Impact Study, an Environmental Management Plan and a Sworn Declaration of Environmental Commitments. Once submitted by the developer, SETENA has two months in which to analyze the application in accordance with the applicable legal and technical criteria of its internal bodies and determine whether or not to grant the Environmental Viability.<sup>37</sup>

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<sup>35</sup> Exhibit C214, SETENA Guideline Executive Decree No. 34522-MINAE

<sup>36</sup> Exhibit C208, Environment Impact Assessment Provisions, Exhibit 3

<sup>37</sup> Exhibit C208, Article 40 and Exhibit C217, SETENA Guidelines EsIA – PGA. Decree 32966

61. Once the Environmental Viability has been granted, if the design of the project changes substantially the developer must inform SETENA of the proposed amendment and provide evidence to demonstrate that the proposed amendment will not increase the environmental impact of the project or vary the construction area by more than 20%. SETENA will then decide whether to approve the modification or not.<sup>38</sup> Once issued, an Environmental Viability is expressed to be valid so long as construction commences within two years starting from the date of issue.
62. Once the Environmental Viability has been granted by SETENA, the developer can apply for the other permits required for the project. These include, *inter alia*, construction permits from the Municipality and, where applicable, logging and tree cutting permits from SINAC.<sup>39</sup>
63. SINAC, like SETENA, is an agency of MINAE. The internal administrative organization of SINAC consists of the following:
- (b) the National Council of Conservation Areas (CONAC);
  - (c) the Executive Secretariat;
  - (d) the Regional Council (CORAC);
  - (e) the administrative structures of the Conservation Areas; and
  - (f) Local Councils.
64. SINAC has powers to (i) manage forest resources, wildlife and protected areas; and (ii) dictate policies and planning and implement processes to assure a sustainable management of natural resources.
65. SINAC is in charge of managing all issues related to WPAs. WPAs are created by act of parliament or by executive decree. There are seven categories of WPA, including wetlands and forestry reserves. SINAC's powers and responsibilities relating to

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<sup>38</sup> Exhibit C208, Environmental Impact Assessment Provisions, Article 46.3

<sup>39</sup> Exhibit C219 Urban Planning Law N° 4240; Exhibit C210, Municipal Zoning Plan of Esterillos - Map; Exhibit C211, Municipal Zoning Plan of Esterillos – Bylaws; Exhibit C205 Construction Act, Law N° 833; Exhibit C206 Construction Provisions, Resolution n. 4290 of INVU; and Exhibit C170 Forestry Law N° 7575; and Exhibit C209 Guidelines R-SINAC-028-2010.

WPAs include defining the strategies and policies to consolidate and develop WPAs and recommending the creation of WPAs.<sup>40</sup>

66. SINAC is also in charge of managing the Natural Patrimony of the State, which includes all forests and forest land held by public bodies or as part of a natural reserve and all wetlands that are neither WPAs nor AAFs.<sup>41</sup>
67. SINAC has 11 conservation areas under its remit, each of which is a territorial unit managed by the relevant Regional Council.<sup>42</sup> In the case of the Las Olas project, the relevant conservation area is ACOPAC, the conservation area for the Central Pacific Coast. As part of its supervision of these conservation areas, SINAC is responsible for (i) protecting, classifying, managing and supervising wetlands; (ii) determining their national or international importance; (iii) determining whether or not a wetland exists; and (iv) delineating the boundaries of wetlands through executive decree.<sup>43</sup>
68. To that end, each conservation area must appoint a professional in natural management (a biologist, forest engineer or WPA manager for example) capable of identifying and delineating a wetland.<sup>44</sup> In the case of ACOPAC, that individual was Mr Manfredi. SINAC also has a department of wetlands, the National Wetland Program, a technical body in charge of recommending policy, plans and actions to better protect wetlands. The National Wetland Program does not have any operational responsibilities but it can assist the local conservation area (in Las Olas's case, ACOPAC) if it lacks the technical ability to perform a certain task. It also has authority to review the wetland related criteria issued by the conservation area.
69. As part of its responsibilities, SINAC also issues permits for logging and hunting.<sup>45</sup> In addition, as stated above, before applying to SETENA for an Environmental Viability, a developer must obtain a certification from SINAC confirming that the land in question is not part of a WPA.
70. The files that are held by SINAC on projects are public record. Members of the public, including the owners of land, therefore have free access to the information,

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<sup>40</sup> Exhibit C207, Biodiversity Act, Article 25

<sup>41</sup> Exhibit C170, Forestry Law No. 7575, Article 13

<sup>42</sup> Exhibit C201, Map of SINAC Conservation Areas

<sup>43</sup> Exhibit C220, Wildlife Conservation Act 1992, Article 7(h)

<sup>44</sup> Exhibit C218, Executive Decree No. 35803-MINAE

<sup>45</sup> Exhibit C170, Forestry Law N° 7575 and Exhibit C209, Guidelines R-SINAC-028-2010.

save where a final act or resolution is being prepared, in which case SINAC could refuse to provide such information until the final act or resolution has taken place.<sup>46</sup>

71. Another agency within MINAE is the Tribunal Ambiental Administrativo (the “TAA”). Created by the Environmental Organic Act, the TAA is an administrative court with jurisdiction over complaints made regarding the violation of regulations protecting the environment and natural resources. If a complaint is filed with an authority other than the TAA, it must refer that complaint to the TAA. When investigating any such complaints, the TAA must coordinate with SETENA, SINAC and any other agencies, such as the local Municipality, to collect evidence.<sup>47</sup>
72. Another agency that plays a role in obtaining relevant permits for a real estate project is the local Municipality. Municipalities have broad powers to rule derived from the general purposes for which they were created. In this regard, the Costa Rican Constitution entrusts to them the administration of services and provides them with administrative, political and financial autonomy within their territory.
73. However, despite its general purposes, on environmental issues a municipality’s powers are limited by the existence of sectoral laws that confer competences to other bodies and state entities, such as SETENA and SINAC. In the case of real estate developments, the Municipality has the power to regulate the use of the land and to intervene in urban planning and regulate construction control. In this way, the Municipality has the authority to (i) grant construction permits, which it does once it has verified that all other necessary permits (such as the Environmental Viability) have been obtained by the developer; and (ii) monitor compliance through inspections during the construction and operational phases.<sup>48</sup>
74. Given the large number of government entities with environmental competence, the Contentious-Administrative Tribunal of Costa Rica has established that there is an obligation on all entities and organs of the Public Administration to coordinate with

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<sup>46</sup> Section 30 of the Political Constitution of Costa Rica

<sup>47</sup> Exhibit C185, TAA Procedure Provisions; Exhibit C184, Environmental Organic Act; Exhibit C186, Public Administrative Law

<sup>48</sup> Exhibit C219, Urban Planning Law N° 4240; Exhibit C205, Law N° 833 on Constructions, Exhibit C206, Construction Provisions, Resolution n. 4290 of INVU; and Exhibit C210, the Municipal Zoning Plan of Esterillos - Map.

one another.<sup>49</sup> Further, there is a specific obligation placed on SINAC to coordinate with other competent authorities in the prevention, mitigation and monitoring of damage to wildlife.<sup>50</sup>

**(b) The Claimants obtain all necessary permits**

75. In early 2005, Mr Aven moved to Costa Rica and settled in a suburb of San José, where he could take a much more hands-on approach to the project.<sup>51</sup> Because of the complexity of the Costa Rican permitting regime about which Mr Aven knew very little, and in view of the fact that he did not speak Spanish, the Claimants appointed lawyers, architects, engineers and other professionals to assist at all stages of the development.
76. The first step the Claimants took in relation to the development was to commission architects to develop the master site plan for the beach club on the Concession, as this was intended to be part of the early phases of the project.
77. Once a master site plan had been obtained, the first and most important step was to apply for and obtain the requisite environmental and construction permits from the relevant authorities. Until such time as these permits were obtained the Claimants' investment consisted simply of title to land and a renewable 20-year Concession with the Costa Rican government. Although there was value in the land and the Concession already, once the Investors had obtained the relevant permits, which would enable them to realize the highest and best use of their lands, the value of their project would increase substantially, only to improve further as development of the site naturally led to the generation of all of the other revenue streams it was capable of supporting (and which the Investors had planned for it).
78. As part of obtaining the Environmental Viability from SETENA for the Concession, the Claimants appointed DEPPAT, a Costa Rican environmental consultancy company, a fact which is confirmed by Mr Bermúdez in his Witness Statement.<sup>52</sup> Mr Bermúdez submitted the D1 application and accompanying documents and kept Mr Aven informed of developments as the application progressed through SETENA. As

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<sup>49</sup> Exhibit C226, TAA Decision number 00079-2015, file number 09-002172-1027-CA.

<sup>50</sup> Exhibit C220, Wildlife Conservation Act, Article 7.

<sup>51</sup> See David Aven Witness Statement ¶ 52

<sup>52</sup> See Esteban Bermúdez Witness Statement ¶ 20

part of this application, in accordance with SETENA's requirements, confirmation was obtained from SINAC that the Concession was not within a WPA<sup>53</sup> and on January 20, 2006, an environmental guarantee deposit in the sum of US\$ 17,500 was paid by the Claimants.<sup>54</sup>

79. On March 17, 2006, the Claimants received the Environmental Viability for the Concession section of the project from SETENA.<sup>55</sup> As is normal, in accordance with SETENA's above-mentioned monitoring requirements, the Environmental Viability contained certain conditions and recommendations for implementation, including that an Environmental Regent be appointed to the Concession to monitor the project's development once construction commenced and provide bi-monthly compliance reports to SETENA.
80. SETENA's Environmental Impact Assessment for the Concession included a study of an area of 500 meters around the Concession and noted that the main use of the land until now had been primarily urban development and some agricultural activities.<sup>56</sup>
81. The Environmental Impact Assessment also noted that no significant impacts were expected as a result of the project.<sup>57</sup> Further, as part of its assessment of the indirect area of influence the project might have, SETENA's Environmental Impact Assessment considered the communities of Esterillos Oeste, Esterillos Este and Bejuco.<sup>58</sup> The study further noted that there was no river or creek on the property or other source of water and that the predominant vegetation was grassland with some dispersed trees – none of which was an endangered species.<sup>59</sup> Importantly, the Environmental Impact Assessment did not identify any fragile environments in the area of study.<sup>60</sup>
82. SETENA's Environmental Impact Assessment for the Concession also noted that the developer, La Canícula, had carried out a sociological survey that determined that:

(b) 40% of those surveyed knew of the project;

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<sup>53</sup> Exhibit C223, SETENA File for Concession

<sup>54</sup> Exhibit C34, Environmental Deposit Guarantee Certificate, January 20, 2006

<sup>55</sup> Exhibit C36, SETENA Environmental Viability for the Concession, March 17, 2006

<sup>56</sup> Exhibit C223, SETENA file for the Concession, p.26

<sup>57</sup> *Ibid.*

<sup>58</sup> *Id.* p. 69

<sup>59</sup> *Id.* p. 46 & p. 55

<sup>60</sup> *Id.* p. 55

- (c) 92% of those surveyed considered the project would have positive effects on the social and environmental conditions; and
  - (d) only 12.7% of those surveyed considered the project would have negative effects on the environment.<sup>61</sup>
83. Once the Environmental Viability had been obtained, the Claimants proceeded to obtain the construction permits for the beach club. This was a very time-consuming process. After a lengthy selection procedure, in 2007 the architect and engineering firm, Mussio Madrigal, was appointed to apply to the local Municipality for the relevant construction permits, which they did.<sup>62</sup>
84. Mussio Madrigal began by conducting a site visit and reviewed the ‘*Plano Regular*’ for the area – a document that determined the density of buildings and set out restrictions on the number of storeys that could be built. In the coming months, they developed the master site plan which would later be used to apply for the Environmental Viability for the Condominium Section of the project.<sup>63</sup> The master site plan consisted of an overall plan for the whole project and mapped out where individual lots, larger lots and infrastructure would be located. Throughout this period Mussio Madrigal reported their progress to Mr Aven, as project manager.
85. In May 2007, the Claimants appointed Zurcher Architects to prepare a detailed design of the beach club.<sup>64</sup> Zurcher were appointed because of their reputation for designing luxury hotels and other commercial facilities. The Claimants felt that the beach club would be the biggest draw to Las Olas and wanted to ensure it was sufficiently luxurious.
86. Later that same year, Mussio Madrigal successfully obtained the construction permits for the Concession.<sup>65</sup> Also in 2007, Mussio Madrigal hired a team of four people to clear the scrub brush from the land. This was necessary to prepare the land for construction, to ensure the project site was kept clean and tidy and attractive to potential purchasers and also to ensure the site did not become overgrown. As

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<sup>61</sup> *Id.* pp. 69-70

<sup>62</sup> Exhibit C43, Mussio Madrigal Contract, April 25, 2007

<sup>63</sup> Exhibit C54, Master Site Plan, September 17, 2008

<sup>64</sup> Exhibit C190, Beach club rendering aerial view; Exhibit C189, Beach club site rendering

<sup>65</sup> Exhibit C40, Construction permits for the Concession, 2007

described by Mr Arce and Mr Aven in their Witness Statements, the land was very fertile having previously been used as grazing land for cattle.<sup>66</sup>

87. Once the master site plan had been completed, Mussio Madrigal developed the site plan for the easements and the lots fronting them and applied for and obtained the relevant construction permits for two of the easements in the first quarter of 2007.<sup>67</sup>
88. At the same time, Mussio Madrigal were working to obtain the Environmental Viability for the Condominium Section of the project from SETENA. As the project was one that could be considered likely to have a high environmental impact, form D1 was appropriate. The Claimants' D1 application form was submitted to SETENA on 8 November 2007. As part of this application, Mussio Madrigal submitted a project environmental management plan.
89. Then, on January 10, 2008, a member of the Institutional Management Department at SETENA carried out a field inspection of the Las Olas project site.<sup>68</sup>
90. Following this inspection, on February 23, 2008, SETENA requested further documents from the Claimants including an updated vegetation cover map, a property registration certificate, confirmation the works would not start until after the Environmental Viability had been received, a photographic record of the project area and confirmation from SINAC that the land was not in a WPA.<sup>69</sup>
91. On March 14, 2008 therefore, Mussio Madrigal wrote to SINAC requesting confirmation from SINAC that the project site was not in a WPA.<sup>70</sup>
92. Separately, on March 24, 2008, Mussio Madrigal applied to SETENA to extend the Environmental Viability for the Concession to prevent its expiry, as it was expressed to be valid provided the construction works were commenced within two years from the date of issue and no works had yet commenced.
93. On April 2, 2008, Mussio Madrigal received written confirmation from SINAC that the Condominium Section of the project was not within a WPA, which meant they

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<sup>66</sup> See David Aven Witness Statement ¶ 84 and Minor Arce Witness Statement ¶ 12

<sup>67</sup> Exhibit C40, Construction permits for the Concession, 2007

<sup>68</sup> Exhibit C222, SETENA file for the Condominium Section

<sup>69</sup> Exhibit C222, SETENA file for the Condominium Section

<sup>70</sup> Exhibit C45, Mussio Madrigal Letter to SINAC, March 14, 2008



were one step closer to obtaining the Environmental Viability for that section of the project.<sup>71</sup>

94. SINAC's letter confirming that the project was not within a WPA, together with the rest of the outstanding information, was submitted to SETENA on April 3, 2008.<sup>72</sup>
95. Following receipt of that information, on June 2, 2008, SETENA issued the Environmental Viability for the Condominium Section. In the Environmental Viability SETENA confirmed that the documents it had received met the requirements and on that basis granted the Environmental Viability, subject to certain conditions. These conditions included that Inversiones Cotsco deposit an environmental guarantee of US\$ 8,000 (which it did on July 20, 2010 prior to commencement of construction) and that it appoint an Environmental Regent to inspect the project for compliance with the applicable permits and present bi-monthly reports to SETENA. As Mr Aven explains in his Witness Statement, this was done in June 2010 when Mr Bermudez of DEPPAT was appointed as Environmental Regent, prior to construction beginning.<sup>73</sup>
96. The Environmental Viability further noted based on SETENA's earlier site inspection that *"the land where the project will be located is defined as flat-rugged with slopes ranging from 0% to 15% in most of the ADI [Area of Direct Influence]. There are no permanent or intermittent streams or rivers in the PA [Project Area], and the vegetation cover is comprised of pastures with scattered trees and small sectors with vegetation cover in the PA [sic]. The area surrounding the project consists of parcels with a similar use as the PA, as well as buildings and houses under construction."*<sup>74</sup>
97. Further, the Environmental Impact Assessment for the Condominium Section noted that most of the vegetation of the project site was pastures or grassland with scattered trees and that no protected areas were detected.<sup>75</sup> It went on to note that the land around the project site had similar features, with some houses built.<sup>76</sup> The

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<sup>71</sup> Exhibit C48, SINAC Confirmation for Condominium Section of no WPA, April 2, 2008

<sup>72</sup> *Ibid.*

<sup>73</sup> See David Aven Witness Statement ¶ 94

<sup>74</sup> Exhibit C52, Environmental Viability for the Condominium Section, June 2, 2008

<sup>75</sup> Exhibit C222, SETENA file for the Condominium Section, p. 220

<sup>76</sup> *Id.*, p. 271

Environmental Impact Assessment also referred to the developer's sociological survey, which concluded, *inter alia*, that:

- (b) To the question about possible benefits of the project, 59% answered work, 29% answered tourism, 17% answered development and only 23% answered that the project would not have any benefits;
- (c) To the question about possible negative effects of the project, 59% of respondents did not think the project would have any negative effect and 18% were concerned about flooding problems in Esterillos Oeste;
- (d) To the question about the impact on the environment, 35% considered that the project would not have any impact on the environment, 47% considered the project would have little effect and only 18% considered the project would have a great effect on the environment;
- (e) To the question about the respondents' main environmental concerns about the project, 41% answered flooding and requested a very good design of the drainage system; and
- (f) Overall, 82% of those surveyed were in favor of the project.<sup>77</sup>

98. SETENA concluded in its Environmental Impact Assessment that the environmental impact caused by the development of the project would be low to nil. One of the mitigation measures provided for by SETENA was the installation of storm drains in areas of the project to minimize runoff and soil drag.<sup>78</sup> It was clear from this mitigation measure and the survey respondents' responses that rainwater flooding was a longstanding issue in the area, something which the Municipality later tried to address by the installation of storm drains.

99. Not long after the Environmental Viability had been issued and before the Claimants had obtained the relevant construction permits for the Condominium Section of the project, the 2008 financial crisis took hold. As a result, the Claimants decided to halt work on the project until such time as the economy recovered. As Mr Aven explains in his Witness Statement, thanks to the Claimants' determination to self-fund the

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<sup>77</sup> *Id.*, p. 49

<sup>78</sup> *Id.*, p. 195; p. 319; p. 322; p. 349

project, there was no debt to service and the project could effectively go into hibernation from September 2008 to December 2009 inclusive, without the project otherwise being adversely impacted.<sup>79</sup>

100. As Mr Aven and Mr Damjanac explain in their Witness Statements, after the project reopened in January 2010, a decision was made, based on the palpable changes in the local real estate market, to adapt the design of the beach club to reduce the size and price of the individual units.<sup>80</sup>
101. As a result of these changes, as explained above, the Claimants had to apply to SETENA for a new Environmental Viability for the Concession. The Claimants appointed architect José Andres Castro to prepare the revised SETENA application. He was assisted by Daniel Loria Sims, an environmental consultant, who later became Environmental Regent for the Concession.
102. Also in January 2010, the Claimants applied to the Municipality for the construction permits for the Condominium Section. This was done by Mr Aven's then attorney, Mr Vargas.
103. The outstanding construction permits for the easements were issued by the Municipality of Parrita on July 16, 2010 and a few months later, on September 7, 2010, construction permits for the remainder of the project site were issued.<sup>81</sup>
104. The new Environmental Viability for the Concession was issued by SETENA on August 23, 2011 but by this time the project had been halted by the Respondent.<sup>82</sup>

**C. Construction, sales and marketing activity commences**

105. In early fall 2010, once the construction permits for the easements and the Condominium Section had been issued, the Claimants proceeded with construction of the infrastructure in the Condominium Section.
106. Work had commenced on two of the Easements in respect of which Mussio Madrigal had obtained construction permits in 2007, before the financial crisis and the

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<sup>79</sup> See David Aven Witness Statement ¶ 103

<sup>80</sup> See David Aven Witness Statement ¶ 107 and Jovan Damjanac Witness Statement ¶ 46(b)

<sup>81</sup> Exhibit C86, Las Olas Project Overview, September 14, 2010

<sup>82</sup> Exhibit C138, Environmental Viability for the Concession, August 23, 2011

consequent closure of the project for approximately 18 months. At this time, Mussio Madrigal had also hired a team of four to clear the land of scrub brush to prevent the area from becoming overgrown.

100. As Mr Arce, Mr Bermúdez and Mr Aven describe in their Witness Statements, the Las Olas site was part of an old cattle ranch and consists mainly of overgrown pastureland and scattered trees.<sup>83</sup> This is confirmed by SETENA's description of the land in its Environmental Impact Assessment for the Condominium Section, as mainly grassland and pastures with scattered trees.<sup>84</sup> As a result, it became necessary to clear the land from time to time by cutting back scrub brush and cutting the grass. This was done in order to keep the site clear for construction and also to ensure the property appeared well-maintained, for the benefit of any potential purchasers of lots. As Mr Aven and Mr Damjanac confirm in their Witness Statements, at no point did any of the workers on site cut down any trees that would have required a permit for the purpose, as is reflected in Mr Bermúdez's bi-monthly reports to SETENA.<sup>85</sup>
107. In the fourth quarter of 2007, roads were carved out for the two easements closest to the beach and pavers and culverts were installed. Water lines were run to each of the lots fronting those easements. Subsequently, electricity was run to each of those lots, for which a permit was obtained from the local electricity company, ICE.
108. In August 2008, not long after Mussio Madrigal applied to SETENA for an extension of the Environmental Viability for the Concession, work commenced on the beach club. Mussio Madrigal supervised this work, which was carried out by a local contractor. Unfortunately, however, by the time the financial crisis of 2008 took hold, only the foundations and walls of four small units had been built.
109. It was not until July and September 2010, after the project had reopened and the remainder of the construction permits had been issued, that construction on the remainder of the site could commence. Work was completed on three further easements going along the main road from the beach into Esterillos Oeste, including

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<sup>83</sup> See Witness Statements of Minor Arce Solano ¶ 12; Esteban Bermudez ¶ 37 and David Aven ¶ 84

<sup>84</sup> Exhibit C222, SETENA file for the Condominium Section, p.55

<sup>85</sup> Exhibits C68, C74, C87, C94, C109, C118, C120, C130, C136, C140, C147, C150, C151 & C153, DEPPAT SETENA updates from June-July 2010 through June-July 2012

roads, electricity, water and culverts by May 2011, when the Municipality ordered the shutdown of the project, as described in more detail below.

110. Also in July 2010, the Claimants agreed to a request from the local Municipality to put in storm drains on two public roads running along the edge of the project site. As explained by Mr Aven in his Witness Statement, an agreement was reached whereby the Las Olas developers would purchase the storm drains and the Municipality would use its equipment to install them and connect them to the storm drains on the Las Olas project site.<sup>86</sup> Storm drains were installed in the internal roads on the project site to collect the rain water that ran off the higher elevations and collected in a depression in the topography of the site.
111. The Municipality had been installing storm drains on public roads near Las Olas in order to deal with flooding caused by heavy rains but had run out of money before the project could be completed. As a result, Las Olas had agreed to provide some financial assistance by purchasing the remaining storm drains. This was very much a collaboration between Las Olas and the Municipality, as explained by Mr Damjanac in his Witness Statement.<sup>87</sup> In fact, problems with drainage of rainwater had long been apparent in the area, a fact that was reflected in the sociological survey Inversiones Cotsco undertook as part of its application for the Environmental Viability for the Condominium Section. As stated above, 41% of respondents considered flooding to be a possible negative effect of the project and requested a very good design of the drainage system and SETENA itself insisted in the Environmental Management Plan that storm drains be introduced in areas of the project to minimize runoff and soil drag.<sup>88</sup>
112. Work on the storm drains took approximately five months to complete and, once installed, they were very effective. Mr Damjanac, who by now was living on the project site and acting as the main point of contact on site, took photographs of the

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<sup>86</sup> See David Aven Witness Statement ¶ 114

<sup>87</sup> See Jovan Damjanac Witness Statement ¶ 108

<sup>88</sup> Exhibit C223, SETENA file for the Concession

extent of the flooding during rainy season before the storm drains were installed and the lack of flooding during rainy season thereafter.<sup>89</sup>

113. Also during this time, the Claimants were working hard on marketing and selling the Las Olas lots.
114. As Mr Aven explains in his Witness Statement, Las Olas opened a sales office in San José in April 2008. At first, Las Olas employed Andrea Cooper who had previously worked in sales and marketing for the very successful Los Sueños project. From around September 2008, the San José and on-site sales offices were managed by Johnny Podesta, an experienced sales representative who had previously worked for another very successful development company in Costa Rica, Costa Developers. The San José office employed four people to do telemarketing.
115. In late 2009, not long before the project re-opened, Mr Aven approached Mr Damjanac with a view to resuming marketing activities. As Mr Aven explains in his Witness Statement, Mr Damjanac began calling potential investors in late 2009 to gauge the market.<sup>90</sup> During that time, Mr Damjanac made around 700 to 800 calls and based on his discussions concluded that the demand for ocean-side homes, such as those on offer at Las Olas was increasing every day.<sup>91</sup>
116. In December 2009, Mr Damjanac accepted Mr Aven's offer to become sales and marketing director at Las Olas. Mr Damjanac was very excited by the opportunity as he recognized how special the Las Olas project was and believed it would be a great success.<sup>92</sup> He moved down to Las Olas and set up an office and made his home on the Las Olas site.
117. In spite of his work on the revised business plan, Mr Damjanac's main role at Las Olas was to market and sell lots, a task that occupied around 75% of his time.<sup>93</sup> He employed the services of brokers, to whom a commission of around 5% would be paid.

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<sup>89</sup> Exhibit C187, Photographs of Municipality of Parrita working to install storm drains donated by Las Olas; Exhibit C66, Video of flooding

<sup>90</sup> See David Aven Witness Statement ¶ 105

<sup>91</sup> See Jovan Damjanac Witness Statement ¶ 41

<sup>92</sup> *Id.* ¶ 42

<sup>93</sup> *Id.* ¶ 45

118. In 2010, Mr Damjanac created signage on the public roads to advertise Las Olas. There is a considerable flow of traffic from San José down the coastal road past Las Olas to Manuel Antonio, one of the most visited tourist attractions in Costa Rica. Mr Damjanac arranged for a large billboard to be erected next to Las Olas, facing the main highway. He also arranged for nine signs in total in Jaco and the surrounding areas, which had lifestyle photos and information about the project and our contact details.<sup>94</sup> As a result, Mr Damjanac recalls that Las Olas received a great number of telephone enquiries and impromptu visits.<sup>95</sup>
119. In addition, Mr Damjanac placed advertisements in publications such as AM Costa Rica, La Nación, the magazine For Sale by Owner, the Toronto Globe & Mail, the National Post, the Calgary Herald and on free property websites, such as Mygola.com.
120. Most of Mr Damjanac's sales efforts focused on speaking to potential buyers. In 2007, Mr Aven had acquired contact details for thousands of people who had visited Costa Rica and had expressed an interest in real estate there.<sup>96</sup> The Claimants also bought leads from companies such as Ventas Leads,<sup>97</sup> who had built up large databases of people with an interest in buying holiday homes in Costa Rica. As Mr Damjanac explains in his Witness Statement, this was very valuable information.
121. During 2010, Mr Damjanac spent most days methodically working his way through the leads, making around 50 to 100 telephone calls a day, obtaining around ten to 20 decent prospects. Mr Damjanac would then follow up with these people regularly.<sup>98</sup>
122. To encourage buyers to become more involved in the purchase process, they were invited to make a refundable lot reservation deposit and given them 45 to 65 days to come and examine the lot at Las Olas. The Claimants offered a number of incentives as well, including the following:<sup>99</sup>
- (b) they offered to reimburse buyers for their travel expenses to Costa Rica if they subsequently bought a lot; and

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<sup>94</sup> For examples of the types of images used, see Exhibit C100, Las Olas Business Plan, Dec 20, 2010 p.28 and Exhibit C199, Photographs of signage in situ

<sup>95</sup> See Jovan Damjanac Witness Statement ¶ 88

<sup>96</sup> Exhibit C195, Individual contact sheets of potential buyers

<sup>97</sup> Exhibit C224, Example of lead provided Ventas Leads, January 20, 2011

<sup>98</sup> See Jovan Damjanac Witness Statement ¶ 72

<sup>99</sup> Exhibit C100, Las Olas Business Plan, December 20, 2010 p.25

- (c) they offered buyers a US\$ 2,000 fee if they could find an equal or better comparative property deal in the Costa Rican market. None ever did.
123. During 2010 through to May 2011, the Claimants received approximately 25 deposits, and more than 100 people visited the site on the basis of Mr Damjanac's marketing efforts, a significant result at a time when economies were only just beginning to recover from the financial crisis. As Mr Damjanac confirms in his Witness Statement, there were also a number of sales in the pipeline in May 2011 that collapsed as a result of the Respondent shutting down the project.
124. During this time, Mr Shioleno was also involved in marketing the project. As he explains in his Witness Statement, he ran advertisements in newspapers including the Tampa Tribune and others in and around the Tampa, St Petersburg, Clearwater, Pasco and Sarasota areas. He also assisted by preparing marketing brochures and other marketing materials depicting the Las Olas site and showing the different lots available.<sup>100</sup>
125. Aside from spearheading the sales and marketing of the Las Olas project, Mr Damjanac assisted Mr Aven and the other investors in obtaining quotes for the construction of the revised post-financial crisis designs. To that end, he obtained sales figures from local brokers in the area in early 2010.<sup>101</sup> He also looked at comparables from other developments located around the Las Olas project site, from Tarcoles down to Dominical on the coast.<sup>102</sup>
126. As a result of Mr Damjanac's work, it became clear that sales prices had dropped from their pre-2008 financial crisis level. However, many of the comparable sites that Mr Aven and Mr Damjanac considered were, in their opinion, inferior to those at Las Olas, when considering factors such as location and proximity to a beautiful beach. Further, in view of the complete lack of debt on the Las Olas project, adjustments could be made to the sales prices of lots and condominiums without impacting the project's ability to turn a profit.

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<sup>100</sup> See Jeffrey Shioleno Witness Statement ¶ 19

<sup>101</sup> See Jovan Damjanac Witness Statement ¶ 55

<sup>102</sup> For examples of these, see Exhibit C100, Las Olas Business Plan December 20, 2010, pp. 31-33/39



127. Throughout 2010, Mr Aven and Mr Damjanac frequently discussed how the business plan should be revised in light of the findings of our market analysis. As a result of those discussions and Mr Damjanac's extensive research, Mr Aven decided to take the following steps:

- (b) The beach club and hotel/condo units on the Concession would be re-designed to reflect the new market conditions. They would be lower-spec than the previous design and the units would be sold for less money. They initially targeted an average of US\$ 249,000 for the larger units US\$ 150,000 for the smaller units. As well as featuring two swimming pools, a beach club and other facilities, this would now include a 66-unit resort hotel/condo complex. Mr Castro was commissioned to prepare the new designs.<sup>103</sup>
- (c) The 14,000 square meter parcel across from the beach club was also re-designed to build a 100-plus room hotel. Initial conceptual designs were subsequently drawn up.<sup>104</sup>
- (d) The lots in the Condominium Section would remain the same. The only change was to adjust the price of lots down from US\$ 160,000 to between US\$ 80,000 and US\$ 90,000.
- (e) The condominiums destined to sit on the lots in the Condominium Section were downsized. Smaller homes had a lower initial price point of around US\$ 160,000 to US\$ 250,000, compared to a pre-crisis level of between US\$ 260,000 and US\$ 750,000.
- (f) The sales prices of the lots on the easements were similarly readjusted downwards from their pre-crisis high of US\$ 100,000 per lot to around US\$ 50,000 to US\$ 70,000 per lot.

128. As a result of this work, a new business plan was produced during the last quarter of 2010.<sup>105</sup> This business plan amalgamated all of the information Mr Damjanac and Mr

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<sup>103</sup> Exhibit C196, José Andres Castro renderings

<sup>104</sup> Exhibit C57, Renders for the hotel design, 2010

<sup>105</sup> Exhibit C100, Las Olas Business Plan, December 20, 2010

Aven had gathered on likely costings with the project's projected revenues, based on the vertically integrated business plan Mr Aven had envisaged from the outset.<sup>106</sup>

**D. Sudden and Drastic Changes Made to the Regulatory Relationship**

**(a) Steps Taken to Halt Construction**

129. Everything was progressing smoothly with the project until around mid-January 2011 when the Claimants received a letter from SETENA requesting an original of a MINAE document SETENA had allegedly received on April 3, 2008 prior to issue of the Environmental Viability.<sup>107</sup>
130. As Mr Damjanac and Mr Aven recall in their Witness Statements, in late 2010 or early 2011, Mr Bucelato, a neighbor who seemed intent on causing trouble, came to the site and made claims that the project was illegal and he would soon have it shut down because the Claimants had falsified a document and he had a copy of that document. However, as Mr Bucelato had been making empty threats and generally making a nuisance of himself for some time, Mr Damjanac and Mr Aven paid no attention to him.<sup>108</sup>
131. The Claimants did not know of the April 3, 2008 document to which SETENA's letter referred, but as Mr Aven explains in his Witness Statement, he began at this point to suspect that SETENA's request related to the document that Mr Bucelato had only a few weeks earlier claimed to have in his possession.
132. As a result, on February 9, 2011, on Mr Aven's instruction, his then attorney, Mr Vargas, wrote to SETENA informing them, *inter alia*, that the Claimants had no connection to or knowledge of the April 3, 2008 document, that it was not a document that had previously been requested by SETENA or any other government agency or institution and that Mr Aven could only assume that it was part of an elaborate ploy by Mr Bucelato to sabotage the Las Olas project.<sup>109</sup>
133. Then, on February 14, 2011, the Claimants received a letter from a SINAC employee, Luis Picado Cubillos, requesting an immediate injunction against further work on the

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<sup>106</sup> Exhibit C39, Las Olas Analysis Report, 2007

<sup>107</sup> Exhibit C104, SETENA Letter to David Aven, January 17, 2011

<sup>108</sup> See Jovan Damjanac Witness Statement ¶ 126

<sup>109</sup> Exhibit C111, David Aven Letter to SETENA, February 9, 2011

project site (the “**SINAC Notification**”). The SINAC Notification referred to a demand that had been filed on February 2, 2011 with the local prosecutor’s office in Aguirre against the Las Olas project on the basis of “*anomalies against the environment*” including “*tree felling,*” “*ground motion,*” “*possible filler of wetlands*” and “*the possible drying of wetlands because of the construction of sewer of 450m which vents into a mangrove swamp*” and on the basis that forged signatures had been found on the record of the project. The SINAC Notification went on to request that the Claimants refrain from construction or other work on the project site.

134. The Claimants were extremely shocked by this development. They had heard rumors in December 2010 or January 2011, around six weeks before, that someone was claiming there were wetlands on the project site but had no idea why or what the source of those rumors was.
135. Nonetheless, as a result of the rumors, Mr Aven and his attorney, Mr Vargas, had visited the local MINAE and SETENA offices to find out what exactly was going on, to no avail. Then, in the last week of January 2011, Mr Vargas had spoken to Mr Picado, who was then director of the local MINAE office. Mr Picado had not raised anything about there being any environmental problems at the project site at that time.
136. As a result, the Claimants were at a loss to understand the basis for the accusations. They had done nothing wrong and had obtained all requisite environmental and construction permits for the project, including confirmation from SINAC that the project site was not within a WPA.<sup>110</sup> Up to this date, none of the authorities with supervision of environmental matters had made any suggestion that the project was anything but compliant with all applicable laws and regulations.
137. Prior to this point, the project had been the subject of several unjustified complaints by Mr Bucelato. As Mr Aven and Mr Damjanac explain in their Witness Statements, Mr Bucelato had tried to purchase the project site himself in 2002 and, having failed to do so, appeared to be determined to sabotage the Las Olas project. As Mr Damjanac explains, Mr Bucelato would turn up on site regularly and make baseless accusations about the project in front of potential customers. He made a number of complaints about the project over the years, first to the Municipality of Parrita in early

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<sup>110</sup> Exhibit C222, SETENA file for Condominium Section

2009 then to the Town Defender in mid-2010 and then to the Municipality again in late 2010. One by one, Mr Bucelato's complaints were investigated and dismissed by these authorities on the basis of a complete lack of evidence.

138. At this point, in February 2011, the Claimants consulted a Costa Rican lawyer and the project's own Environmental Regent, Mr Bermúdez, whose bi-monthly reports to SETENA had always confirmed that the project was in compliance with the terms of the Environmental Viability and all other applicable permits.<sup>111</sup> As Mr Bermúdez explains in his First Witness Statement, he confirmed to Mr Aven that all works had been carried out appropriately and that he had no reason to believe there had been any breach by the Claimants of any applicable environmental laws.
139. Furthermore, the Claimants were advised that the SINAC Notification had no legal effect. Although SINAC has the power to issue injunctions relating to its own permits and it has policy powers over natural resources which imply the ability to issue an injunction, in practice, as SINAC has no jurisdiction over construction or other operative permits, its injunction was ineffective.
140. On that basis, and on the basis that (i) they had all relevant permits from SETENA and the Municipality, which included confirmation that the area was not a threat to the environment or within a WPA; and (ii) they had done nothing wrong, the Claimants disregarded the SINAC Notification.
141. Nonetheless, on February 23, 2011, Mr Aven, on behalf of Inversiones Cotsco, filed a motion for revocation of the SINAC Notification on the basis that it had been granted by an incompetent employee of SINAC who lacked jurisdiction to issue such an injunction over the project.<sup>112</sup>
142. On February 25, 2011, Mr Aven received a response to his motion for revocation of the SINAC Notification from Mr Picado, the very same employee responsible for issuing the Notification in the first place.<sup>113</sup> In his response, Mr Picado stated that the situation had arisen from a complaint filed by the Municipality of Parrita based on a visual inspection concerning the construction of an entrance without the requisite

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<sup>111</sup> Exhibits C68, C74, C87, C94, C109, C118, C120, C130, C136, C140, C147, C150, C151 & C153, DEPPAT SETENA updates from June-July 2010 through June-July 2012

<sup>112</sup> Exhibit C113, Motion for revocation of SINAC Notification, February 23, 2011

<sup>113</sup> Exhibit C114, Response from the state to motion for revocation, February 25, 2011

municipal permit. Mr Picado went on to refer to “irregularities [that] have been taking place with regard to [the] project” “since more or less 2008.” This was the first the Claimants had heard of any such irregularities.

143. As a result of his concern over the sudden developments, Mr Aven and the project’s advisors began a review of the correspondence exchanged over the years with the various government authorities in relation to the permits and authorizations the project had acquired. It was during this review that Mr Bermúdez uncovered in the SETENA file, a letter from Mr Bogantes to Hazel Diaz Meléndez at the Town Defender’s Office dated August 27, 2010 that referenced a SINAC report on the project that had confirmed, in July 2010, that there were no wetlands on the project site (the “**July 2010 SINAC Report**”).<sup>114</sup> This was the first the Claimants and their advisors had heard of this report and, given its potential relevance to the alleged issue with the project, Mr Aven went to the local MINAE office to obtain a copy.

144. Upon arrival at the local MINAE office, Mr Aven requested a copy of the July 2010 SINAC Report which confirmed the absence of wetlands on the project site. Mr Bogantes, the author of the August 27, 2010 letter, was called and he claimed not to have a copy of the report on file. As Mr Aven recalls in his witness statement, Mr Aven challenged Mr Bogantes and demanded that he be provided with a copy, as was his right. Mr Bogantes then called the MINAE office in Puriscal and spoke to an attorney by the name of Laura Chavez. After speaking with Mr Aven, Ms Chavez ordered Mr Bogantes to provide Mr Aven with a copy of the report, which he reluctantly did.

145. This report revealed that a SINAC site inspection had taken place on July 8, 2010 and concluded:

*During the field inspection carried out at the Las Olas Project located in Esterillos Oeste, it was noticed that one part of the property topography is flat and another is rugged. A shallow topographic depression or drainage channel about one meter deep relative to the slope in some stretches is located in the flat area of the property. Stagnant water is found in this shallow depression. In other sectors, water flows along the streambed; in some areas it does not exceed 20 cm, and it continues running to the neighboring property.*

[...]

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<sup>114</sup> Exhibit C80, Letter from SINAC to Hazel Diaz Meléndez, August 27, 2010

*Because of its rugged topography and downward slope to the flat part of the property, rainwater (precipitation water) is recharged on these slopes and directly pours into the depression located on the ground, mainly during the rainy season. Two inspections were carried out in the months of January and February of this year by MINAET officials, and in their report, **they clearly state that the environment is not being affected. Neither do they mention that a wetland or water mirror is found in the property.***

[...]

*The Secretaría Técnica Nacional Ambiental (SETENA<sup>115</sup>) in Resolution No. 1597-2008-SETENA granted the Environmental Viability Permit to Las Olas Residential Condominium.*

*[According to] the inspection of the Las Olas Residential Condominium property, its topographical and ecological characteristics and vegetation profile and soil, and [based on] the reports mentioned above which do not mention that this property has wetland areas anywhere, it is concluded that no wetlands are found in this property.*

146. Following receipt of that report, on August 27, 2010, Mr Bogantes had written to Ms Diaz, confirming there were “no damages on the environment” and that “according to the inspections there aren’t wetlands lakes or lagoons in the property.”<sup>116</sup>
147. At around this time, SETENA had also conducted an inspection of the Las Olas project site as a result of another of Mr Bucelato’s baseless complaints. An inspection had taken place on August 18, 2010 and SETENA produced a report on August 19, 2010, concluding that Mr Bucelato’s complaint should be rejected on the basis that there was no evidence of wetlands on the project site. On September 1, 2010, SETENA passed a resolution confirming the dismissal of Mr Bucelato’s complaint on the basis of a lack of evidence.<sup>117</sup>
148. Following receipt of the February 14, 2011 SINAC Notification, Mr Aven instructed Mr Bermúdez, Environmental Regent for the Condominium Section, to write to SINAC outlining his view on the project’s compliance with all applicable environmental laws and regulations.
149. On March 22, 2011, Mr Bermúdez wrote to SINAC outlining his concern over the finding of wetlands in the SINAC Notification on the bases that:

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<sup>115</sup> Exhibit C52, Environmental Viability for Condominium Section, June 2, 2008

<sup>116</sup> Exhibit C80, Letter from SINAC to Hazel Diaz Meléndez, August 27, 2010

<sup>117</sup> Exhibit C83, SETENA Resolution confirming no wetlands, September 1, 2010

- (b) all prior inspections by the various government agencies had concluded there were no wetlands on the project;
- (c) the project had the requisite Environmental Viability;
- (d) the only activity on the project site affecting the alleged wetland involved, in November 2010, installing pipes to collect rainwater that ran off the surrounding hills and collected in a naturally occurring depression in the land. He said that this depression was not a wetland; and
- (e) no trees had been felled that would have required a permit in order to be cut.

150. Mr Bermúdez never received a response to his letter.

151. Then, on or around April 13, 2011, they received a resolution from SETENA requesting an injunction from the Municipality against any further work on the Condominium Section (the “**SETENA April 2011 Resolution**”).<sup>118</sup> The SETENA April 2011 Resolution was premised on the fact that a document underlying SETENA’s original decision to grant the Environmental Viability for the project was allegedly a forgery. As Mr Aven explains in his Witness Statement, at the time, the Claimants assumed this to be the allegedly forged document referred to in the SINAC Notification that had also been the subject of SETENA’s request of January 17, 2011.<sup>119</sup> The SETENA April 2011 Resolution also stipulated that a copy be sent to the Environmental Prosecutor’s office.

152. On April 29, 2011, Mr Aven instructed his attorney to file an appeal against SETENA’s April 2011 Resolution on the basis that the Claimants knew nothing about the document in question and that, so far as they were aware, it was not the document upon which SETENA had relied when it issued the Environmental Viability for the Condominium Section.

153. Nonetheless, in spite of their outstanding appeal, on May 11, 2011, the Claimants received a copy of a shutdown notice from the Municipality of Parrita (the “**Shutdown Notice**”). The Shutdown Notice referenced the April 2011 SETENA

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<sup>118</sup> Exhibit C122, SETENA April 2011 Resolution, April 13, 2011

<sup>119</sup> See David Aven Witness Statement ¶ 172

Resolution and, apparently on the basis of the principle of coordination between public administrative bodies, required that all works on the project site be stopped.

154. At this point Mr Aven and Mr Damjanac were incredulous. They could not understand why the authorities were acting in this way, having only recently (in July and August 2010) reconfirmed something that had been declared at the outset – the project was not an environmental threat and did not contain any wetlands. Nonetheless, in view of the Shutdown Notice, all work on the project site was halted.
155. The Claimants later learned that, on the same day that SETENA issued its April 2011 Resolution, the TAA had also issued an injunction against the project on the basis of a complaint by Mr Bucelato (the “**TAA Injunction**”), although this TAA Injunction was never received. The TAA Injunction appears to rely on a January 3, 2011 letter from Mr Picado summarizing a number of inspections he made of the project site on December 6, 10, 17 and 21, 2010.
156. In that letter, Mr Picado stated that neighbors of the Las Olas site claimed that approximately two months prior to his inspection the Municipality had started to put in a pipeline to dry up the existing wetland. He concluded that there are “*bodies of water, supposedly classified as wetlands, on the property*” and recommended asking “*the National Wetlands programme to inspect the site of the events [...] to determine whether or not the alleged wetland claimed by the civil society exists.*” He also recommended that the National Institute for Agricultural Innovation and Technology Transfer (“**INTA**”) take soil samples from the site at which the supposed wetlands had been reported in order to determine the type of soil present at the property.
157. As Mr Damjanac explains in his Witness Statement, following receipt of the Shutdown Notice, the Claimants stopped all work on the project site, with the exception of some necessary maintenance work.
158. On May 19, 2011, the criminal prosecutor, Luis Martínez Viñega, visited the project site, accompanied by Mr Picado and some other MINAE officials. Mr Damjanac accompanied them on their tour of the site. As Mr Damjanac describes in his Witness Statement, they walked to the southwest portion of the site, near the easements and Mr Picado ordered workers to put stakes in the ground at certain points to designate the supposed wetlands. After the inspection, Mr Damjanac returned to those points



and together with a Las Olas employee, dug holes of around 1.5 meters in the ground next to those stakes. None of the holes Mr Damjanac dug contained any water or even wet soil, as is clear from the photographs he took.<sup>120</sup> There was absolutely no basis on which to claim that these areas formed part of any wetlands.

159. The Claimants later learned about yet more inspection reports that had been prepared by the authorities relating to the Las Olas project. In spite of the fact that (i) SINAC had confirmed at the outset that the project was not affected by a WPA; (ii) SETENA had issued the requisite Environmental Viability, on the basis, *inter alia*, of a physical inspection of the project site; (iii) on July 8, 2010, SINAC had inspected the project site and confirmed there were no wetlands on site;<sup>121</sup> and (iv) on August 19, 2010 SETENA had confirmed that there were no wetlands on the project site;<sup>122</sup> following Mr Picado's recommendations in his January 3, 2011 letter, on March 18, 2011 SINAC produced two further inspection reports in which it identified a "*Palustrine Wetland*" and claimed that it "*was completely filled in*" and "*damage was done to the wetland eco-system.*" This was in complete contradiction to SINAC's earlier July 2010 Report, which incidentally SINAC sent to Mr Aven on the same day.
160. Throughout this whole phase, Mr Aven and Mr Damjanac were making increasingly desperate attempts to understand the grounds for the Respondent's unfounded and contradictory actions. As Mr Damjanac explains in his Witness Statement, the Shutdown Notice proved to be the final nail in the coffin as the project came to a complete standstill at this point.<sup>123</sup>
161. Mr Aven spent the latter half of 2011 working on demonstrating to SETENA that there were not wetlands on the project site, that no environmental infractions could possibly have been committed and that he had no responsibility for the allegedly forged document that was in SETENA's file. On November 15, 2011, SETENA reconfirmed the validity of the Environmental Viability for the Condominium Section.<sup>124</sup> SETENA stated that the Environmental Viability had been issued on the basis of valid documentation. The official SINAC letter of April 2, 2008, which had

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<sup>120</sup> Exhibit C200, Test hole photographs; Exhibit C128, Video of MINAE Inspection of holes

<sup>121</sup> Exhibit C72, July 2010 SINAC Report, July 16, 2010

<sup>122</sup> Exhibit C79, SETENA Report confirming no wetlands, August 19, 2010

<sup>123</sup> See Jovan Damjanac Witness Statement ¶ 132

<sup>124</sup> Exhibit C144, SETENA November 2011 Resolution, November 15, 2011

been sent to Mussio Madrigal and submitted with the D1 application, was sufficient proof that the project site was not in a protected area.

**(b) An Explanation for Costa Rica's Abrupt Change of Behavior**

162. The Claimants were at a loss to understand the basis for the authorities' continued change of position and apparent desire to revisit issues that had long since been resolved. However, as Mr Aven explains in his Witness Statement, Mr Aven had his suspicions about the reason for this unjustified campaign against the Las Olas project.
163. In late July to mid-August 2010, Mr Bogantes came to the project site where he was met by Mr Damjanac. The two men were walking around the project site observing the work that had been completed to date, when Mr Bogantes told Mr Damjanac that the developers would have to give him either lots or money in order to keep the project going. As Mr Damjanac explains in his Witness Statement, he was horrified and asked Mr Bogantes to explain himself, to which Mr Bogantes replied that Mr Damjanac knew what he was talking about.<sup>125</sup> In Mr Damjanac's opinion, this was a clear attempt at bribe solicitation.
164. Later in August 2010, Mr Bogantes again visited the Las Olas site on one of his many inspections. He toured the property with Mr Damjanac, as Mr Damjanac confirms in his Witness Statement. On returning to the Las Olas site office where Mr Aven was located, Mr Bogantes claimed that there were problems with the project regarding the existence of wetlands and trees. He was speaking in Spanish and Mr Damjanac was translating for Mr Aven. Mr Aven showed Mr Bogantes the Environmental Viability and construction permits to demonstrate that everything was in order. Mr Bogantes's reaction was to dismiss the permits and claim that the unexplained problems could be solved if the developers contributed to his "*retirement or pension plan.*"
165. Mr Aven and Mr Damjanac were outraged and Mr Aven made it very clear to Mr Bogantes that they would not be paying any bribes, and that to do so would be unlawful both in Costa Rica and the United States. As Mr Aven explains, he did not report this clear bribe solicitation to the authorities at the time as he was concerned that by doing so he would create problems for the project.

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<sup>125</sup> See Jovan Damjanac Witness Statement ¶ 99

166. There appears to be a link between Mr Aven and Mr Damjanac’s refusal to participate in Mr Bogantes’s illegal activity and the subsequent problems Mr Bogantes created for the Las Olas project. After all, it was on August 27, 2010, only a few weeks at most after his unsuccessful attempt to solicit a bribe, that Mr Bogantes wrote a letter to Ms Diaz at the Town Defender’s Office making accusations about problems at the Las Olas project site. As mentioned above, in that letter, despite concluding that there are no wetlands on the project site or any environmental damage being produced, Mr Bogantes makes reference to unspecified “*anomalies on Project Las Olas.*”<sup>126</sup>
167. In any event, this was not the first such bribery attempt to which Mr Aven was exposed. Early on in the project’s life, on September 4, 2009, Mr Aven attended a meeting at the local Municipality to discuss construction permits. He was accompanied by his then lawyer, Gavridge Perez. At that meeting, an employee of the Municipality, Ovideo, sought to extract a US\$ 200,000 bribe from Mr Aven and the Las Olas project for the smooth continuation of the project. He explained that he was the front man for a group of around 12 or 13 members of the Municipality and that he would be sharing any bribe money with them. Again, Mr Aven was disgusted and simply refused to participate. He explained to Ovideo, in the presence of Mr Perez and a number of other Municipality employees, that bribery is a crime in the US and, he believed, in Costa Rica and that he was not prepared to risk going to jail. However, on the advice of Mr Perez, who witnessed this bribery attempt, Mr Aven did not report it to the authorities for fear of causing problems for the project at a time when the Municipality was deciding the project’s construction permit application.
168. Mr Aven did mention the bribery attempt to a good acquaintance at the time – Fernando Zumbado, ex-Housing Minister for Costa Rica. As Mr Zumbado explains in his Witness Statement, he was not surprised by what happened to Mr Aven.<sup>127</sup> He had heard rumors of corruption at the Municipality of Parrita and sympathized with Mr Aven’s situation. More than anything, Mr Zumbado felt embarrassed by what had gone on and, as he explains in his Witness Statement, wanted to do something about

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<sup>126</sup> Exhibit C80, Letter from SINAC to Hazel Diaz Meléndez, August 27, 2010

<sup>127</sup> See Fernando Zumbado Witness Statement, ¶ 22

the situation. He mentioned what had happened to the then-Housing Minister, brother to President Oscar Arias, but nothing came of his discussion.<sup>128</sup>

169. Sometime later, on September 16, 2011, Mr Aven filed a formal criminal complaint against Mr Bogantes in respect of his bribery attempt. Needless to say, Mr Aven was never again contacted about this complaint. In December 2012, Mr Aven attended the prosecutor's office for an update, only to be told that there was nothing on the file for him to see.
170. Several years later, in July 2015, Mr Aven's attorney in Costa Rica, Manuel Ventura, attended the prosecutor's office and after some persistence on his part, was finally able to obtain a copy of the file.<sup>129</sup> The file revealed that the investigation had been dropped based on a lack of evidence. Notes on the file claimed that the prosecutor had repeatedly tried to contact Mr Aven. The prosecutor claimed to have asked Mr Aven on November 4, 2011 to attend his office for an interview. Mr Aven never received such request. The file also noted that the prosecutor had requested evidence from Mr Aven and that Mr Aven had said he was not interested in pursuing the matter. As Mr Aven states in his Witness Statement, this is simply not true. A third note on the file claimed that the prosecutor had attempted to place a call to Mr Aven. Mr Aven never received such call, nor was his attorney contacted by the prosecutor's office.
171. In the circumstances, Mr Aven can only conclude that the prosecutor had no interest in following up his complaint against Mr Bogantes, presumably because he intended to rely on him as a witness in the criminal proceedings against Mr Aven and Mr Damjanac.

**(c) The Criminal Investigation and No Evidence of Criminal Liability**

172. In early 2011, the criminal prosecutor, Mr Martínez, commenced a criminal investigation into whether Mr Aven and Mr Damjanac had violated Costa Rican environmental laws through their activities on the Las Olas site.<sup>130</sup> The investigation was largely premised on a series of third-party complaints filed by nearby resident,

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<sup>128</sup> *Ibid.* ¶14

<sup>129</sup> Exhibit C162, Police report of shooting, April 15, 2013

<sup>130</sup> See David Aven Witness Statement ¶ 177.

Steve Bucelato.<sup>131</sup> During his trial testimony, Mr Bucelato described himself as a retired musician, and admitted that he had no knowledge of the definition of a “*wetland*” under Costa Rican law. Mr Bucelato based his complaints on his own personal observations of the Las Olas site, without any level of expertise to back up his allegations. Nonetheless, Mr Martínez decided to predicate a criminal investigation on Mr Bucelato’s statements, and eventually file criminal charges, despite the actual evidence available to Mr Martínez even earlier than 2011 demonstrating that Mr Aven and Mr Damjanac had not committed any crimes.

173. For example, by early 2011, Las Olas had received an Environmental Viability from SETENA and a construction permit from the Municipality of Parrita.<sup>132</sup> In addition, Las Olas had designated its Environmental Regent, who issued a series of reports based on inspections of the property in which he found no compliance issues or nonconformities.<sup>133</sup> Indeed, Mr Martínez had little to no evidence of wrongdoing at the outset of his investigation other than the blanket assertions of a retired musician, and this did not change throughout the course of the investigation and the criminal trial.

174. From the beginning of the investigation, Mr Aven was fully cooperative with authorities, as he had nothing to hide. On May 6, 2011, Mr Martínez requested that Mr Aven attend a meeting to provide a statement in relation to the potential criminal charges.<sup>134</sup> Mr Aven’s attorney, Sebastian Vargas, also attended the meeting.<sup>135</sup> Although he had the right to refuse to speak with the prosecutor at the meeting, Mr Aven provided a declaration in which he discussed the Las Olas project in detail and presented the relevant permits, reports, and authorizations received by the project, each of which indicated that the project was in compliance with Costa Rican environmental regulations, and that Mr Aven had committed no crimes.<sup>136</sup><sup>137</sup> The meeting took place about three weeks after the SETENA April 2011 Resolution.

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<sup>131</sup> *Ibid.*

<sup>132</sup> Exhibit C52, Environmental Viability for the Condominium Section, June 2, 2008; Exhibit C40, Construction permits for the Concession 2007

<sup>133</sup> Exhibits C68, C74, C87, C94, C109, C120, C130, C140, C147, C150, C151, & C153, DEPPAT SETENA updates from June-July 2010 through June-July 2012

<sup>134</sup> See David Aven Witness Statement ¶ 181

<sup>135</sup> *Ibid.*

<sup>136</sup> David Aven Witness Statement ¶ 182

<sup>137</sup> The meeting took place about three weeks after the April 2011 SETENA Resolution.

175. Mr Aven also discussed Mr Bogantes’s bribery attempt at the meeting, and requested that Mr Martínez investigate this crime.<sup>138</sup> As explained above, a few months later, in September of 2011, Mr Aven filed a formal complaint against Mr Bogantes in which he described the bribery attempt in detail.<sup>139</sup> Mr Aven listed Mr Damjanac as a witness in the complaint, as Mr Damjanac was present during the bribery attempt and could corroborate Mr Aven’s description of the events.<sup>140</sup> Mr Aven has no reason to believe that his complaint was ever even considered, and as discussed above, it was arbitrarily dismissed, without any notice to Mr Aven, based on a “*lack of evidence.*”<sup>141</sup> However, it is abundantly clear that the prosecution’s evidentiary grounds for pursuing an investigation are wholly inconsistent. Indeed, throughout Mr Martínez’s investigation, not only was there was a lack of evidence of Mr Aven’s criminal wrongdoing, but there was substantial evidence that Mr Aven had intended to act, and did act, in full compliance with Costa Rican law.
176. Nonetheless, Mr Martínez proceeded with his investigation by ordering two additional environmental reports. The first was issued by INTA, the very same agency that Mr Picado had recommended in his January 3, 2011 letter be asked 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 that of a wetland.<sup>142</sup> The second report was issued by MINAE. INTA is a national agricultural research institute with specific expertise in wetlands classifications. Dr Diogenes Cubero Fernandez, a wetlands specialist at INTA, inspected the Las Olas property and issued a report on May 5, 2011, which indicated that there were no wetlands on the property.<sup>143</sup> About two weeks later MINAE issued Report ACOPAC-CP-081-11, reaching the opposite conclusion and claiming that the Las Olas site did contain wetlands.<sup>144</sup>
177. Mr Martínez conducted another site visit in May of 2011 in which he toured the property in search of the alleged wetlands referenced in the MINAE report.<sup>145</sup> During

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<sup>138</sup> See David Aven Witness Statement ¶ 184

<sup>139</sup> Exhibit C139, Criminal complaint against Christian Bogantes, September 16, 2011

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> Exhibit C124, INTA Report on Las Olas Project, May 5, 2011, *see also* ¶131 above

<sup>143</sup> *Ibid.*

<sup>144</sup> Exhibit C126, SINAC Report (ACOPAC-CP-081-11) May 16, 2011

<sup>145</sup> See David Aven Witness Statement ¶ 193; Jovan Damjanac Witness Statement ¶ 138

the inspection, Mr Aven addressed the INTA report, stating that it contradicted the MINAE report and demonstrated that Mr Aven had not committed a crime. In response, Mr Martínez simply stated that he “*does not believe*” the INTA report.<sup>146</sup> During the site visit, Mr Martínez also accused Mr Aven and Mr Damjanac of unlawfully cutting down trees in violation of Costa Rican forestry laws.<sup>147</sup> Mr Aven asked Mr Martínez to show him any evidence of this, and Mr Martínez could only point to the stump of a small caliper tree, the cutting of which is not prohibited by Costa Rican forestry laws.<sup>148</sup> Two forestry experts later confirmed this fact through expert reports and testimony offered at trial.<sup>149</sup>

178. Criminal liability under Costa Rican law requires proof of intent to commit a crime.<sup>150</sup> Mr Martínez’s criminal investigation revealed overwhelming evidence that Mr Aven and Mr Damjanac did not intend to commit crimes – 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. All of these actions disprove criminal intent, and should have led Mr Martínez to abandon his investigation and decline to file criminal charges. This would have been the proper course of action and the result of a competent investigation. Mr Martínez’s investigation was anything but competent, and as demonstrated below, the criminal trial was no different.

## **E. The David Aven Trial**

### **(a) The Charges**

179. On October 21, 2011, Prosecutor Martínez formally filed criminal charges against Mr Aven and Mr Damjanac with the Criminal Court of Aguirre and Parrita in the Second Judicial Circuit of Puntarenas.<sup>151</sup> 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

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<sup>146</sup> *Ibid.*

<sup>147</sup> See David Aven Witness Statement ¶ 194; Jovan Damjanac Witness Statement ¶ 141

<sup>148</sup> *Ibid.*

<sup>149</sup> Exhibit C148, INGEOFOR Forestry Report, December 2011

<sup>150</sup> See Nestor Morera Witness Statement ¶ 32.

<sup>151</sup> Exhibit C142, Criminal charges filed against David Aven and Jovan Damjanac, October 21, 2011

the Costa Rican Forestry Law.<sup>152</sup> Mr Damjanac was charged with illegal exploitation of a forest in violation of Article 61 of the Costa Rican Forestry Law.<sup>153</sup>

180. The factual allegations in the criminal complaint were based largely on the assertions in Mr Bucelato's Denuncia. The complaint had numerous factual inaccuracies, the first of which is apparent from the timeline of the alleged violations. In particular, the complaint alleged that beginning in April 2009, Mr Aven ordered the gradual filling of a wetland located on the western portion of the Las Olas site, and that this continued between November 2010 and February 2011.<sup>154</sup> However, in September 2008, Las Olas ceased all work on the project due to the global financial crisis.<sup>155</sup> As a result, the project site was essentially vacant from September 2008 until early 2010 – indeed, there was no activity on the project in April 2009, much less any activity related to the filling of alleged wetlands.<sup>156</sup>
181. The complaint further alleged that Mr Aven hired two individuals named Francisco Iglesias Caldera and Gabriel Alberto Montero Arce in November 2010. According to the complaint, Mr Aven ordered them to construct a canal for the purposes of draining the alleged wetland on the western portion of the project between November 2010 and February 2011.<sup>157</sup> The complaint further alleged that Mr Aven ordered the drained wetland to be covered with soil so that he could construct paved streets.<sup>158</sup> As discussed above and in Mr Aven's Witness Statement, the paved roads were fully compliant with the construction permit issued by the Municipality of Parrita.<sup>159</sup> Additionally, the environmental prosecutor presented no credible evidence that such roads were constructed on wetlands or had any effect on wetlands.<sup>160</sup>
182. Despite the fact that Mr Aven was also charged with forestry law violations, the criminal complaint was largely devoid of any allegations specific to Mr Aven with regard to those charges. Instead, the forestry law allegations were largely directed at Mr Damjanac. Mr Aven was presumably charged only by virtue of being in a

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<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> *Id.* at 2-4.

<sup>155</sup> See David Aven Witness Statement ¶ 198

<sup>156</sup> *Ibid.*

<sup>157</sup> Exhibit C142, Criminal charges against David Aven and Jovan Damjanac, October 21, 2011 at 4.

<sup>158</sup> *Id.*

<sup>159</sup> See David Aven Witness Statement ¶ 202

<sup>160</sup> In fact, Mr Caldera even testified at trial, stating that Mr Aven never ordered him to fill wetlands and that he had no knowledge of any wetlands on the project site.



leadership position at Las Olas. However, the criminal complaint alleged that Mr Damjanac actually ordered two workers named Melvin José González Benavides and Antonio Gutiérrez Méndez to cut down about 400 trees that were protected by Costa Rican forestry laws.<sup>161</sup> The trees allegedly had diameters from five to twenty-five centimeters.<sup>162</sup> The complaint also alleged that Mr Damjanac ordered the cutting down of a higuierón tree.<sup>163</sup> Both of these charges were wholly unsubstantiated and lacking in merit, and Mr Damjanac was eventually acquitted after a full criminal trial.

183. The unsupported allegations in the criminal complaint were completely inconsistent with numerous independent expert reports based on multiple site inspections. First, the INTA report, which was issued by Dr Diogenes Cubero Fernandez on May 11, 2011, concluded that the Las Olas site did not contain wetlands.<sup>164</sup> Dr Cubero analyzed numerous soil samples taken from the Las Olas property, and concluded in his report that the soil characteristics were completely inconsistent with soil in wetlands areas.<sup>165</sup>
184. In addition, Las Olas commissioned a report from Minor Arce Solano, a Costa Rican forestry consultant. Mr Arce conducted multiple site visits before concluding in a September 2010 report that the Las Olas property did not contain a forest.<sup>166</sup> As described in detail in his Witness Statement, he also raised concerns about the methodology employed by MINAE in its July 7, 2011 report. Mr Arce found that MINAE used a completely subjective methodology for determining the sampling areas for its study and failed to define the parameters to be evaluated when determining the existence of a forest in accordance with Article 3(d) of the Forestry Law 7575.<sup>167</sup>
185. Mr Arce's findings were consistent with a December 2011 report issued by INGEOFOR, a Costa Rican environmental consulting company.<sup>168</sup> INGEOFOR analyzed the findings of MINAE report ACOPAC-CP-129-2011-DEN, which claimed

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<sup>161</sup> Exhibit C142, Criminal Charges against David Aven and Jovan Damjanac, October 21, 2011, at 5-6.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> Exhibit C124, INTA Report on Las Olas project confirming no wetlands, May 5, 2011.

<sup>165</sup> *Ibid.*

<sup>166</sup> Exhibit C82, Minor Arce Solano Forestry Report, September 2010

<sup>167</sup> See Minor Arce Solano Witness Statement ¶¶ 18 *et seq.*

<sup>168</sup> Exhibit C148, INGEOFOR Forestry Report, December 2011

to have discovered a forest on the Las Olas property.<sup>169</sup> The INGEOFOR report disagreed with MINAE's findings, and determined that the Las Olas site did not contain a forest, but largely consisted of a cattle pasture.<sup>170</sup>

**(b) Pre-Trial and Preliminary Hearing**

186. The criminal court scheduled a preliminary hearing in Mr Aven and Mr Damjanac's case on June 19, 2012.<sup>171</sup> At a preliminary hearing, the judge has the opportunity to determine whether the prosecutor has enough evidence to take a case to trial.<sup>172</sup> If there is insufficient evidence, the judge might dismiss certain charges or the prosecutor might choose not to pursue certain charges. Mr Aven, who was represented by his attorney Nestor Morera, made a statement at the preliminary hearing in support of his case.<sup>173</sup> In doing so, Mr Aven presented the relevant environmental permits and reports, including the INTA report and the INGEOFOR report.<sup>174</sup> As Mr Aven explained in his Witness Statement, after he presented his evidence, the judge provided the government attorneys the opportunity to question Mr Aven regarding the charges.<sup>175</sup> The government largely ignored this opportunity, choosing to ask only one question related to the alleged forged document.<sup>176</sup> Additionally, the government attorneys presented no evidence at the preliminary hearing, instead choosing to simply restate the factual allegations set forth in the criminal complaint.<sup>177</sup>
187. Despite the overwhelming evidence presented in support of Mr Aven's case, and the complete lack of evidence supporting the prosecution's allegations, the judge determined after the preliminary hearing that three of the charges should proceed to trial.

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<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> See Witness Statement of Nestor Morera ¶ 21 ; Witness Statement of David Aven ¶ 201

<sup>172</sup> See Witness Statement of Nestor Morera ¶ 13

<sup>173</sup> See Witness Statement of David Aven ¶ 202

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

**(c) Trial**

188. The criminal trial of Mr Aven and Mr Damjanac began on December 5, 2012.<sup>178</sup> Mr Morera represented both Mr Aven and Mr Damjanac at trial. The judge was Rafael Solis Gullock. As stated by Mr Aven in his Witness Statement, the defense strategy was fairly simple – the defense planned to present each of the reports that refuted the criminal allegations and to call each of the individuals that conducted those reports to testify as witnesses in support of Mr Aven and Mr Damjanac.<sup>179</sup> As described below, this 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.

**(i) Prosecution’s Witnesses**

189. The prosecution’s case was plagued by contradictory and, at times, wholly unfavorable or irrelevant witness testimony. In addition, the prosecution offered no compelling documentary evidence, whatsoever, to substantiate the criminal charges, and had no credible explanation as to how multiple experts had reached the complete opposite conclusions as those set forth in the criminal complaint. By the end of the trial, it was clear that the prosecution had failed to carry its burden of proof and had virtually no chance of obtaining a criminal conviction. As a result, the prosecution chose to take advantage of an obscure procedural loophole in order to secure a new trial and an opportunity to correct the detrimental mistakes made in the first trial.

190. The prosecution called Mr Bogantes as one of its first witnesses, to testify in support of the wetlands charge against Mr Aven. Mr Bogantes’s testimony only harmed the prosecution’s case. He attempted to highlight the MINAE report of May 16, 2011, which claimed that there were wetlands on the Las Olas site.<sup>180</sup> However, Mr Bogantes himself had previously come to the complete opposite conclusion less than a year earlier. Indeed, Mr Bogantes conducted an investigation with Mr Manfredi that led to the July 2010 SINAC report stating that the Las Olas site did not in fact contain wetlands.<sup>181</sup> Judge Solis specifically addressed this report during Mr Bogantes’s testimony and requested an explanation for the contradiction. In doing so, Judge Solis

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<sup>178</sup> *Id.* ¶ 205

<sup>179</sup> *Id.* ¶ 206

<sup>180</sup> Exhibit C126, SINAC Report, May 16, 2011

<sup>181</sup> Exhibit C72, July 2010 SINAC Report, July 16, 2010

read almost the entire July 2010 report to Mr Bogantes, noting the obvious discrepancies with his statements at trial. In response, Mr Bogantes offered a series of unconvincing explanations that did nothing other than undermine his credibility.

191. First, Mr Bogantes claimed that he was just the driver during the investigation with Mr Manfredi, and had little to do with the actual findings in the report. This statement was directly contradicted by a letter that Mr Bogantes wrote to Hazel Diaz Meléndez of the Defensoría de los Habitantes in August 2010 in which he confirmed that he did in fact conduct the inspection.<sup>182</sup> Second, Mr Bogantes criticized Mr Manfredi, stating that Mr Manfredi was a biologist and not a “100% specialist” in wetlands classification. Again, this only called into question MINAE’s credibility. Even if Mr Bogantes’s criticism of Mr Manfredi was warranted, it raised serious questions as to why MINAE would be willing to issue an official report conducted by an individual that could not properly classify wetlands, and why anyone should trust the findings of any subsequent MINAE reports that were purportedly issued by specialists. Third, Mr Bogantes blamed the results of his July 2010 report on the fact that the inspection took place during the summer. Again, this only weakened the credibility of his testimony and MINAE in general—he offered no coherent explanation as to why wetlands cannot be classified during the summer, or why MINAE would be willing to issue official reports during the summer if they were inherently unreliable.
192. Mr Bucelato also testified for the prosecution, and offered a rambling, bizarre series of unsubstantiated assertions, including admissions that he had not only trespassed on the Las Olas property, but that he had also removed wildlife from the property. Mr Bucelato admitted during his testimony that he knew nothing about wetlands classifications under Costa Rican law. Indeed, he offered no scientific evidence to back up his testimony, instead claiming that his allegations came “*from the heart.*”
193. In addition, the prosecution called Monica Vargas Quesada, an employee of the Municipality of Parrita, to testify. On May 31, 2010, Ms Vargas filed a complaint with MINAE regarding the Las Olas site. The complaint was based on a separate complaint submitted to Ms Vargas by numerous neighbors of the Las Olas site. Both complaints claimed that there were wetlands on the property, but Ms Vargas’s testimony at trial did nothing to prove the existence of wetlands. Instead, she admitted

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<sup>182</sup> Exhibit C80, Letter from SINAC to Hazel Diaz Meléndez, August 27, 2010

that she never personally observed wetlands on the Las Olas site, because she never actually stepped foot on the property. Moreover, she conceded that her department, titled the Department for Environmental Action, is not responsible for the classification of wetlands. Notably, not a single neighbor listed in the complaint to Ms Vargas agreed to testify at Mr Aven's trial, with the exception of Mr Bucelato.<sup>183</sup>

194. The numerous witnesses called by the prosecution did nothing to advance its case, and in certain situations, offered testimony that actually supported Mr Aven's case. The prosecution's witnesses repeatedly made unsubstantiated and contradictory assertions that severely damaged their credibility. As a result, the prosecution came nowhere close to meeting its burden, which is further evidenced by the strength and credibility of the defense witnesses.

**(ii) Defense Witnesses**

195. In accordance with the strategy described above, the defense offered independent, experienced wetlands and forestry experts to testify at trial. As to the wetlands allegations, the defense offered Dr Cubero, a wetlands specialist for INTA. Dr Cubero inspected the Las Olas property in the spring of 2011, and subsequently issued a report on May 5, 2011, in which he concluded that the Las Olas property did not contain wetlands.<sup>184</sup> His testimony was consistent with his 2011 report. In particular, Dr Cubero emphasized that it is necessary to conduct a soil analysis in order to classify an area as wetlands. The prosecution had failed to focus on the soil characteristics of the Las Olas site, and instead focused primarily on the mere existence of water, which is insufficient for a wetlands classification.
196. As to the forestry allegations, the defense called Minor Arce Solano, an independent forestry consultant. Mr Arce had inspected the Las Olas site on two separate occasions, and issued a report in September 2010 in which he detailed his findings, including the conclusion that there were no forests on the property.<sup>185</sup> His testimony was consistent with his report. In addition, during his testimony Mr Arce also

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<sup>183</sup> Carlos Alberto "Beto" Solano Mora also lived near the Las Olas site and testified for the prosecution. During his testimony, Mr Mora stated that although he is not an environmental expert, he has lived near the Las Olas site his entire life and believes there are no forests or wetlands on the property. Instead, he confirmed that the property largely consisted of a cattle pasture.

<sup>184</sup> Exhibit C124, INTA Report on Las Olas project, May 5, 2011

<sup>185</sup> Exhibit C82, Minor Arce Solano Forestry Report, September 2010

referenced and relied on the INGEOFOR report of December 2011,<sup>186</sup> which also came to the conclusion that there were no forests on the property.

197. The defense also 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 approvals. The documents admitted and/or discussed by the defense included the following: (1) Resolution No. 1597-2008-SETENA of June 2, 2008, granting an Environmental Viability to Las Olas;<sup>187</sup> (2) Inspection Report ACOPAC-OSRAP371-2010 SINAC of July 16, 2010, stating that there were no wetlands on the Las Olas site;<sup>188</sup> (3) Resolution 2086-2010 SETENA of 1 September 2010, rejecting the complaints of Steve Bucelato;<sup>189</sup> (4) Various construction permits issued by the Municipality of Parrita from 2008 through 2011 granting permission to develop the project site;<sup>190</sup> (5) INTA Report of May 5, 2011, stating that there were no wetlands on the Las Olas site;<sup>191</sup> (6) Report of Minor Arce Solano of September 2010, stating that there were no forests on the Las Olas site;<sup>192</sup> (7) INGEOFOR Forestry Report of December 2011, concluding that there were no forests on the Las Olas site;<sup>193</sup> (8) Periodic reports issued by Esteban Bermudez, Environmental Regent for Las Olas, stating that the project was in compliance with environmental regulations and there were no non-conformities on the project site;<sup>194</sup> (9) Resolution No. 2850-2011-SETENA of 15 November 2011, upholding the revocation of Resolution No. 839-2011-SETENA and reconfirming the project's Environmental Viability;<sup>195</sup> and several other documents.

### (iii) The Ten-Day Rule

198. As the trial came close to an end, 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. After a brief suspension for the

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<sup>186</sup> Exhibit C148, INGEOFOR Forestry Report, December 2011

<sup>187</sup> Exhibit C52, Environmental Viability for Condominium Section, June 2, 2008

<sup>188</sup> Exhibit C72, July 2010 SINAC Report, July 16, 2010

<sup>189</sup> Exhibit C83, SETENA Resolution confirming no wetlands, September 1, 2010

<sup>190</sup> Exhibit C40 Construction Permits for the Concession, 2007; Exhibit C71, Construction Permit Nos 090-10 to 96-10, July 16, 2010 and Exhibit C85, Construction permits, September 2010

<sup>191</sup> Exhibit C124, INTA report on Las Olas project, May 5, 2011

<sup>192</sup> Exhibit C82, Minor Arce Solano Forestry Report, September 2010

<sup>193</sup> Exhibit C148, INGEOFOR Forestry Report, December 2011

<sup>194</sup> Exhibits C68, C74, C87, C94, C109, C120, C130, C140, C147, C150, C151 & C153, DEPPAT SETENA updates from June-July 2010 through June-July

<sup>195</sup> Exhibit C144, SETENA November 2011 Resolution, November 15, 2011

holidays and the New Year, the trial was scheduled to resume on January 16, 2013. On the morning of January 16, Mr Aven made a closing declaration in which he reintroduced certain documentary evidence that refuted the prosecution's allegations.

199. After Mr Aven completed his declaration, the defense and the prosecution were scheduled to make closing arguments before the trial came to a close.<sup>196</sup> However, after Mr Aven's declaration, the prosecution filed a motion for continuance with the judge, stating that there was insufficient time for both sides to complete their closing arguments, and that both arguments should be delivered on the same day.<sup>197</sup> As a gesture of professional courtesy, Mr Morera did not oppose the continuance.<sup>198</sup> As a result, Judge Solis granted the motion and the trial was continued until January 25, 2013.<sup>199</sup>
200. A day or two before the trial was scheduled to resume, Judge Solis issued a writ to the parties, stating that he had to take leave for a medical condition related to his left hand.<sup>200</sup> At the time, there were no judges available to replace Judge Solis on short notice.<sup>201</sup> Under Section 336 of the Costa Rican Criminal Code, if a criminal trial has been suspended for ten days, then the proceedings must be discontinued and the trial must start over completely.<sup>202</sup> This provision has been referred to as the "ten-day rule." The effect of the ten-day rule is that the court sets an entirely new trial in which the parties must start over from square one, without the ability to rely on any evidence or testimony from the first trial.<sup>203</sup> A re-trial is generally automatic under Section 336 after the ten-day lapse, unless the parties agree to proceed with the trial despite the ten-day interruption.<sup>204</sup>
201. Mr Morera sought agreement from the prosecution to waive the ten-day rule. However, the prosecution saw the ten-day rule as an opportunity to correct the mistakes it had made in the pending trial.<sup>205</sup> It was clear that a conviction was highly unlikely, and as explained by Mr Morera, Mr Aven's case was an important one for

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<sup>196</sup> See Nestor Morera Witness Statement ¶ 39

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> *Id.* ¶ 40

<sup>201</sup> *Id.* ¶ 37

<sup>202</sup> Exhibit C213, Section 336, Costa Rican Criminal Code

<sup>203</sup> See Nestor Morera Witness Statement ¶ 37

<sup>204</sup> *Id.* ¶ 42-43

<sup>205</sup> *Id.* ¶ 43

the prosecution's yearly statistics.<sup>206</sup> As a result, the prosecution refused to waive the ten-day rule, and the trial was re-set.<sup>207</sup> As explained by Mr Morera, re-trials under Section 336 are rare in Costa Rica, and Mr Aven's trial was not a typical example of the use of Section 336.<sup>208</sup> In addition, the purpose of the rule is to provide continuity in the criminal justice process and to protect parties from protracted trials – not to permit the prosecution to have a second chance to obtain a conviction after making mistakes in the first trial.<sup>209</sup> The effect of the prosecution's refusal to waive the ten-day rule was that 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.

**F. Reasonable and Justifiable Fears about Returning to Costa Rica**

202. As explained above, Mr Aven's complaint against Mr Bogantes was largely ignored, in spite of the seriousness of his allegations. In addition, even though the prosecutor was more than happy to charge Mr Aven in relation to the allegedly forged MINAE report, he showed no interest in identifying and prosecuting the real culprit once Mr Aven had been exonerated of all links to the alleged forgery.
203. Mr Damjanac's complaints against Mr Bucelato to the police in late 2010 and 2011, as a result of his threats of physical violence, were also essentially ignored. On top of this, the prosecution's apparent willingness to take advantage of a rule of criminal procedure to try Mr Aven and Mr Damjanac a second time only served to contribute to their growing concerns over the authorities' fairness and impartiality in their dealings with them.
204. In early 2013, after the first trial against the two men had concluded, Mr Aven received a series of anonymous threats. It had started in January 2012 with a threatening telephone call in which the caller told Mr Aven in no uncertain terms to

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<sup>206</sup> *Id.* ¶ 18

<sup>207</sup> *Id.* ¶ 43

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*



leave the country while he was still able to. Although he was concerned by this occurrence and mentioned it to his criminal lawyer, Mr Morera, at the time Mr Aven dismissed it as a prank.

205. However, in early 2013, the threats took on a more serious tone. On February 2, Mr Aven received an email from Ruben Jimenez that said:<sup>210</sup>

*Senior David Aven i here your debate didn't go well for you. Don't think the next one will be better. Some good advice is to go bac home were you come from while you still can. Bad things happen to greedy gringos who caus problemas all time here. go home now.*

206. Then, on April 15, 2013, Mr Aven and Mr Shioleno were the victims of a shooting incident, whilst driving back to San José and from a trip to the courthouse in Quepos and the Las Olas project site. Five shots were fired into their car at close range by a motorcycle with two passengers on it. As Mr Aven describes, after the shots had been discharged, the motorcycle sped off into the distance. Mr Aven immediately contacted his attorneys, Mr Ventura and Mr Morera, and as Mr Ventura recalls in his witness statement, together they attended the police station where a police report of the incident was filed. A forensics team examined the car, as Mr Aven's photographs demonstrate and the rental company to which the car belonged was contacted. However, like the Bogantes bribery allegation, nothing further ever came of this police report.<sup>211</sup>

207. Around a week later, on April 11, 2013, Mr Aven received another email from R. Jimenez that stated as follows:<sup>212</sup>

*You are getting message (GRINGO) GRINGO Aven, you very lucky, nex time not be so lucky. Get out Costa Rica and stop your law suits. This is last warning, wont get no more, cant hide, we know when you go and come, know you were in US for two weeks in March, know you have to try case again and will know when and where nex court debate is. We may be watching you now. Are you getting message now (GRINGO) R. Jimenez.*

208. Several months later, on July 22, 2013, Mr Aven received yet another threatening email from Ruben that stated as follows:<sup>213</sup>

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<sup>210</sup> Exhibit C159, Threatening email from Ruben Jimenez to David Aven, February 2, 2013

<sup>211</sup> Exhibit C162, Police Report of shooting; Exhibit C163, Photographs of damage to car

<sup>212</sup> Exhibit C164, Threatening email, April 22, 2013

<sup>213</sup> Exhibit C165, Threatening email, July 22, 2013

*Gringo Aven Know you moved back to US. Don\'t [sic] come back and don\'t caus problemas for Costa Rica Government. You have choice, write off your loss or write off your life. We are watching you and can find you.*

209. Then on September 30, 2013, Mr Aven received yet another email, this time from an email address of [gohomenow@live.com](mailto:gohomenow@live.com) stating:<sup>214</sup>

*You still not getting message GRINGO Aven, you lucky not long we know your moves your adres in CLIRWATER your novia just visit you. Stop all your bizness in Costa Rica or no more luck for you and your friends. Get the message Gringo!*

210. As Mr Aven explains in his Witness Statement, he does not know anyone by the name of Ruben Jimenez and he has not been successful in his attempts to trace the author of these emails. Although he initially dismissed the threatening phone call as a hoax, after the shooting incident in April 2013, he took these threats on his life very seriously. Eventually, in May 2013 he reluctantly decided to leave his home in San José and return to the US.
211. As Mr Damjanac explains in his witness statement, after the conclusion of the first trial, he too received several anonymous threats in the form of emails and telephone calls. They were of a similar nature to the ones Mr Aven received. Mr Damjanac now fears for his own safety and that of his family too.
212. In light of these events, Mr Aven is understandably scared to return to Costa Rica to stand trial once again and, as a result of their past failings, he has no faith in the ability of the Costa Rican authorities to offer him the protection he would need were he to return.
213. Since leaving Costa Rica, Mr Aven has, at the instigation of the Respondent, been the subject of an INTERPOL Red Notice, by way of which the Respondent notified all INTERPOL member countries that the extradition of Mr Aven was sought. Given the nature of the alleged offence, this action represented an enormous overreaction by the Respondent. On learning of the issuance of the Red Notice, Counsel for Mr Aven promptly protested the matter to the Respondent and challenged the Red Notice by way of INTERPOL's procedures. Some time later, INTERPOL notified Counsel for Mr Aven that the Red Notice had been permanently deleted and INTERPOL issued to

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<sup>214</sup> Exhibit C166, Threatening email, September 30, 2013

Mr Aven a certificate for his general use in order that he could, of required by any national police agency, confirm that the original Red Notice had been annulled. For the period that the Red Notice was in place, Mr Aven was listed on INTERPOL's publicly accessible website as wanted for prosecution or to serve a prison sentence in Costa Rica. As the Respondent will have realized, that information is routinely collected by third-party agencies, who in turn store and disseminate that information for the purposes of corporate due diligence and the like. This is why it is incumbent on States to take care when using the INTERPOL system; that system represents a valuable tool in the service of genuine law enforcement efforts, but when used without proper regard for the wellbeing of individuals, it quickly becomes a tool of abuse. The Respondent knew at all stages that Mr Aven was not a serious criminal – the fact that the Red Notice was inappropriately sought is confirmed by its deletion – and the Respondent knew that having Mr Aven made the subject of an INTERPOL Red Notice, even only temporarily, would result in him suffering harm.

214. Although it came as a huge relief to Mr Aven when INTERPOL confirmed that the Red Notice had been lifted,<sup>215</sup> it remains unclear whether the Respondent agreed to its removal. To date, the Respondent has refused to explain what, if any, response it made to INTERPOL when the Red Notice on Mr Aven was challenged. The purpose of the Red Notice system is to assist authorities in apprehending serious criminals when attempting to cross international borders and extraditing them to the country responsible for issuing the Red Notice. On any reading, Mr Aven cannot be seen as a serious criminal. The crimes for which he is being pursued would, even if such offences could be proved amount to minor environmental infractions. The fact of the subsequent removal of the INTERPOL Red Notice bears out Mr Aven's claim that it was improperly issued in the first place.

215. As a result of the Red Notice, as he explains in his witness statement, Mr Aven has suffered financially, physically and emotionally. He has lost out on a specific business opportunity with Google and Facebook because the fact of the Red Notice having existed was picked up by World Check and he is no longer seen as a desirable business partner. The combined stress and fear resulting from the Red Notice, the threats against him and the shooting incident in April 2013 have caused his mental

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<sup>215</sup> Exhibit C173, INTERPOL Certificate, September 11, 2015

and physical health to deteriorate. He now suffers from severe migraines and is being treated for post-traumatic stress disorder.

**G. No wetlands or forests on the Las Olas project site**

216. The Respondent's arbitrary actions against the Las Olas project and Mr Aven and Mr Damjanac personally have all been premised on the alleged existence on the project site of two things: a forest and a wetland. The criminal prosecutor even today pursues his case against the two men, in spite of the fact that (i) SETENA, the government agency in charge of environmental matters, has reconfirmed the Claimants' Environmental Viability for the Condominium Section, thereby confirming that there are no protected areas, including forests and wetlands, on the project site; and (ii) INTA, the body whom SINAC specifically indicated should be consulted in order to determine the existence of wetlands on the project site, has reported that no such wetland exists.

217. By way of summary, the following findings have been made by the Respondent in respect of the Las Olas site:

- (b) On January 20, 2006, SINAC, as agency in charge of identifying and protecting wetlands, issued confirmation that the Concession is not within a WPA;
- (c) On March 17, 2006, following a site inspection and Environmental Impact Assessment, SETENA issued the Environmental Viability for the Concession;
- (d) On April 2, 2008, SINAC issued confirmation to SETENA that the Condominium Section is not within a WPA;<sup>216</sup>
- (e) On June 2, 2008, following a site visit and the submission of the D1 application, which included an Environmental Impact Assessment, SETENA issued the Environmental Viability for the Condominium Section;<sup>217</sup>

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<sup>216</sup> Exhibit C36, SETENA Environmental Viability for the Concession, March 17, 2006

<sup>217</sup> Exhibit C48, SINAC Confirmation for Condominium Section of no WPA, April 2, 2008

- (f) On July 8, 2010, following an unfounded complaint by Mr Bucelato, a site inspection was carried out by Mr Bogantes and Mr Manfredi, SINAC's representative responsible for determining the existence of wetlands;
- (g) On July 16, 2010, on the basis of the July 8 inspection, SINAC issued a report confirming there are no wetlands on the project site;<sup>218</sup>
- (h) On August 18, 2010, following a second unfounded complaint by Mr Bucelato, SETENA carried out an inspection of the project site to determine the existence of wetlands;<sup>219</sup>
- (i) On August 19, 2010, SETENA produced a report of its August 18 inspection confirming there are no wetlands on the project site;<sup>220</sup>
- (j) On August 27, 2010, Mr Bogantes of SINAC wrote to the Defensoria de los Habitantes, confirming there is no damage to the environment and there are no wetlands on the project site;<sup>221</sup>
- (k) On September 1, 2010, by resolution SETENA dismissed Mr Bucelato's second complaint on the basis of a complete lack of evidence;<sup>222</sup>
- (l) Nonetheless, on November 30, 2010 SINAC wrote to SETENA requesting suspension of the Environmental Viability for the Condominium Section on the basis that a group of residents had complained about the "truthfulness" of a preliminary study of environmental impact prepared by SINAC on March 27, 2008;<sup>223</sup>
- (m) Subsequently on December 6, 10, 17 and 21 2010, SINAC carried out further inspections of the Las Olas site;<sup>224</sup>
- (n) On January 3, 2011, SINAC produced a report stating that the project site appeared to have a body of water consistent with a wetland and that

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<sup>218</sup> Exhibit C72, July 2010 SINAC report, July 16, 2010

<sup>219</sup> Exhibit C78, SETENA Inspection report, August 18, 2010

<sup>220</sup> Exhibit C79, SETENA Report confirming no wetlands, August 19, 2010

<sup>221</sup> Exhibit C80, Letter from SINAC to Hazel Diaz Meléndez, August 27, 2010

<sup>222</sup> Exhibit C83, SETENA Resolution confirming no wetlands, September 1, 2010

<sup>223</sup> Exhibit C93, SINAC Letter to SETENA, November 30, 2010

<sup>224</sup> Exhibit C101, SINAC Inspection Report, January 3, 2011

approximately 400 trees had been eliminated unlawfully. SINAC stated that “it is important to get a pronouncement [on the existence of wetlands] from the National Wetlands Program” and requests “INTA to sample the soils at the site of the reported events in order to find out the class of soil on said property.” SINAC also recommended that criminal and administrative charges be filed for elimination of a forest and that the works on the project be injuncted,<sup>225</sup>

- (o) On February 14, 2011, SINAC issued an administrative injunction against the Las Olas project to prevent any further works from taking place;<sup>226</sup>
- (p) On April 13, 2011, in response to SINAC’s request, SETENA revoked the Environmental Viability for the Condominium Section and the TAA issued an injunction against further works on the project site;<sup>227</sup>
- (q) On March 18, 2011, following an inspection attended by Mr Piccado and representatives of INTA, SINAC issued a report stating that there was a Palustrine wetland on the project site which was being affected by construction works;<sup>228</sup>
- (r) On March 18, 2011, SINAC issued another report, which concluded that the Palestrine wetland described in the first SINAC report of the same date had been filled;<sup>229</sup>
- (s) On May 5, 2011, INTA prepared a report on the project site, per SINAC’s February 4, 2011 request, and concluded that there are no wetlands on the project site;
- (t) On May 11, 2011, the Municipality of Parrita issued a shutdown notice to prevent future works on the project site;

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<sup>225</sup> *Ibid.*

<sup>226</sup> Exhibit C112, SINAC Notification, February 14, 2011

<sup>227</sup> Exhibit C121, TAA Injunction, April 13, 2011

<sup>228</sup> Exhibit C116, SINAC Inspection Report, March 16, 2011

<sup>229</sup> Exhibit C117, SINAC Inspection Report, March 18, 2011

- (u) On May 23, 2011, SINAC reported, at the request of the environmental prosecutor, that the project site included a wetland and damage to an area of forest;
- (v) On July 7, 2011, MINAE prepared a report that alleging that a forest on the project site had been illegally cut down;
- (w) On August 23, 2011, SETENA issued a revised Environmental Viability for the Concession;
- (x) On October 21, 2011, criminal charges were filed against Mr Aven and Mr Damjanac for allegedly draining and filling a wetland and destroying a forest;
- (y) On November 7, 2011, SINAC issued a further report on the project site, this time concluding that there is a body of water that could be described as a wetland and evidence of cut vegetation;
- (z) On November 30, 2011, the criminal court issued an injunction against any further works on the project site; and
- (aa) On November 15, 2011, SETENA reconfirmed the Environmental Viability for the Condominium Section.

218. The level of dysfunction and conflicting conclusions among the Respondent's various government agencies is striking. As explained above, the criminal prosecutor appears to have had his own agenda, choosing to pursue his case against Mr Aven and Mr Damjanac in spite of clear evidence from the Respondent's top agency for the determination of wetlands, INTA, that no such wetland exists on the project site. Despite the fact that SINAC and INTA representatives, including Dr Diogenes Cubero-Fernández, carried out a joint inspection of the project site on March 16, 2011,<sup>230</sup> with the specified objective to “[d]etermine whether any wetlands exist” and that Mr Cubero subsequently concluded that the site's soils were not typical of a wetland system,<sup>231</sup> SINAC nonetheless concluded in its inspection report that there was a Palustrine wetland on the project site.<sup>232</sup> Evidently, Mr Picado did not take into

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<sup>230</sup> Exhibit C116, SINAC Inspection Report, March 16, 2011

<sup>231</sup> Exhibit C124, INTA Report, May 5, 2011.

<sup>232</sup> Exhibit C116, SINAC Inspection Report, March 16, 2011

consideration INTA's views, despite that the inspection appeared to have been conducted on a joint basis. Further, SINAC appears incapable of providing definitive findings on the project, at times concluding that there are no wetlands on the project site, at other times concluding that there might be wetlands on the project site and, most recently, in spite of an INTA report that it commissioned finding no evidence of wetlands, concluding that there are wetlands on the project site.

219. As outlined above, inspections of the project site were undertaken by the relevant Costa Rican agencies before any Environmental Viabilities were issued to the Claimants in respect of the project and the Claimants at all times complied with the terms of those Environmental Viabilities, as evidenced by the Environmental Regent's reports and as confirmed by Mr Bermúdez in his Witness Statement.<sup>233</sup>
220. Further, out of an abundance of caution, Mr Bermúdez commissioned a forestry report in 2010, in order to be certain that there were no trees on the project site that could not be cut without a permit.<sup>234</sup> As Mr Arce explains in his Witness Statement, during his inspection of the project site, he mostly observed trees for which no tree felling permit would be required and saw nothing that he would consider a forest.<sup>235</sup>
221. Mr Arce also reviewed MINAE's July 7, 2011 report on the Las Olas project, in which it alleged that a forest had been cut. As Mr Arce describes in his Witness Statement, in late 2011, at the request of Mr Bermúdez, he carried out a further site inspection and provided a critique of MINAE's report. Mr Arce is categorical in his condemnation of the findings of MINAE's July 7, 2011 report. As he explains in his Witness Statement, MINAE's report includes a number of errors and fails to employ a sound methodology. Based on his inspection, Mr Arce concluded that the Las Olas site largely consisted of overgrown pasture land with a few scattered trees and it was not possible to conclude that a forest had been cut down. As Mr Arce goes on to explain, he later gave evidence to this effect before the court in Mr Damjanac's criminal trial.<sup>236</sup>

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<sup>233</sup> Exhibits C68, C74, C87, C94, C109, C120, C130, C140, C147, C150, C151 & C153, DEPPAT SETENA updates from June-July 2010 through June-July and *see* Witness Statement of Esteban Bermúdez

<sup>234</sup> Exhibit C82, Minor Arce's Forestry Report, September 2010

<sup>235</sup> *See* Witness Statement of Minor Arce Solano ¶ 14

<sup>236</sup> *Id.* ¶ 29



222. Mr Arce's conclusions are further supported by the INGEOFOR report obtained in December 2011. INGEOFOR, a Costa Rican environmental consulting company, concluded in no uncertain terms that "*the area under review is not a Forest in accordance to [sic] the definition established in article 3, [...] of the Forest Law No. 7575 and Executive Regulations 35868-MINAET.*"<sup>237</sup> INGEOFOR instead considered that the area in question was an area of very early to early regeneration, a finding consistent with Mr Arce and Mr Bermúdez's descriptions of the site and with the description of the site given by SETENA in its Environmental Impact Assessment in 2008.
223. The INGEOFOR report is also critical of the methodology employed by MINAE in its July 7, 2011 report, concluding that there are no samples identified by MINAE that would have enabled it to determine whether the area under inspection was a forest or not.<sup>238</sup>
224. These findings are consistent with the granting by SETENA of the Environmental Viability for the Condominium Section and with Mr Bermúdez's bi-monthly reports on the project site, which found no evidence of non-compliance with the Environmental Viability or the law in general.
225. The clear absence of a forest on the project site is further supported by satellite images of the Las Olas project site taken in 1997, 1992, 1997, 2005 and 2013.<sup>239</sup>
226. Turning to the question of wetlands, in the Claimants' submission it is abundantly clear from the Respondent's agencies' findings that there were no wetlands on the project site. SETENA's decisions to issue and then reconfirm the Environmental Viability for the project site confirm this, as does the INTA report of May 5, 2011 (a report that SINAC itself commissioned) which concludes that there are no wetlands on the project site.<sup>240</sup> Further, as previously mentioned, there are also a number of

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<sup>237</sup> Exhibit C148, INGEOFOR Forestry Report, December 2011

<sup>238</sup> *Ibid.*

<sup>239</sup> Exhibit C198, Aerial photographs- 1974 and 1992 and 1997; Exhibit C33, Satellite image of Las Olas, 2005; Exhibit C160, Satellite image of Las Olas, 2013

<sup>240</sup> Exhibit C124, INTA Report, May 5, 2011

reports prepared by both SETENA and SINAC during the 2008 to 2010 period, all of which confirm there are no wetlands on the project site.<sup>241</sup>

227. The absence of wetlands was also confirmed in expert testimony given by Dr Cubero, a wetlands specialist from INTA, in Mr Aven and Mr Damjanac's first criminal trial. As outlined above, Dr Cubero inspected the Las Olas site in the spring of 2011, and subsequently issued a report on May 5, 2011, in which he concluded that the Las Olas property did not contain wetlands.<sup>242</sup> In both his report and his testimony, Dr Cubero emphasized that it is necessary to conduct a soil analysis in order to classify an area as wetlands, a fact that SINAC itself had previously acknowledged. Indeed, it appears that SINAC recognized the need for soil analysis when it conducted a joint inspection at the project site on March 16, 2011 with Dr Cubero from INTA to determine if a wetland was present.<sup>243</sup> It is, however, surprising that the report of that inspection that SINAC subsequently issued on March 18, 2011<sup>244</sup> concluded that there was a wetland on the site when Dr Cubero's findings from the same inspection, and based on soil analysis he carried out, showed that there was no such wetland at Las Olas.<sup>245</sup>
228. Further, the Claimants' expert, Mr Barboza, a biologist and former SINAC employee with experience working on the current formulation of the national wetlands policy in Costa Rica, concludes in his report that.<sup>246</sup>
- (b) SINAC was not rigorous in applying the legal framework to evaluate the Las Olas project site, as it did not describe the ecological characteristics that must be found in order to determine that an area is a palustrine wetland;
  - (c) According to the coordinates given by SINAC for the alleged wetland, the area falls outside the Las Olas project site in any event, with the majority across the public road running down the west side of the project site;
  - (d) It is possible that SINAC erroneously determined that authorized works carried out on the project site in accordance with the environmental

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<sup>241</sup> Exhibit C72, SINAC Report, July 16, 2010; Exhibit C79, SETENA Report, August 19, 2010; Exhibit C80, Letter from SINAC to Hazel Diaz Meléndez, August 27, 2010; Exhibit C83, SETENA Resolution, September 1, 2010

<sup>242</sup> Exhibit C124, INTA Report, May 5, 2011.

<sup>243</sup> Exhibit C117, SINAC Inspection Report, March 18, 2011.

<sup>244</sup> *Ibid.*

<sup>245</sup> Exhibit C124, INTA Report, May 5, 2011.

<sup>246</sup> Gerardo Barboza Expert Report ¶ G

management plan SETENA put in place when it granted the Environmental Viability amounted to the filling and draining of wetlands; and

(e) There are no wetlands on the Las Olas project site.

229. More specifically, Mr Barboza explains that there are three criteria necessary to establish the presence of wetlands. They are the combined presence of hydrophyte vegetation, hydric soils and water conditions.<sup>247</sup> He also explains that the normal procedure for the identification of wetlands involves (i) observing the presence of these three elements; (ii) once observed, undertaking a field assessment to delimit the parameters of the wetland area; and (iii) logging the presence of all three conditions, which involves the sampling of soil and water specimens by qualified specialists.<sup>248</sup> Once a wetland has been identified, its geographical territory must be defined using GPS technology.<sup>249</sup>
230. Mr Barboza is unequivocal in stating that it is necessary for soil samples to be taken in order accurately to classify the soil and thereby determine the existence or otherwise of a wetland, in accordance with the criteria established by law.<sup>250</sup>
231. Based upon these criteria, Mr Barboza concludes authoritatively that the methodology SINAC employed in reaching its wetlands finding in its March 18, 2011 report was inappropriate and inadequate.<sup>251</sup> For example, SINAC gave only partial and very limited descriptions of the ecological characteristics of the site that did not meet the three criteria outlined above. SINAC failed to report the existence of hydrophyte vegetation and instead reported non-hydrophyte species such as Snakewood and West Indian Elm. Further, Mr Barboza observes that the March 18, 2011 report fails to indicate whether soil samples were submitted for analysis.
232. SINAC's report was also contradictory on its face. Based on the field inspection of March 16, 2011, the report notes "*at the inspection site, we detected the presence of a non-tidal palustrine wetland with a superficial water table.*" However, later in the

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<sup>247</sup> *Id.* ¶ E.I.1.

<sup>248</sup> *Id.* ¶ E.I.4.

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

<sup>251</sup> Exhibit C117, SINAC Report, March 18, 2011; Gerardo Barboza Expert Report ¶ F.II.1.

same paragraph, the author noted that “*at the time of inspection, there was no source of surface water detected.*”<sup>252</sup>

233. A further contradiction is apparent when comparing SINAC’s March 18, 2011 report with that of INTA, Costa Rica’s specialized institute for the classification of soils, which, as explained above, were based on an inspection carried out on the same day, apparently on a joint basis.<sup>253</sup> SINAC noted in its report that “[a]s part of soil sampling, INTA officials detected the presence of hydromorphic soils characteristic of these ecosystems”<sup>254</sup> while INTA reported that “*the anthropic interference that has occurred for several decades in this sector (road infrastructure, deforestation, stock raising) and the definition of the Management Unit in Point 4, do not lead to categorizing these soils as typical of wetland ecosystems*” (emphasis added).<sup>255</sup> In fact, INTA did not find any hydromorphic soil (one of the three mandatory criteria for the determination of a wetland) on the project site, leading to the inevitable conclusion that there was no wetland on the Las Olas project site.
234. Mr Barboza considers that SINAC’s bare reference to having “*detected a palustrine wetland,*” without any convincing evidence to that effect, demonstrates its desire to conclude that a wetland existed on the Las Olas site, when in fact it did not.<sup>256</sup> He also notes that the majority of SINAC’s reports are “*qualitative, without sampling of hydrophyte vegetation or soils.*”<sup>257</sup>
235. Further, Mr Barboza’s analysis of SINAC’s reports on the Las Olas site (specifically the March 18, May 23 and June 29, 2011 reports)<sup>258</sup> enabled him to determine that the coordinates given by SINAC for the location of the alleged wetland revealed the alleged wetland was located outside the Las Olas project site, a fact which is illustrated by the satellite images Mr Barboza prepared showing the location of the alleged wetland in relation to the Las Olas site.<sup>259</sup> This inaccuracy should not only have disposed of the question of wetlands on the project site, it also calls into question

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<sup>252</sup> Exhibit C117, SINAC Report, March 18, 2011

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> Exhibit C124, INTA Report, May 5, 2011

<sup>256</sup> Gerardo Barboza Expert Report ¶ F.II.1.

<sup>257</sup> *Id.* ¶ F.II.3.

<sup>258</sup> Exhibit C117, SINAC Report, March 18, 2011; Exhibit C129, SINAC Report, May 23, 2011; Exhibit C225, SINAC Report, June 29, 2011

<sup>259</sup> Exhibit C33, Satellite image of Las Olas showing alleged wetlands, 2005; Exhibit C160, Satellite image of Las Olas showing alleged wetlands, 2013

the reliability of the entire content those reports and the conclusions they reach, more generally.

236. Finally, Mr Barboza notes, as outlined above, that the management plan SETENA specified when the Environmental Viability for the Condominium Section was issued included the following actions for the protection of water and soil:

(b) Protection of Waters: *“Drainage, maintaining natural drainage as possible and directing those changed. When deemed necessary gradient breaks or traps will be used.”*

(c) Protection of Soils: *“Rainwater drainage in the project area to minimize runoff and soil displacement. When deemed necessary, gradient breaks and/or traps will be used”; “c) Slopes will have moderate inclination and those higher than 1 meter will be protected and road cuts will be protected using permanent works to prevent landslides.” “f) Soil removed will be placed in appropriate locations within the area or at a site authorized by the owner and deposited; meanwhile, they will be protected.”*<sup>260</sup>

237. It is clear from these stipulations that the development of the infrastructure on the project site in conformity with the environmental management plan would have entailed the transformation and reorientation of the land and runoff waters. In Mr Barboza’s opinion, it is probable that SINAC misinterpreted these works as the filling and draining of a wetland. A simple soil study (as required) would have enabled SINAC to evaluate and discount this possibility.<sup>261</sup>

238. For all of these reasons, it is abundantly clear that there are no wetlands on the Las Olas project site. A careful review of SINAC’s reports reveals many inconsistencies and deficiencies and betrays an apparent willingness on the part of SINAC to conclude that there are wetlands on site, in the absence of evidence to that effect. Further, the prosecutor’s apparent willingness to prefer SINAC’s deficient and contradictory reports, without further interrogation or explanation, over the ‘no wetlands’ finding of INTA, the country’s leading soil specialist, seriously calls into question his motive in pursuing his investigation against Mr Aven.

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<sup>260</sup> Gerardo Barboza Expert Report ¶ F.II.4.

<sup>261</sup> *Ibid.*

## **H. Conclusion**

239. In 2002, the Claimants made a careful and considered decision to invest in Costa Rica, having identified a jewel of a property along a stretch of pristine beach that provided a fantastic development opportunity. They, and their advisors, viewed the project with great optimism, convinced that it would benefit not only them but the people of Costa Rica as well. Expensive and time consuming though it was, the Claimants, together with their advisers, did everything necessary to ensure they obtained all relevant environmental and construction permits, at times even assisting the local municipality with its own projects, for the benefit of the local community as well as their own.
240. Their project ran smoothly until early 2011, when certain government agencies launched a sustained attack on the Las Olas development and Mr. Aven and Mr. Damjanac personally. Bogus claims of wetlands and forged documents started flying around, certain government officials tried to extract bribes from the two men and when they were rebuffed in their attempts, they turned on Las Olas and did everything in their power to halt the development - conducting inspection after inspection and writing report after report, until at last they succeeded in running the project into the ground. All of this was done without the slightest notice to the Claimants, who in good faith continued to pour money and resources into the project.
241. The nail in the coffin came when, just days after the Respondent's environmental agency reconfirmed the validity of Las Olas's environmental permit, Mr Aven and Mr Damjanac were charged with environmental crimes there was no evidence they had committed.
242. Although the Claimants have all suffered financially as a result of the Respondent's actions, it is Mr Aven who has paid the ultimate price. Forced to flee a country he had made his home, he has now given up all hope of realising the project's potential and clearing his name. Mr Aven had been convinced there was some innocent misunderstanding within the Respondent's bureaucracy when he was charged by the prosecutor in 2011. As is his nature, Mr Aven did everything in his power to cooperate fully with the Costa Rican authorities, voluntarily giving statements and submitting documents to the prosecutor and the Court. Unfortunately however, the

Respondent has neglected to correct its mistakes and the Claimants now seek redress for the Respondent's actions and compensation for the loss suffered as a result.

### III. LEGAL BASIS FOR THE CLAIMS

#### A. Applicable Law

##### (a) Applicable Rules of Interpretation

243. This arbitration is proceeding under the 1976 UNCITRAL Rules of Arbitration (the “**UNCITRAL Rules**”). Article 33(1) of the UNCITRAL Rules provides that the Tribunal “...shall apply the law designated by the parties as applicable to the substance of the dispute.” DR-CAFTA Article 10.22(1) provides: “the tribunal shall decide the issues in dispute in accordance with [CAFTA-DR] and applicable rules of international law.” The applicable rules of international law consist of norms drawn from customary international law and general principles of international law, both as applicable to the conduct of the arbitration and in the Tribunal's interpretation of the text of the Agreement.

244. The applicable rules for interpretation of the DR-CAFTA are the customary international law rules of treaty interpretation, as applied to treaties that expressly purport to convey benefits to legal persons who are not parties to them. Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (“**VCLT**”) recall the general approach to interpretation prescribed by custom.<sup>262</sup> Caution and prudence are required however, when a tribunal applies the general method of interpretation to treaty provisions concluded for the benefit of third parties – because one of the parties to a

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<sup>262</sup> CLA20, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 (“**VCLT**”). *VCLT* Article 32 reflects a consensus opinion that treaty interpreters should only consult supplementary materials, such as *travaux préparatoires*, as an aid to interpretation, and only in cases where applying the general approach to interpretation, encapsulated in *VCLT* Article 31(3), produces a meaning that is “ambiguous or obscure,” or “leads to a result which is manifestly absurd or unreasonable.” *VCLT* Article 32 further allows that recourse may be had to supplemental sources, such as *travaux préparatoires*, “in order to confirm the meaning resulting from the application of article 31.” Understood within the context of a provision that permits such resource when the meaning is “ambiguous or obscure,” it is manifest that supplemental sources should not be used as part of the process of arriving at an initial interpretation, and should only be considered – absent an ambiguous or obscure finding – as potentially confirmatory instruments. In other words, if the meaning reached without recourse to supplemental sources is unambiguous and clear, it would be inappropriate to change such determination merely because *available* supplemental sources introduce ambiguity or doubt as to that otherwise manifest meaning.

Chapter 10 arbitration will always have been a stranger to the Agreement's negotiation.<sup>263</sup>

245. VCLT Article 31(1) memorializes the general rule of treaty interpretation: “*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.*” The underlying premise of the general rule is that the text of a treaty is presumed to be **the** authentic, contemporaneous expression of the intentions of the State parties to it. Thus the starting point for any exercise of treaty interpretation must be the treaty text itself.<sup>264</sup>

*The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end of the matter.*<sup>265</sup>

246. The object and purpose of a treaty guides interpreters as to how the ordinary meaning of its text should be construed, in context.<sup>266</sup> Context consists of the remainder of the treaty text, particularly the text found in close proximity to the terms under consideration. Context can also be identified by reference to the preamble, footnotes and annexes of a treaty.<sup>267</sup> Leaving no room for doubt, the DR-CAFTA Parties went so far as to record the Agreement's objectives at Article 1.2. It provides, in relevant part:

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<sup>263</sup> CLA124, *Industria Nacional de Alimentos SA and Indalsa Perú v Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, Opinion of Sir. Frnak Berman (13 August 2007) ¶¶ 9-13. See, also, generally: Mahnoush H. Arsanjani and W. Michael Reisman, “Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties” 104 (2010) A.J.I.L. 597-604; and Todd Weiler, “Who Then Must Judge?” in: *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013*, A. Rovine, ed., (Leiden: Martinus Nijhoff, 2015) 299 at 315-329.

<sup>264</sup> See, e.g.: CLA72, *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. and the Argentine Republic*, ICSID, ARB/03/17, Decision on Jurisdiction at para’s 54-55 (May 16, 2006). See also: CLA75, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, at para. 54 (3 August 2006); *National Grid PLC v. Argentina*, UNCITRAL/BIT Arbitration, Jurisdictional Decision at para. 80 (20 June 2006); and *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (2002), WTO Doc. WT/DS213/AB/R and Corr.1 at paras 61-62.

<sup>265</sup> CLA14, *Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] I.C.J. Rep. 4 at 8 (Advisory Opinion).

<sup>266</sup> CLA65, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award at para. 52 (October 12, 2005).

<sup>267</sup> CLA20, VCLT Art. 31(2). Sub-paragraphs (a) & (b) mention other instruments, which could provide additional sources of context, but which are not relevant to the instant case.



1. *The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to:*
  - ...
    - (d) *substantially increase investment opportunities in the territories of the Parties;*
    - ...
      - (f) *create effective procedures for ... the resolution of disputes; and*
  - 2. *The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*  
[Emphasis added]

247. These objectives are accompanied by the preambular text of the Agreement, which demonstrates the purposes intended for the rights held, and relief sought, by the Claimants in this case. In relevant part, the DR-CAFTA preamble provides:

*The Government of the Republic of Costa Rica, the Government of the Dominican Republic, the Government of the Republic of El Salvador, the Government of the Republic of Guatemala, the Government of the Republic of Honduras, the Government of the Republic of Nicaragua, and the Government of the United States of America, resolved to:*

...

*ENSURE a predictable commercial framework for business planning and investment;*

...

*PROMOTE transparency and eliminate bribery and corruption in international trade and investment;*

*CREATE new opportunities for economic and social development in the region;*

...

*IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters;*

*PROTECT and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories...*

[Emphasis added]

248. It would be manifestly inconsistent with the object and purpose of the DR-CAFTA if the provisions breached by the Respondent – viz. Articles 10.5 and 10.7 – were

construed in a manner so deferential that decisions taken by the Costa Rican officials identified by the Claimants were not subjected to appropriate and reasonable scrutiny. Appropriate scrutiny involves a proper construction of terms such as fair and equitable. Reasonable scrutiny involves applying that standard in light of the object and purpose of the Agreement. The Respondent and the other DR-CAFTA Parties expressly delineated the object and purposes of the DR-CAFTA, in its preambular text and in Article 2.1. Accordingly, it is only reasonable that, in determining whether a governmental decision was fair and equitable in context, the Tribunal should have regard to the stated object and purposes of the Agreement. If it appears that certain Costa Rican officials exercised discretionary authority in a manner inconsistent with the object and purpose of the Agreement, and otherwise in an unfair or inequitable manner, the breach should be recognized.

249. *VCLT* Article 31(3) also provides, in relevant part: “*There shall be taken into account, together with the context... (c) any relevant rules of international law applicable in the relations between the parties.*”<sup>268</sup> Foremost amongst these relevant rules of international law is the general international law principle of good faith, which, as demonstrated further below, is used by treaty interpreters to ascertain the meaning of the terms “fair and equitable treatment” or “full protection and security” in proper context. By virtue of their inclusion in DR-CAFTA Article 10.5(1) the DR-CAFTA Parties have employed these terms as treaty standards. And, as per paragraph 2 of that same provision, the Parties have also recognized these two standards as having attained the status of standards of customary international law.

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<sup>268</sup> Paragraphs (a) and (b) of this provision concern sources of evidence pertaining to subsequent agreement, or practice, of the treaty parties pertaining to the interpretation of a treaty. These provisions are not at issue in this case but, even if such evidence existed, it would not be appropriate to apply within the context of an investor-State arbitration. The logic of these sub-paragraphs is premised on there being only State parties to a treaty, which governs only relations between States, *qua* States. Traditionally, it was understood that States were, first and foremost, responsible for interpreting treaty texts, with no provision for dispute settlement by a disinterested third party even contemplated. Sub-paragraphs (a) and (b) regulate types of State conduct – short of outright re-negotiation – that could impact upon interpretation, on the basis that each party is responsible for managing its own expectations and interests. By contrast, treaties concluded for the benefit of third parties establish rights and interests that exist apart from those of the parties to the treaty, and which cannot be properly or fully represented by future meetings or instruments from which their participation was necessarily excluded. Similarly, if one posits the interpreter as an independent adjudicator, paragraphs (a) and (b) provide the basis for establishing an *estoppel* as against one of the parties to the underlying Agreement, on the basis of a subsequent act or agreement. It would be impossible to conceive of an *estoppel* being applied vis-à-vis a third party beneficiary to the agreement. Thus it is apparent that these two sub-paragraphs ought not be considered part of the *applicable* rules of international law in respect of the interpretation of investment protection treaties, from which non-State parties derive separate rights and interests, enforceable by independent dispute settlement (which, in turn, will necessarily inquire interpretation of treaty text by that independent, neutral adjudicator.

**(b) Relevance of DR-CAFTA Provisions Located Elsewhere in the Agreement**

250. As the Respondent has recently confirmed within the context of another DR-CAFTA arbitration, it considers that recourse can be had to other provisions of the Agreement as aids to determining whether a Party has breached Articles 10.5 or 10.7.<sup>269</sup> Chapter 10 does not contain any express references to the provisions the Respondent cited in that case, and Article 10.5(3) expressly provides: “*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.*” Hence, the Respondent must regard its recourse to other DR-CAFTA provisions as a justifiable means of interpreting Chapter 10 provisions, including Article 10.5, on the ground that each represents an “*applicable rule of international law,*” as per the language of Article 10.22(1), and/or as “*relevant rules of international law applicable in the relations between the parties,*” as per the text of VCLT Article 31(3)(c).<sup>270</sup> Although the Claimants disagree with the propositions the Respondent attempted to substantiate by recourse to other DR-CAFTA provisions, either method would have been valid.

**(i) Article 17.2(1)(b) – The Applicable Margin of Appreciation**

251. For example, in that other DR-CAFTA proceeding the Respondent recently declared: “*Article 17.2 allows Costa Rica a measure of discretion in implementing environmental laws, including a measure of discretion in terms of how to carry out the expropriation, taking into account allocation of resources.*” Although this is a manifestly inaccurate representation of how Article 17.2 informs the interpretation of Article 10.5 in an environmental enforcement case, the Respondent was at least on the right track.

252. DR-CAFTA Article 17.2 provides, in relevant part:

***Article 17.2: Enforcement of Environmental Laws***

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<sup>269</sup> CLA127, *Spence et al v. Costa Rica*, DR-CAFTA/UNCITRAL Rules Arbitration, Respondent’s Post-Hearing Submission, 26 May 2015, ¶¶ 60-65; See, also: CLA128, *Spence et al v. Costa Rica*, DR-CAFTA/UNCITRAL Rules Arbitration, Claimants’ Post-Hearing Submission, 26 May 2015, ¶¶ 8-28. The Respondent also invoked DR-CAFTA Article 17.3 at paragraph 23 of its Reply in the instant case, as evidence of its compliance with Article 10.5 in relation to the potential grant of interim measures of protection.

<sup>270</sup> Respondent may also regard these other provisions of the Agreement as relevant because they constitute a contextual source for interpretation, as recalled by VCLT Article 31(2), but its approach suggests that it is the substantive content of these other provisions, in and of themselves, which ought to be recalled in ascribing meaning to the Chapter 10 provisions, within the context of the case itself.

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.***
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*

**[Emphasis added]**

253. The mischief at which this provision is aimed is not present in the instant case. This is a case of harm caused by what can (if the issues of corruption and abuse of due process are set to one side) most charitably be labelled irrationally overzealous enforcement, whereas Article 17.2 concerns intentional under-enforcement. It prohibits Parties from engaging in intentionally lax enforcement practices in order to attract or maintain trade or investment. Paragraphs (1)(a) and (2) thus reflect the Parties' commitment to maintaining high standards of enforcement for environmental measures, while sub-paragraph (1)(a) demonstrates what the Parties consider to be the appropriate margin of appreciation when they are called upon to scrutinize the enforcement record of another Party for DR-CAFTA compliance. Whereas Article 17.1 confirms the Parties' shared recognition of the respective authority to adopt and maintain environmental policy measures, Article 17.2 is only directed at enforcement of those measures.<sup>271</sup>

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<sup>271</sup> Costa Rica's error in the other case was to attempt to rely upon the terms of Article 17.2 to defend the manner in which it adopted and maintained certain legislative and regulatory measures, rather than whether or how they had been "enforced."

254. It is in Article 17.2(1)(b) where the Parties stipulate the precise methodology for evaluating whether the discretion each enjoys, to enforce its own environmental measures, has been exercised appropriately. First they confirm that scrutiny can be concentrated on a wide array of enforcement decisions – i.e. “*investigatory, prosecutorial, regulatory, and compliance matters.*” Second the Parties confirm the validity of prioritization decisions, when driven by scarcity of enforcement resources. Third, they provide that any “*sustained or recurring course of [enforcement] action or inaction*” will be scrutinized on the basis of whether it “*reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources*” [Emphasis added].
255. Logic demands that the same margin of appreciation also ought to be applied when the allegation concerns some other defect in the enforcement of environmental measures, such as the failure to accord due process, which results in a Party’s non-compliance with one of its DR-CAFTA obligations. In other words, regardless of whether the allegation involves assiduously permissive or unfairly overzealous enforcement of an environmental law, the host State’s conduct ought to be evaluated on the basis of whether the official’s “*course of action or inaction reflects a reasonable exercise of discretion.*”

**(ii) Articles 17.3 and 18.8**

256. For the instant case, two other DR-CAFTA provisions promise to aid in informing interpretation of Article 10.5: Articles 17.3 and 18.8. Both could be construed as being “*relevant rules of international law applicable in the relations between the parties,*” as per VCLT Article 31(3)(c), and/or otherwise as constituting “*applicable rules of law,*” for purposes of DR-CAFTA Article 10.22(1). Each provision will be addressed in more detail further below.

**(c) Doctrine Can Be Instructive, But Not Binding**

257. VCLT Article 31(3)(c) also furnishes the methodological means by which treaty interpreters can draw upon insights from doctrinal developments in public international, so long as they can be justified as relevant to the case at hand. The primary sources for doctrine are the secondary sources of international law: viz. the work of esteemed publicists, and reasons for decision issued by international

adjudicators. The *Jurisprudence constante* of international investment law is a form of doctrine accessible through this interpretative method, but recourse may also be had to other sub-fields of public international law. For example, certain prominent features of international human rights law doctrine may be relevant to one's interpretation of provisions such as DR-CAFTA Articles 10.5 and/or 10.7.

258. To be sure, the *Claimants* do **not** suggest that the Tribunal must rely upon doctrine in interpreting the DR-CAFTA text. Nor do the Claimants argue that the Tribunal should consider itself in any way bound by the reasoning of publicists or other treaty interpreters, including tribunals established under DR-CAFTA Chapter 10.<sup>272</sup> It is merely observed that the customary rule of interpretation, as expressed in *VCLT* Article 31(3)(c), permits an interpreter to consider reasons for decision rendered by other international adjudicators, treating as “*relevant*” those specimens in which the same or similarly-worded provisions were involved and especially if applied in circumstances analogous to those of the instant case.<sup>273</sup>

259. Finally, and also for the avoidance of doubt, the municipal laws of Costa Rica **do not**, in any way constitute “*applicable law*” or “*governing law*” in the instant case. Costa Rica's municipal legal order, including any act or omission of its officials, or any measures it has adopted or maintained in relation to the issues in dispute, can **only** serve as evidence in this proceeding. The only bearing that the municipal laws of Costa Rica can have on the instant case would be as a source for findings of fact.<sup>274</sup>

## **B. The Tribunal Has Jurisdiction to Hear the Investors' Claims**

### **(a) Jurisdiction *Ratione Voluntatis***

260. By submitting their claims to arbitration in this forum, and waiving their rights to seek compensation for the alleged DR-CAFTA breaches in other fora, the Claimants have

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<sup>272</sup> In this regard, the Claimants recall how DR-CAFTA Article 10.26(4) provides: “*An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.*”

<sup>273</sup> See e.g.: CLA74, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award at ¶ 391 (July 14, 2006). See also CLA52, Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford University Press 2003) at 602.

<sup>274</sup> In this regard it should be noted that, under Article 42(1) of the *ICSID Convention*, municipal law may be construed – solely or in combination with international law – as the governing law of other proceedings. Care must accordingly be observed before consulting ICSID awards to establish the existence of doctrine such as that which may be seemingly reflected in *jurisprudence constante*.

consented to the arbitration.<sup>275</sup> Respondent's consent to the arbitration is provided at DR-CAFTA Article 10.17. As such, jurisdiction *ratione voluntatis* exists.

**(b) Jurisdiction *Ratione Personae***

261. Jurisdiction *ratione personam* exists because all Claimants are nationals of the United States of America, thereby qualifying as “*investors of a Party*,” as defined in CAFTA Article 10.28.

**(c) Jurisdiction *Ratione Materiae***

262. 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 CAFTA Article 10.28(h). The governmental measures described herein relate directly to these investments, consistent with the terms of Article 10.1 of the CAFTA. As such, the Tribunal possesses jurisdiction *ratione materiae* to adjudicate the Claimants' claims.

**(d) Jurisdiction *Ratione Temporis***

263. 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. All investments claimed in the instant proceeding satisfy this implicit requirement. In addition, all of the measures at issue in the instant proceeding were adopted or maintained after January 1, 1999.

264. 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 CAFTA Article 10.16(3).

265. Arbitration was not commenced until more than six months had passed, since the measures were adopted or maintained, consistent with the terms CAFTA Article

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<sup>275</sup> 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. The terms of those waivers have been scrupulously honored.

10.16(3). In addition, the instant 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 CAFTA Article 10.16(2).<sup>276</sup>

266. As such, jurisdiction *ratione temporis* exists for all of the Investors' claims to be heard.

### C. CAFTA Article 10.5

#### (a) The Meaning of Article 10.5

267. Article 10.5 provides:

***Article 10.5: Minimum Standard of Treatment*<sup>1</sup>**

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.*

<sup>1</sup> Article 10.5 shall be interpreted in accordance with Annex 10-B.

#### **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*

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<sup>276</sup> The purpose of a Notice of Intent is to provide the host State with an opportunity to remedy measures identified as inconsistent with their DR-CAFTA obligations by prospective claimants. The Claimants submitted their Notice of Intent on September 17, 2013, expressing the desire to resolve the conduct and measures that had given rise to the dispute without having to proceed to formal arbitration. Contrary to the express terms of Article 1115, Respondent made no effort whatsoever to seek to resolve the dispute identified in the Claimants' Notice of Intent, through consultation or negotiation with them.



*customary international law principles that protect the economic rights and interests of aliens.*

**(i) Fair and Equitable Treatment and Full Protection and Security Are No Longer Just Treaty Standards; They Are Illustrative of the Host State’s Absolute (i.e. ‘Minimum’) Duty to Aliens (i.e. Foreign Investors) Under Customary International Law**

268. Article 10.5(2) confirms the Parties’ consensus opinion that the standards of “*fair and equitable treatment*” (“FET”) and “*full protection and security*” (“FP&S”) are not only treaty standards, but also standards of customary international law. In other words, the provision constitutes 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 FET and FP&S did not appear anywhere in the Agreement. This was a position previously rejected by Costa Rica and other countries in Central and South America, which had previously adhered to the *Calvo* doctrine,<sup>277</sup> although the contrary position had long been maintained by their future DR-CAFTA partner, the United States of America.<sup>278</sup>
269. For greater certainty, 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.*” As such, it is apparent that Costa Rica and the other DR-CAFTA Parties regard the FET and FP&S

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<sup>277</sup> See, generally: CLA15, Manuel R. Garcia-Mora, “The Calvo Clause in Latin American Constitutions and International Law,” *Marquette L.Rev.* 33 (1950) 208-209; and CLA28, César Augusto Bunge & Diego César Bunge, *The San Jose De Costa Rica Pact and the Calvo Doctrine*, 16 *U. Miami Inter-Am. L. Rev.* 13 (1984).

<sup>278</sup> See, e.g., CLA88, Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford: OUP, 2009), who observed, in respect of the Secretary of State’s letters of referral, of various bilateral investment treaties, to the Senate:

Thus, while the Secretary’s early letters of submittal were ambiguous, by mid-1995 the Secretary was quite clear in stating that the fair and equitable treatment, the full protection and security standard, the duty to observe obligations with respect to investment, and the prohibition on arbitrary and [or] discriminatory measures all are elements of customary international law. The letters indicate that each is required by customary international law, but none of the four exhausts the entirety of the international minimum standard.

standards as illustrative examples, rather than the only exemplars, of the type of conduct expected of every host State under customary international law and, by express reference, Article 10.5.

270. Moreover, as explained further below, the Parties' reference to "*principles*" in Annex 10-B 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.

**(ii) The DR-CAFTA Parties' Abandonment of the Customary International Law Rule Regarding the Exhaustion of Local Remedies**

271. The Claimants also note how 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. 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.*"<sup>279</sup>

272. Had the parties not intended to relinquish any right to raise an exhaustion of local remedies defense in response to an Article 10.5 claim (or any Chapter 10 claim, for that matter), they would have drafted this condition-precedent differently, or they would have dispensed with it altogether. Instead, they made it impossible for an investor actually to await the outcome of a dispute with the host State, during which it could conceivably attempt to pursue its local remedies, without risking the likely loss of any right to seek relief from a DR-CAFTA tribunal (apart from a residual

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<sup>279</sup> CLA83, DR-CAFTA Article 10.16(2).

complaint over whether her final appeal was properly considered and dismissed by a court of cassation [or lower] in the host State). This is because the Parties have given prospective claimant-investors only two years and nine months – from the date upon which the first semblance of a dispute with the host State arose – during which to commence arbitration under the Agreement.<sup>280</sup>

273. Given the incredibly short window of time allowed under Articles 10.16(2) and 10.18(1), for an arbitral claim to be commenced after the originating harm is discovered, the DR-CAFTA “*option*” to pursue local remedies has been rendered virtually illusory. Three years, less 90 days’ notice, is not nearly long enough for any foreign investor in any DR-CAFTA country, to exhaust all available local remedies. This is why electing to exhaust one’s municipal remedies would be fatal to whatever claim one might have pursued under Chapter 10 in the first place. By the time all appeals would have been exhausted, it would be too late to revert to a DR-CAFTA tribunal to consider what would have been the original claim.<sup>281</sup> Instead, the frustrated claimant-investor would only have the right to pursue a Chapter 10 claim in respect of the portions of the appellate process falling within the three-year limitation period.<sup>282</sup> The result would likely be similar that which the unsuccessful claimant-investor experienced in the *Mondev v. U.S.A.* NAFTA case.<sup>283</sup>
274. If, as it certainly appears, an investor cannot seriously expect to be able to **both** exhaust her local remedies **and** have a DR-CAFTA tribunal hear her original complaint, it would be wholly inequitable for a respondent Party nevertheless to remain entitled to raise/rely on any exhaustion of local remedies argument – in the event that the claimant-investor made the seemingly logical choice of taking her

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<sup>280</sup> Article 10.18(1) provides: “*no claim may be submitted to arbitration ... if more than three years have elapsed from the date upon which the claimant first acquired... knowledge of the breach...*” and Article 10.16(2) provides: “[*at*] *least 90 days before submitting any claim to arbitration... a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration.*”

<sup>281</sup> This result would undoubtedly accrue even if one were to discount the possibility that lawyers representing the respondent at every level would pursue the quintessential strategy of dragging their collective feet throughout.

<sup>282</sup> For the purposes of demonstrating that the ability to both exhaust one’s local remedies and pursue a DR-CAFTA claim over the originating conduct (which would form the basis of the alleged breach), it is logically necessary to assume that the claimant-investor would not be able to obtain any relief without having been forced to exhaust its remedies (i.e. it would have been unsuccessful throughout its process of dispute settlement and appeal). Of course it is entirely plausible, in any event, for governmental conduct that breaches a DR-CAFTA provision (e.g. Article 10.3) to be entirely consistent with (if not mandated under) the municipal legal regime.

<sup>283</sup> CLA50, *Mondev v U.S.A.*, ICSID Case No ARB(AF)/99/2, Award, October 11, 2002

chances with a DR-CAFTA tribunal from the outset.<sup>284</sup> This is not the only logical basis for concluding that the Parties have surrendered any right to rely on the customary exhaustion of local remedies rule, however.

275. It is uncontroversial that an investor who retains the right to “*continue*” dispute settlement proceedings under the laws of a host State putatively appears to have not yet exhausted her local remedies. From this proposition it logically follows that if a host State withholds its consent to treaty arbitration until the investor has provided it with a written waiver of “*any right*” to continue municipal proceedings against it arising out of the same matter, that State cannot reasonably maintain that it could still rely upon an exhaustion defense, on the ground that the investor stopped before she reached the end of the municipal process. To posit otherwise would be inconsistent with the Article 1.2(1)(f) objective of the Parties “*to create effective procedures... for the resolution of disputes.*”<sup>285</sup>
276. Moreover, if the Parties had really wanted to retain the exhaustion rule – for use as a defense against any customary international law claims brought against them under Article 10.5 – they would have made some explicit provision for that contingency rather than consenting, unreservedly, to have such claims heard under the *ICSID Convention*, as per DR-CAFTA Article 10.17(2)(a). Article 26 of the *ICSID Convention* provides that a Contracting Member’s consent to arbitration shall “*be deemed consent to such arbitration to the exclusion of any other remedy*” [emphasis added]. It also provides that a Contracting Party may choose to “*require exhaustion of local administrative or judicial remedies as a condition of its consent.*” The fact that the Parties to the DR-CAFTA apparently decided against including such a *proviso* in the Agreement is determinative that no such intent exists, particularly in light of the

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<sup>284</sup> This point is reinforced by explanatory provision found in 1992 the U.S. Model BIT, as DR-CAFTA Chapter 10 was negotiated on the basis of a subsequent U.S. Model BIT, which only excluded an express prohibition on arbitrary interference because it was considered to be covered entirely by the FET standard. Article 2(2)(b) of the 1992 Model BIT (CLA36) provided:

Neither party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has or has exercised the opportunity to review such measures in the courts or administrative tribunals of a Party [Emphasis added].

<sup>285</sup> The adjective “*effective*” cannot reasonably be applied to a dispute settlement procedure that appears open to claimant-investors but is, in fact, closed – unless or until the claimant-investor has proved that it has exhausted all available local remedies.

requirement found in Article 25 of the *ICSID Convention* that consent to arbitration *must* be provided “*in writing*.”

**(iii) General Principles of International Law Inform the Substantive Content of the Customary International Law Minimum Standard Articulated in Article 10.5, on a Case-by-Case Basis**

277. It is thus manifest that 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 remedies.<sup>286</sup>
278. Moreover, neither Article 10.5 nor Annex 10-B impose any sort of restriction or limitation on the meaning or application of the “*customary international law principles*” referred to in the latter provision. These “*principles*” need only be oriented towards the protection of the economic rights and interests of “*aliens*.” In this regard it might also be noted that the term, “*aliens*,” connotes a category of legal persons that must be broader than, but nevertheless includes, foreign investors.<sup>287</sup> Moreover, the reference to “*aliens*” is indicative of the Parties’ understanding that the economic rights and interests at issue are those of individuals, vis-à-vis those of the host State.
279. Before determining whether the instant principle is concerned with protecting individuals’ economic rights and interests, however, interpreters of Annex 10-B and Article 10.5(2)(b) must also sensibly parse the phrase: “*customary international law principles*.” The orthodox consensus on sources of international law, reflected in

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<sup>286</sup> The investor enjoys the discretion – as to whether, or how far, to exhaust remedies made available to it under municipal law – on the basis that Article 10.16(1) accords it the right to pursue arbitration in respect of an “investment dispute.” It therefore lies for the claimant-investor to decide whether to exhaust local remedies, in which case it could not pursue arbitration until their completion (lest it run afoul of the Article 10.16(2) waiver requirement. If the claimant-investor elects not to exhaust local remedies, it may execute the required waiver and proceed immediately to arbitration.

<sup>287</sup> The term “*aliens*” must include foreign investors because the Parties have defined Article 10.5 by reference to the treatment of “*aliens*,” whilst elsewhere defining the class of persons entitled to pursue claims under Article 10.5 as “*investors of another party*” who are making, have made or seek to make an investment in the territory of the host State DR-CAFTA Party.

Article 38 of the *Statute of the Court of International Justice*, recognizes three primary sources of international law: (1) treaties; (2) customary international law; and (3) general principles of international law. Thus, on a *prima facie* basis, the term “*customary principles of international law*” is an oxymoron. This seemingly inarticulate choice of terms can nevertheless be reconciled, through a proper application of the customary approach to treaty interpretation outlined further above, and by regarding the drafters’ reference to “principles” as an invitation.<sup>288</sup> The textual context is of great assistance, because it demonstrates the use to which the phrase has been put: i.e. to aid in attributing concrete and substantive meaning to paragraph (1), as applied in a contemporary and particularized [i.e. case-specific] context. Such use is also obviously in accord with the object and purpose of the Chapter, and Agreement: i.e. to encourage economic growth in the free trade area by promoting and protecting foreign investors and their investments. Only one interpretation of the ordinary meaning of the terms combined in “*customary principles of international law*” is to regard the phrase as an injunction to have recourse to general principles of international law in according meaning to the customary minimum standard as applied to the facts of any given case.

280. As noted above, the customary international law minimum standard of treatment of aliens is evolutive. The Parties obviously therefore prescribed the use of general principles of international law, by future interpreters of the Agreement, so as to ensure that Article 10.5 could not be properly construed as a reference to some ancient or reified version of the protection available to aliens under customary international law. Requiring interpreters to have recourse to general principles of law was a means of ensuring that the protection offered under Article 10.5 would always reflect contemporary practice. By design, general principles of international law always reflect modern practice because of the comparative methodology used to identify them. The Parties recognized this fact in Article 10.5(2)(a), which provides, in relevant part: “*in accordance with the principle of due process embodied in the principal legal systems of the world*” [*Emphasis added*]. By contrast, the orthodox methodology for determining whether a norm has become part of the corpus of customary international law involves a cumbersome process of cataloguing evidence

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<sup>288</sup> See: CLA18, Georg Schwarzenberger, *The Inductive Approach to International Law* (Oceana Pubs: New York, 1965) at 87-91.

from the official statements and practices of an indefinite number of States. Such an undertaking could never possibly be undertaken within the context of a single arbitration and would, in any event, only reflect an accumulation of past statements and past practice, rather than the contemporary understanding of any given norm.<sup>289</sup>

281. Thus, it is apparent that when the Parties 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. They further intended that relevant principles would be the ones oriented towards protection of individual economic rights and interests. By this means, the Parties ensured 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 law.
282. As explained below, two general principles of international law critically inform the construction and application of Article 10.5(1) in the instant case: the principle of good faith and 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

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<sup>289</sup> This is the process described in the first sentence of Annex 10-B, the purpose of which was obviously to restrict their liability exclusively to the category of customary law norms that could be logically regarded as falling within the penumbra of protections for individuals, vis-à-vis States, with respect to the economic rights and interests of those individuals. By way of example, the text of Annex 10-B manifestly precludes a DR-CAFTA claim being brought by an investor for a host State having declared war without legitimate cause, or having failed to recognize the territorial waters of a third State, or having engaged in systematic genocide – all of which would be breaches of customary international law, but not in respect of obligations relating directly to the protection of the economic rights and interests of individuals. See, e.g. CLA53, *ADF Group Incorporated v United States*, Award, ICSID Case No ARB(AF)/00/1, (2003) 18 ICSID Rev-FILJ 195, (2004) 6 ICSID Rep 470, (2003), 6 January 2003, 9 January 2003 ¶ 184, citing: CLA50, *Mondev International Limited v United States*, Award, ICSID Case No ARB(AF)/99/2, (2003) 42 ILM 85, (2004) 6 ICSID Rep 192, (2004) 125 ILR 110, IIC 173 (2002), 11 October 2002, ¶ 113. See, also: CLA97, *Chemtura Corporation v Canada*, NAFTA/ UNCITRAL Rules Arbitration, Award, 2 August 2010, ¶ 122, and see, generally: CLA109, Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* (Leiden: Martinus Nijhoff, 2013) at 241-258.

respect to all decision-making processes, whether legislative, executive or judicial in nature.

**(b) The Principle of Good Faith**

**(i) The Frustration of Legitimate, Investment-Backed Expectations**

283. Good faith “*is an indisputable rule of international law, without which the very notion of international law itself would be a mockery.*”<sup>290</sup> It serves as “*the common guiding beacon that will orient the understanding and interpretation of obligations*” just as fair and equitable treatment affords foreign investors the opportunity to form and hold legitimate expectations as to manner in which they will be treated, including expectations in respect of the property rights they have acquired and any government permissions attaching to them during their tenure as landholders. Investors are therefore entitled reasonably to rely upon promises made by a State, both implicit and explicit. The less ambiguous the promise, the more reasonable the expectation.<sup>291</sup> The more specific the promise, the more reasonable the expectation.<sup>292</sup>

284. To be sure, the concepts of detrimental reliance and legitimate expectation are not just the component parts of delict that occurs when the host State breaks an explicit promise made exclusively to a single foreign investor. Rather, they are rooted in the principle of good faith and, accordingly, have often been used to explicate the meaning of ‘fair and equitable treatment’ in appropriate cases. In other words, it is the principle of good faith that requires host State officials to abstain from conduct that would negatively “*... affect the basic expectations that were taken into account by foreign investor*” when establishing its investment.<sup>293</sup> As indicated in the oft-cited passage from *Tecmed v. Mexico*, the customary international law standard of fair and equitable treatment requires a State:

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<sup>290</sup> CLA68, Bin Cheng, *General Principles of Law as Applied by International Court and Tribunals* (Cambridge: CUP, 2006) at 113.

<sup>291</sup> CLA70, *International Thunderbird Gaming Corp. v. United Mexican States*, Award, UNCITRAL Arbitration (January 26, 2006), at para’s. 241-243.

<sup>292</sup> CLA77, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Turkey*, Award, ICSID Case No ARB/02/5 (January 19, 2007), at paras 241-243.

<sup>293</sup> CLA81, *Sempra Energy International v Argentina*, Award and partial dissenting opinion, ICSID Case No ARB/02/16 (28 September 2007), ¶ 298; citing CLA54, *Técnicas Medioambientales, TECMED S.A. v United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (May 29, 2003), ¶ 254.



... to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved there under, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>294</sup>

285. The general principle of good faith had a pervasive impact upon international investment law long before the explosion of arbitrations that started little more than one decade ago. For example, the Tribunal in *AMCO Asia v. Indonesia* relied upon the customary international law doctrine of acquired rights,<sup>295</sup> in explaining how foreign investors were entitled “to realize the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law.”<sup>296</sup>
286. Investors can, of course, hold any expectation they desire about the performance of their investments and the disposition of the host State in the years to come. He legitimizes those expectations when he performs a reasoned and prudent assessment of “the state of the law and the totality of the business environment” prior to, and in the process of, establishing his investments.<sup>297</sup> Absent some extraordinary guarantee of stability, no investor would reasonably expect that the circumstances prevailing at the time of establishment to remain totally unchanged throughout the life of the

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<sup>294</sup> CLA54, *Tecmed*, ¶ 154; approved in: CLA59, *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7, (May 25, 2004), ¶¶ 114-115.

<sup>295</sup> CLA34, *AMCO Asia v. Indonesia*, 24 ILM 1985 at 1022 at 1034-35, 1 ICSID Reports, 377 at 490 & 493; citing: CLA11, *German interests in Polish Upper Silesia* (Merits), P.C.I.J., May 25, 1926, Series A, No. 7 (1926) at 22 & 44; CLA16, *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 ILR 117 (1958), at 168, 205; CLA27, *Starrett Housing Corp. v. Islamic Republic of Iran*, 4 (1984) Iran-US Cl. Trib. Rep. 122, 156-57 (1983); and CLA13, *Award in the Shufeldt Claim*, 24 July 1930, UNRIAA, Vol. II, XXVII, at 1081, 1097. See, also: CLA17, *The Sapphire Award* (1963) 35 ILR 136 at 181.

<sup>296</sup> CLA34, *AMCO*, at 1035.

<sup>297</sup> CLA77, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Turkey*, Award, ICSID Case No ARB/02/5 (January 19, 2007), at para. 255; citing *Saluka*, op. cit., at para. 305.

investment.<sup>298</sup> On the other hand, foreign investors are certainly entitled to expect the host State will continue to comport itself in a fair and equitable manner during the life of the investment, abjuring arbitrary, discriminatory or non-transparent conduct.

287. Foreign investors are thus entitled to expect a reasonable level of stability and/or certainty with respect to how property rights or regulatory regimes will be administered, vouchsafed by the customary international law standard of fair and equitable treatment.<sup>299</sup> International responsibility will be engaged whenever host State officials conduct themselves in ways that effectively “[*eviscerate*] the arrangements in reliance upon which the foreign investor was induced to invest.”<sup>300</sup>

288. This is why publicists and international adjudicators variously relate the principle of good faith, the standard of fair and equitable treatment, and the doctrine of legitimate expectations with the host State’s obligation to “provide a transparent and predictable business and regulatory climate” to foreign investors. In so doing, they are not attempting to create new norms or expand old ones; they are merely articulating what is already the status of customary international law today. As recently noted by the Tribunal in *Gold Reserve v. Venezuela*, the conception of legitimate expectations as the manifestation of fair and equitable treatment is based upon precisely the type of comparative analysis recalled by the Parties in directing that the Article 10.5 minimum standard should be informed by principles of international law:

This has been succinctly stated recently by other ICSID tribunals, for example in *Total v. Argentina* and in *Toto Costruzioni Generali SpA v Republic of Lebanon*. Based on converging considerations of good faith and legal security, the concept of legitimate expectations is found in different legal traditions according to which some expectations may be reasonably or

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<sup>298</sup> See, e.g.: CLA39, 1999 UNCTAD Report on Fair and Equitable Treatment, at pp. 59-60 (*see*; also: the 2004 UNCTAD Report on Transparency, at p. 71):

*Where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.*

<sup>299</sup> CLA77, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Turkey*, Award, ICSID Case No. ARB/02/5 (January 19, 2007), ¶¶ 248-250. See, also: *Eureko BV v Poland*, Partial Award, UNCITRAL Arbitration (August 19, 2005), ¶¶ 235 & 242.

<sup>300</sup> CLA47, *CME Czech Republic B.V. v. Czech Republic*, Partial Award (UNCITRAL, September 13, 2001), ¶ 611

legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent. In particular, in German law, protection of legitimate expectations is connected with the principle of *Vertrauensschutz* (protection of trust) a notion which deeply influenced the development of European Union Law, pointing to precise and specific assurances given by the administration. The same notion finds equivalents in other European countries such as France in the concept of *confiance légitime*. The substantive (as opposed to procedural) protection of legitimate expectations is now also to be found in English law, although it was not recognized until the last decade.<sup>301</sup>

289. Expectations can be found in the celebrated separate opinion Thomas Wälde in *Thunderbird v. Mexico*. The late Professor Wälde, who began his career working on development policy with the late, former ICSID Secretary General Ibrahim Shiata, at the United Nations, explained:

Investors need to rely on the stability, clarity and predictability of the government's regulatory and administrative messages as they appear to the investor when conveyed – and without escape from such commitments by ambiguity and obfuscation inserted into the commitment identified subsequently and with hindsight. This applies not less, but more with respect to smaller, entrepreneurial investors who tend to be inexperienced but provide the entrepreneurial impetus for increased trade in services and investment which NAFTA aims to encourage. Taking into account the nature of the investor is not formulation of a different standard, but of adjusting the application of the standard to the particular facts of a specific situation.

... under developed systems of administrative law, a citizen – even more so an investor - should be protected against unexpected and detrimental changes of policy if the investor has carried out significant investment with a reasonable, public-authority initiated assurance in the stability of such policy.... Such protection is, however, not un-conditional and ever-lasting. It leads to a balancing process between the needs for flexible public policy and the legitimate reliance on in particular investment-backed expectations... The “fair and equitable standard” can not be derived from subjective personal or cultural sentiments; it must be anchored in objective rules and principles reflecting, in an authoritative and universal or at least widespread way, the contemporary attitude of modern national and international economic law. The wide acceptance of the “legitimate expectations” principle therefore supports the concept that it is indeed part of “fair and equitable treatment” as owed by governments to foreign investors under modern investment treaties and under Art. 1105 of the NAFTA.<sup>302</sup>

290. Similar sentiments were also expressed in *Saluka v. Czech Republic*:

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<sup>301</sup> CLA115, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 576.

<sup>302</sup> CLA67, *International Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion, UNCITRAL/NAFTA, January 26, 2006, ¶¶ 5 & 8.

An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host state subsequent to the investment will be fair and equitable.

The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations.

...  
The expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.<sup>303</sup>

291. In summary, customary international law protects the foreign investor who is engaged in making important decisions about 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 him to expect that municipal administrative, regulatory and adjudicative regimes – and the officials responsible for operating them – will function in a transparent, stable and predictable manner.<sup>304</sup> He 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. These are the expectations that have been sanctioned under customary international law and vouchsafed through Costa Rica's participation in the DR-CAFTA.
292. The foreign 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 he is most certainly entitled to expect that, should a bribe ever be solicited from him, his complaint to the host State about the crime will be immediately and thoroughly investigated, in good faith, and that neither he nor his investment will suffer any retribution for having reported it to the proper authorities.

## (ii) Arbitrariness in the Exercise of Public Authority

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<sup>303</sup> CLA71, *Saluka* ¶¶ 301-303.

<sup>304</sup> CLA62, *CMS Gas Transmission Company v Argentina*, Award, ICSID Case No ARB/01/8 (May 12, 2005), para's. 274-277; and CLA82, *CMS Gas Transmission Company v Argentina*, Annulment Decision, ICSID Case No ARB/01/8 (September 25, 2007), at para. 89.

Arbitrariness in any form is – or ought to be – abhorrent to *homo juridicus*. His whole professional outlook is dominated by the attitude that, in the eyes of the law, equal situations require equal remedies.<sup>305</sup>

293. The prohibition against arbitrariness is one of long standing in international investment law. In the opening decades of the 20<sup>th</sup> Century, it was reflected in the doctrine of “*substantive denials of justice*,” which publicists had effectively conflated both with the customary international law minimum standard of treatment, and with its precursor, the so-called standard of civilization.<sup>306</sup> For example, Borchard wrote: “*As a rule, unjustified discrimination will be found an ingredient in sustainable claims*,”<sup>307</sup> while Desvernine elaborated: “*a grossly unfair or notoriously unjust decision may be and has been considered as equivalent to a denial of justice*.” Desvernine further observed that any type of governmental decision is capable of being “*so unfair*” as to constitute a denial of justice.<sup>308</sup>
294. These views both reinforced, and were reinforced by, the practice of treaty drafters, which developed early in the century, of including clauses to prohibit “*arbitrary and/or discriminatory*” or “*arbitrary and/or unreasonable*” interference with the property rights and person of foreign traders and investors.<sup>309</sup> Later publicists, such as Georg Schwarzenberger and Bin Cheng, articulated a different rationale for prohibiting arbitrariness, based instead on the general principle of good faith. For them, and for subsequent publicists and adjudicators, arbitrariness represented the antithesis of the rule of law in international society, the two fundamental tenets of which were the overriding principle of sovereign equality and the mitigating principle of good faith.<sup>310</sup> This approach was also reinforced by contemporary developments in

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<sup>305</sup> CLA22, Georg Schwarzenberger, *International Law and Order*, *op. cit.*, at 100-101.

<sup>306</sup> For a more recent example and description of this synthesis of minimum standards, see: CLA117, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID No. ARB/10/19, Award, 18 November 2014, ¶¶ 561-565 & 584, although the Tribunal took great pains to stress that the content of the customary minimum is by no means static, and has indeed increased in scope and protection over the intervening years.

<sup>307</sup> CLA130, Borchard, at 458.

<sup>308</sup> CLA10, Desvernine, *Claims Against Mexico* (New York: Private Edition, 1921) at 79-80. The case involved a host State official’s finding of fact that certain invoices constituted evidence of fraud on the part of the alien, despite the fact such a conclusion was manifestly untrue.

<sup>309</sup> CLA109, Weiler, *The Interpretation of International Investment Law*, *op. cit.*, at 166-169

<sup>310</sup> This universalist conception of ‘international society’ supplanted the old conception of a law of nations, in which a slow march to civilization would be nurtured by States of superior wealth and strength. The principle of good faith was complimentary to the principle of sovereign equality than the doctrine of substantive denials of justice, which – after all – had been rooted in the archaic ‘standard of civilization.’

the law of international human rights,<sup>311</sup> the jurisprudence of which has provided investment treaty tribunals with an additional source of doctrine for interpretation of minimum standard provisions, including as FET.<sup>312</sup>

295. As Garcia-Amador observed over 50 years ago, under a minimum standards approach supported by the general principle of good faith, all States would be regarded as the rightful possessors of “*wide discretionary powers*” with respect to any matter falling “*essentially within the domestic jurisdiction,*” which included their treatment of aliens. On the other hand, however, the “*arbitrary*” or “*abusive*” exercise of such discretionary powers remained prohibited under customary international law.<sup>313</sup> The concept is ingrained in international law, as demonstrated in the 1927 *International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, a multilateral treaty that would have ostensibly eliminated all border controls between signatories, had it come into force. Article 5 of the Convention, however, would have provided ample authority for the parties to reserve measures from its coverage, “for the purpose of protecting, in extraordinary and abnormal circumstances, the vital interests of the country.” This reservation of sovereign authority was itself constrained, however, by the provisos that: (1) such measures could only be reserved for the duration of the alleged justificatory circumstances and (2) that they could only “*be applied in such a manner as not to lead to any arbitrary discrimination against any other High Contracting Party.*”<sup>314</sup>
296. The same logic applied to the sovereign power to confiscate property rights held by aliens, conditioning its exercise on the basis of requiring a rational public policy justification to be provided upon demand:

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<sup>311</sup> See e.g. CLA32: Article 9 of the United Nations General Assembly, *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, A/RES/40/144, 13 December 1985: “*No alien shall be arbitrarily deprived of his or her lawfully acquired assets.*”

<sup>312</sup> See, generally: CLA63, Andrea Bjorklund, 861-878; CLA109, Weiler, *The Interpretation of International Investment Law*, op. cit., at 169-178.

<sup>313</sup> F.V. Garcia-Amador, *The Changing law of International Claims*, Vol. I (Oceana, New York: 1984), at 112-113.

<sup>314</sup> Steve Charnovitz, “Exploring the Environmental Exceptions in GATT Article XX,” 5 *Journal of World Trade* 38 (1991), 40-42. Citing: *International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, done at Geneva, Nov. 8, 1927, 97 LNTS 391; 8 *League of Nations O.J.* 1653 (1927); *Exception Claims by Governments under Article 6 of the Convention*, 9 *League of Nations O. J.* 1233 (1928).

Also of note was Article 4(8), which would have arguably denuded the Convention of much of its liberalizing impact: “Prohibitions or restrictions applied to products which, as regards production or trade, are or may in future be subject -within the country to State monopoly or to monopolies exercised under State control.”

Whenever a State has seized the property of a foreigner it should be prepared, when challenged, to give a reason for its action. In the absence of evidence other States need not presume that minimum international standards have been complied with. For when the right to confiscate is not used for the public good as generally recognized by States, but for some arbitrary motive, foreign States may well protest.

...

Even genuine health and planning legislation... may be abusively operated, for example, if health or quarantine regulations are imposed not bona fide to protect public health, but with the real, though an avowed, purpose of ruining a foreign trader. When the evidence of such indirect motive is clear, the foreign State concerned may properly protest on the ground that the trader is being unjustifiably deprived of his rights.<sup>315</sup>

297. The modern rationale for protecting foreign investors from arbitrary results is also not unlike that which Thomas Wälde supplied for the vindication of legitimate expectations. As explained by the Tribunal in *Lemire v. Ukraine*:

Foreign investors covered by a BIT enjoy an additional level of protection: they can avail themselves of the same instruments open to local investors, and additionally they can draw protection from the international law rights conferred by the treaty. The different treatment between foreign and domestic investors is a natural consequence of a BIT. However, this unequal treatment is not without justification: justice is not to grant everyone the same, but *suum cuique tribuere*. Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection [Emphasis added].<sup>316</sup>

298. The prohibition on arbitrariness thus remains a touchstone for scrutinizing the exercise of discretionary authority under investment protection agreements. For example, in one of the earliest NAFTA cases, *Metalclad v. Mexico*, the host State was held responsible for the decision of a regional governor to render the investment enterprise inutile – by decreeing it to be part of a new cactus preserve area, just prior to his leaving office. The governor issued his last-minute declaration upon learning that a federal court had finally vacated an injunction, which his compatriots in local government had obtained by launching a procedurally abusive court proceeding against the foreign investor, thereby precluding its operation or any further development.
299. This ending was particularly difficult for the investor, as the establishment of its investment had initially gone smoothly with both state and federal levels of

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<sup>315</sup> B.A. Wortley, *Expropriation in Public International Law* (Cambridge: CUP, 1959) at 103 & 110.

<sup>316</sup> CLA41, *Lemire* at ¶ 57.

government. It was not until a substantial capital investment has been made that the governor made his first demand to the investor, for the payment of a bribe. It was not long after the investor rebuffed the attempted extortion that everything quickly began to fall apart. Suddenly the investor was informed that a construction permit process was outstanding, for a facility whose construction phase was all but complete. The investor's federal contacts assured it that this was merely a *pro forma* matter, so an application was made. The decision to deny the allegedly *pro forma* permit was denied without a hearing. When the incredulous investor decided to open for business anyway, local officials initiated a constitutional court proceeding for which they possessed no standing. It would take years before a supervising court would dismiss it, however, and in the meantime the investment would be frozen by an automatic stay. Once that stay was lifted, the governor stepped in with his decree, and the investor never did obtain the opportunity to operate its investment.<sup>317</sup>

300. Just a few years later, the Mexican investment of a Spanish investor, *Tecmed*, suffered a similar fate. Here a permit, the renewal of which was supposed to be *pro forma*, was not renewed. Insufficient notice was provided of the host State's intent to reject the renewal application, and the foreign investor was not offered any opportunity to answer the alleged deficiencies subsequently cited in support of the rejection. The investment enterprise could not be operated without the permit and any hoped-for recommencement would be contingent upon success being achieved in an uncertain and protracted municipal legal process.<sup>318</sup>
301. More recently, in *Quiborax v. Bolivia* and *Dan Cake v. Hungary*, State responsibility was found in a case where mineral resource concessions were capriciously revoked, presumably for discriminatory reasons.<sup>319</sup> And in *Dan Cake v. Hungary*, a regional

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<sup>317</sup> CLA42, *Metalclad Corporation v Mexico*, Award, ICSID Case No. ARB(AF)/97/1, (2001) 16 ICSID Rev-FILJ 168, (2001) 40 ILM 36, (2001) 26 YB Com Arb 99, (2002) 119 ILR 618, (2002) 5 ICSID Rep 212, (2001) 13(1) World Trade and Arb Mat 45, 25 August 2000; and CLA61, Todd Weiler, "Good Faith and Regulatory Transparency: The Story of *Metalclad v. Mexico*" in: *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, T. Weiler, ed. (London: Cameron May, 2005 [Since 2012: Leiden: Brill]). 713 at 718-724 et sub.

<sup>318</sup> CLA54 *Tecmed* at ¶ 173

<sup>319</sup> CLA123, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, ¶¶ 291-295. The Tribunal was not convinced that the FET standard should be equated with the customary minimum standard – out of concern that the content of the former ought not to be read down to meet that of the latter. For the purposes of the instant case, however, the Tribunal nevertheless determined that the facts supported a breach, even if the customary law standard were construed as being more 'minimal' than 'minimum' in relation to the FET standard.



court responsible for supervising a bankruptcy process – launched by erstwhile local business partner – imposed conditions on the investor’s application for relief that had the effect of indirectly ensuring that such relief could not possibly be obtained before it was too late to be of any assistance to the investor.<sup>320</sup>

302. It is thus apparent that there are numerous ways in which the prohibition against arbitrariness can be engaged. In one of his most-cited opinions, Christoph Schreuer attempted to distill the catalogue of examples from various cases into the following four familiar categories (or patterns) of arbitrariness:

- a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
- c. a measure taken for reasons that are different from those put forward by the decision maker;
- d. a measure taken in willful disregard of due process and proper procedure<sup>321</sup>

303. While such exercises may provide tribunals with a shorthand key to the most common cases of arbitrariness in international investment law today, the problem remains that it can be difficult, if not impossible, for any adjudicator to ascertain what was really on the mind of a decision-maker, when the impugned decision was made. Schwarzenberger encapsulated the problem as follows:

[A]nybody who is acquainted with the techniques by which judicial precedents are applied and distinguished is aware of the element of subjectivity which is inseparable from deciding even on a judicial level what situations are supposed to be equal. In the fields of quasi-judicial, administrative or political decisions, it is even more difficult to verify the arbitrary exercise of discretion. The wider the scope of discretion, the easier it is to find plausible arguments to hide irrelevant or objectionable reasons behind such reasons. If discretion is exercised within as wide a framework of territorial jurisdiction, only the most potent abuses of sovereignty could possibly be caught by any prohibition of the arbitrary use of sovereign right.<sup>322</sup>

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<sup>320</sup> CLA122, *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, August 24, 2015, ¶¶ 151-160.

<sup>321</sup> CLA91, *EDF v Romania*, ¶ 303. See, also: CLA46, *Lauder v Czech Republic*, Ad Hoc Trib., Award, 33 September 2001, ¶ 221; CLA54 *Tecmed*, ¶ 154; CLA45, *Loewen Group Inc. & R. Loewen v. United States of America*, ICSID Case No. ARB/AF/98/3, Award on Jurisdiction, January 9, 2001, ¶ 131; and CLA71 *Saluka*, ¶ 307

<sup>322</sup> CLA22, Georg Schwarzenberger, *International Law and Order* (Baltimore: The Johns Hopkins Press, 1971) at 100-101.

304. The approach long favored by publicists to overcome this judging problem involves instructing adjudicators to concentrate their attention either on evidence of procedural irregularities or on the impact of discretionary governmental decision-making on aliens, rather than expecting to receive the kind of evidence that is likely to reveal the *real reason* behind the subject decisions.<sup>323</sup> Cheng explained the method as follows:

Each case must be judged according to its particular circumstances by looking either at the intention or motive of the doer or the objective result of the act, in the light of international practice and human experience. When either an unlawful intention or design can be established, or the act is clearly unreasonable, there is an abuse prohibited, by law [Emphasis added].<sup>324</sup>

305. The additional benefit of this approach – i.e. concentrating either on finding evidence of manifest procedural unfairness in the exercise of discretionary authority, or by determining whether the overall outcome of the that discretionary act appears manifestly unjust, unreasonable, arbitrary, and/or patently discriminatory – is that the adjudicator can still recognize and maintain appropriate deference to the sovereign authority under which the scrutinized decision was made. She does so by simply by remaining agnostic as to the relative legitimacy of the panoply of potential policy reasons for the decision.<sup>325</sup> Her concern is to assess the fairness of the decision-making process and evaluate the relative reasonableness and/or proportionality of the decision, in light of whatever non-discriminatory policy goals may have been claimed for making it.

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<sup>323</sup> A similar rationale underpins the arbitral practice of drawing adverse inferences about the factual record, in cases where the available evidentiary record supports the allegation that other evidence – requested from, but withheld by, the respondent – would reveal the *real reason* for an impugned decision, if produced.

<sup>324</sup> CLA68, Bin Cheng, *General Principles of Law as Applied by International Court and Tribunals* (Cambridge: CUP, 2006)

<sup>325</sup> Whereas future publicists relied upon a universalized conception of good faith, which applied equally across international law, these older publicists relied upon a narrative of civilizational progress to unify what they understood to be the law of nations. See, e.g.: CLA21, Frederick S. Dunn, *The Diplomatic Protection of Americans in Mexico* (Kraus Reprint, New York:1971) at 1 and 426:

... ultimately concerned with the possibility of maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units of diverse cultures and stages of civilization, different legal and economic systems, and varying degrees of physical power and prestige.<sup>325</sup>

Unquestionably, the very existence of the institution [of mixed claims commissions which provide redress for denial of justice] operates as a strong inducement to governments and their officials to be more careful in their treatment of foreigners than might otherwise be the case.<sup>325</sup>

306. Of course it also remains true that evidence of bad faith, improper motives, or malicious intent will usually attract State responsibility,<sup>326</sup> but such evidence is not required in order to succeed in a claim of arbitrary interference with the economic rights or interests of a foreign investor,<sup>327</sup> which would accordingly violate both DR-CAFTA Article 10.5 and the customary international law standard of fair and equitable treatment.
307. In summary, for over a century international adjudicators have scrutinized the conduct of host State officials by evaluating both the impact of governmental decisions and the process by which discretion was exercised to make those decisions. The rationale for this approach has been incrementally strengthened over the years through the express inclusion of treaty prohibitions against arbitrary interference with aliens and/or their investments in bilateral treaties<sup>328</sup> and as subsequently subsumed within the newer FET standard found in virtually all investment protection treaties today.<sup>329</sup>

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<sup>326</sup> See, e.g.: CLA92, *Cargill, Inc v Mexico*, Award, ICSID Case No ARB(AF)/05/2, August 13, 2009, ¶ 296.

<sup>327</sup> See, e.g.: CLA26, F.A. Mann, “British Treaties for the Promotion and Protection of Investments” 52 (1981) *Brit. Yrbk. Int’l. Law* 241 at 245:

In other words, it is submitted that good faith is presumed here as elsewhere, and that bad faith need not be proved by the investor if he can establish a breach of the overriding objective duty of acting fairly, equitably and reasonably. If the authorities of the host country are found to be acting unfairly, inequitably or unreasonably they are in bad faith. The latter phrase at first sight carries a subjective connotation, and there may be occasions in the law when this is the correct interpretation. But on account of the primary duties imposed on the host country this, it is submitted, is not one of them.

*Loewen*, ¶ 50:

Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.

<sup>328</sup> Indeed, as evidenced in DR-CAFTA Article 10.9(3)(c), which exempts certain types of measure from the overall prohibition against the adoption of performance requirements, the Parties have demonstrated their continuing commitment to the consensus opinion that measures which are “not applied in an arbitrary or unjustifiable manner” [emphasis added] are to be considered legitimate, *per se*.

<sup>329</sup> The 2004 U.S. Model BIT (CLA57) was used as the starting point for negotiations on Chapter 10 of the DR-CAFTA. The explanation provided by the United States for not including an “arbitrary and...” provision in the 2004 Model was that it had become redundant in light of the widespread use of the FET standard. A very large number of arbitral tribunals, operating under treaties negotiated using earlier models, have demonstrated consensus with this opinion by recognizing that the FET standard prohibits arbitrary, unreasonable or discriminatory host State interference with investors and/or their investments. See, generally: Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford: OUP, 2009) at 358, citing, e.g., CLA62, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 290:

308. Whether one focuses upon the procedural aspects of an investor's treatment or the substantive result, and whether one grounds one's theory of liability in an express treaty provision, the doctrine of substantive denials of justice, or the general international law principle of good faith, as well as the prohibition against abuses of right flowing therefrom, the decisions of host State officials will, and should, remain subject to scrutiny in respect of the relative arbitrariness of the result.<sup>330</sup>

**(iii) Abuse of Rights**

309. The general international law principle of good faith obviously serves as a wellspring for customary international law rules concerning the treatment of foreign nationals. It does so because it speaks to the very core of the relationship between Sovereigns, as well as the relation between Sovereign and other subjects of international law. As Bin Cheng demonstrated in his landmark treatise on the general principles of international law:

[W]henver the law leaves a matter to the judgment of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused.<sup>331</sup>

Where the right confers upon its owner a discretionary power, this must be exercised honestly, reasonably, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interest of others. All rights have to be exercised reasonably and in a manner compatible with both the contractual obligations of the party exercising them and the general rules and principles of the legal order. They must not be exercised fictitiously so as to evade such obligations or rules of law, or maliciously so as to injure others. Violations of these requirements of the principle of good faith constitute abuses of right, prohibited by law.<sup>332</sup>

Good faith in the exercise of rights... means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and *bona fide* exercise of a

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The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.

<sup>330</sup> See, e.g., CLA43, the *S.D. Myers* First Partial Award, *op. cite.* at para. 258 et. s.

<sup>331</sup> CLA68, Bin Cheng, *General Principles of Law as Applied by International Court and Tribunals* (Cambridge: CUP, 2006) at 132-133.

<sup>332</sup> *Id.* at 136.

right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from the obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. The protection of the law extends as far as this limit, which is the more often undefined save by the principle of good faith. Any violation of this limit constitutes an abuse of right and a breach of the obligation-an unlawful act. In this way, the principle of good faith, by recognising their interdependence, harmonises the rights and obligations of every person, as well as all the rights and obligations within the legal order as a whole.<sup>333</sup>

Good faith in the exercise of the discretionary power inherent in a right seems thus to imply a genuine disposition on the part of the owner of the right to use the discretion in a reasonable, honed, and sincere manner in conformity with the spirit and purpose, as well as the letter, of the law. It may also be called a spontaneous sense of duty scrupulously to observe the law.<sup>334</sup>

310. There is no need to dwell too long upon how the principle of good faith informs the customary minimum standard specifically in relation to the doctrine on abuses of right. It has already been demonstrated in how the principle informs the customary prohibition on arbitrariness in discretionary decision-making. The only reason to consider the subject separately is to address the connection between abuses 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 investment. As confirmed by the Tribunal in *EDF v. Romania*, a request for a bribe by a State official constitutes a manifest violation of the host State's FET obligation, "*as well as a violation of international public policy*" and "*a fundamental breach of transparency and legitimate expectations.*"<sup>335</sup>
311. At root, however, when an official who exercises the discretionary authority vested in him by the Sovereign, on the basis of, or to facilitate or abet, corruption, he has

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<sup>333</sup> CLA68, Bin Cheng, *General Principles of Law as Applied by International Court and Tribunals* (Cambridge: CUP, 2006) at 131-132.

<sup>334</sup> CLA68 Bin Cheng, *General Principles of Law as Applied by International Court and Tribunals* (Cambridge: CUP, 2006) at 135.

<sup>335</sup> CLA91, *EDF (Services) Ltd v Romania*, Award, ICSID Case No. ARB/05/13, October 2, 2009, ¶ 221.

committed a grave abuse of right, for which the State must be held responsible. This conclusion is only strengthened by DR-CAFTA Article 18.8, which provides:

**Article 18.8: Anti-Corruption Measures**

1. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:
  - (a) a public official of that Party or a person who performs public functions for that Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
  - (b) any person subject to the jurisdiction of that Party intentionally to offer or grant, directly or indirectly, to a public official of that Party or a person who performs public functions for that Party any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
  - (c) any person subject to the jurisdiction of that Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and
  - (d) any person subject to the jurisdiction of that Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs (a) through (c).
2. Each Party shall adopt or maintain appropriate penalties and procedures to enforce the criminal measures that it adopts or maintains in conformity with paragraph 1.
3. In the event that, under the legal system of a Party, criminal responsibility is not applicable to enterprises, that Party shall ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions, for any of the offenses described in paragraph 1.
4. Each Party shall endeavor to adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery or corruption described in paragraph 1.

[Emphasis added]

312. Indeed, the above-cited provision does more than merely providing confirmation that Article 10.5 is breached when a Costa Rican official who exercises discretionary authority that – if wielded abusively – could eviscerate the value of an investment. It goes further to demonstrate why Article 10.5 is also breached 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 have committed

themselves to serious obligations upon which legitimate expectations of future behavior can obviously be based.

**(c) The Principle of Due Process**

313. The principle of due process is closely associated with the principle of good faith, particularly in respect of the doctrine on abuses of right, which emanates from the latter. Both principles are applicable to cases in which sovereign authority has been vested in, and exercised by, host State officials. Both can also be applied regardless of whether such discretionary authority has been exercised by the executive/administrative, legislative or judicial branches of State, although the concept of due process is more closely associated with legislative and judicial rulemaking than good faith. This is because of the higher degree of deference that has traditionally accorded to the decisions of democratically-elected rule makers and the members of an independent judiciary. The language of due process is more commonly employed in these scenarios because the principle is more easily translated into categories of procedural fairness, and it is conventionally considered to be less objectionable (i.e. more deferential) to impugn a rule based upon some defect in the process that generated, rather than the rule itself. This is particularly true of the principle of due process as applied to the conduct of the judicial officials of a host State, manifested in the modern doctrine on denials of justice.
314. This difference of orientation between these two principles can be appreciated by observing the differences of approach evident in their application. Whereas the good faith approach to scrutinizing the exercise of discretionary power by administrative and regulatory decision makers requires one to focus on the ultimate outcome for investors affected by their decisions, the due process approach is more concerned with identifying procedural flaws that may have contributing to those decisions – either because the decision-maker erred in observing existing procedural rules or because no such rules existed (through which to guide/constrain the manner in which harmful decisions were made).
315. Dolzer and Schreuer have correctly observed: “[f]air procedure is an elementary requirement of the rule of law and a vital element of FET. It includes the traditional

*international law concept of denial of justice.*<sup>336</sup> To be clear, the “it” to which Dolzer and Schreuer referred was the principle of due process, not FET. This distinction is relevant because the doctrine on denials of justice only represents one manifestation of the general international law principle of due process. In recent years, some tribunals have come to mistakenly regard the doctrine on denials of justice as being only applicable to the scrutiny of municipal legal regimes,<sup>337</sup> even though the consensus opinion is that the doctrine of denials of justice also concerns observation of due process norms in the operations of the administrative/regulatory branch of State.<sup>338</sup>

316. As explained further above, under DR-CAFTA Chapter 10, the investor who has suffered loss as a result of an administrative or regulatory decision must choose between submitting its claim to arbitration or pursuing a remedy under the municipal legal regime. If it chooses the latter option, the Agreement’s *de facto* 33-month time limitation will – in all likelihood – preclude the investor from being entitled to pursue anything other than a denial of justice claim if it is unsatisfied with the result (in which case, as its claim would necessarily concern the ultimate outcome of the host State’s court system, it will have had to see the matter through to its end anyway). In this case, the investors have exercised the right to seek relief directly and immediately from a DR-CAFTA tribunal. Thus their claims, which pertain to the conduct of host State officials, rather than court judgments, are to be considered under a different application of the due process principle than the doctrine on denials of justice.
317. Informed by the general principle of due process, Article 10.5 and the minimum standard require Costa Rica to: (1) ensure that investors receive notice of important rules or decisions that could negatively impact upon their investments,<sup>339</sup> (2) provide investors with a meaningful opportunity to have their objections and/or

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<sup>336</sup> CLA104, Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2<sup>nd</sup> (Oxford, OUP, 2012) at 154.

<sup>337</sup> See, e.g.: CLA101, *Grand River Enterprises Six Nations Ltd and ors v United States*, Award, NAFTA/UNCITRAL Arbitration, ICSID Case No ARB/10/5, January 12, 2011, ¶¶ 222-225. Another recent development has involved incorrectly attributing development of the denials of justice doctrine to FET, in spite of the fact that the FET standard only came into existence decades *after* the doctrine on denials of justice had been established under customary law (originally emanating from applications of the original customary international law minimum standard: i.e. protection and security. See, also: Todd Weiler, *The Interpretation of International Investment Law*, op. cit., at 257-259

<sup>338</sup> See, e.g.: CLA104, Dolzer & Schreuer, *Principles of International Investment Law*, 178-182; or Jeswald Salacuse, *The Law of Investment Treaties* (Oxford: OUP, 2010) 241-243.

<sup>339</sup> See, e.g.: CLA48, *Middle East Cement v Egypt*, Award, April 12, 2002



recommendations heard; (3) not refuse to enforce valid judgments issued by municipal courts, even if perceived as unfavorable to the government's interests;<sup>340</sup> (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;<sup>341</sup> 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 regime.<sup>342</sup>

318. The well-established examples of conduct that could be found inconsistent with the general principle of due process have also been augmented and/or clarified by the DR-CAFTA Parties with respect to both legitimate and putative environmental policy measures, as indicated by Article 17.3, which provides:

**Article 17.3: Procedural Matters**

1. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violations of its environmental laws.
  - (a) Such proceedings shall be fair, equitable, and transparent and, to this end, shall comply with due process of law and be open to the public, except where the administration of justice otherwise requires.
  - (b) The parties to such proceedings shall be entitled to support or defend their respective positions, including by presenting information or evidence.
  - (c) Each Party shall provide appropriate and effective remedies or sanctions for a violation of its environmental laws that:
    - (i) take into consideration, as appropriate, the nature and gravity of the violation, any economic benefit the violator has derived from the violation, the economic condition of the violator, and other relevant factors; and
    - (ii) may include criminal and civil remedies and sanctions such as compliance agreements, penalties, fines, injunctions, suspension of activities, and requirements to take remedial action or pay for damage to the environment.
2. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws, and that each Party's competent authorities shall give such requests due consideration in accordance with its law.

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<sup>340</sup> CLA90, *Siag & Vechi v Egypt*, Award, June 1, 2009, ¶¶ 451–5.

<sup>341</sup> CLA66, *Bayindir v Pakistan*, Decision on Jurisdiction, November 14, 2005, ¶¶ 242–243.

<sup>342</sup> CLA49, *Pope & Talbot v Canada*, Award on Damages, May 31, 2002, ¶¶ 67–9; CLA100, *Total v Argentina*, Decision on Liability, 27 December 2010 ¶ 338; or CLA85, *Desert Line v Yemen*, Award, February 6, 2008, ¶¶ 151–94.

3. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to proceedings referred to in paragraph 1.
4. Each Party shall provide appropriate and effective access to remedies, in accordance with its law, which may include rights such as:
  - (a) to sue another person under that Party's jurisdiction for damages under that Party's laws;
  - (b) to seek sanctions or remedies such as monetary penalties, emergency closures or temporary suspension of activities, or orders to mitigate the consequences of violations of its environmental laws;
  - (c) to request that Party's competent authorities to take appropriate action to enforce its environmental laws in order to protect the environment or to avoid environmental harm; or
  - (d) to seek injunctions where a person suffers, or may suffer, loss, damage, or injury as a result of conduct by another person subject to that Party's jurisdiction that is contrary to that Party's environmental laws or that violates a legal duty under that Party's law relating to human health or the environment.
5. Each Party shall ensure that tribunals that conduct or review proceedings referred to in paragraph 1 are impartial and independent and do not have any substantial interest in the outcome of the matter.
6. For greater certainty, nothing in this Chapter shall be construed to call for the examination under this Agreement of whether a Party's judicial, quasi-judicial, or administrative tribunals have appropriately applied that Party's environmental laws.<sup>343</sup>

[Emphasis added]

319. In agreeing to maintain processes through which environmental measures are to be enforced, Costa Rica and the other DR-CAFTA Parties have also confirmed their respective commitments to prosecute alleged offences under these measures in accordance with minimum standards of international law. While nothing contained in the above provision should be properly construed as being additive to the obligation already owed to 'Investors of another Party' under Article 10.5, the provision nevertheless aids the Tribunal in properly construing Costa Rica's Article 10.5 obligation towards the individual claimant-Investors, in context.

320. For example, in addition to reconfirming the obligation to accord due process to foreign investors who have become the subjects of prosecutions under an environmental measure, sub-paragraph (1)(c)(i) provides an express example of how

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<sup>343</sup> The Claimants note how paragraph (6) only applies to the conduct of tribunals and courts (and not, for example, the actions of prosecutors or regulatory officials); and that it also applies only with respect to the application of "environmental laws" [as opposed to the much broader category of "measures" of which "laws" is only one example; see Article 2.1: "measure includes any law, regulation, procedure, requirement, or practice"]. More importantly, it is manifest that the purpose of paragraph (6) is to prevent one Party from challenging the substance of another Party's environmental laws, collaterally, by attacking procedural flaws in the way it is enforced. Otherwise, the terms of paragraph (6) would render the remainder of the provision effectively inutile.

the principles of good faith and due process can be respected, under Article 10.5(1), if a foreign investor becomes the subject of an investigation or prosecution under one of the host State's environmental policy measures. It appears manifest that due process is not accorded, in such cases, if the official responsible for the prosecution of offences under an environmental policy measure failed to take "*the nature and gravity of the [alleged] violation*" into consideration, in relation to any economic benefit the alleged violator might have derived from the alleged violation, as well as – perhaps most importantly – the economic condition of the alleged violator.

321. It is submitted that: (1) if an official cannot produce convincing evidence that contemporaneous consideration of the factors mentioned in Article 18.8 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, a *prima facie* breach of Article 10.5 shall exist.

**(e) Application of Article 10.5 to the Facts of this Case**

**(i) Frustration of Legitimate, Investment-Backed Expectations**

322. The Claimants demonstrated complete good faith in establishing their investment in Costa Rica, observing and endeavoring to comply with every requirement imposed by the Respondent, for the ultimate protection of the public interest. They hired professionals to ensure that they remained in compliance with all applicable rules and procedures throughout the process of establishing their investment. Mr Aven goes to great lengths in his Witness Statement to describe the significance he, as the lead Investor, ascribed to the acquisition of all the required approvals and permits in order that the project could be developed. To state the obvious, the Investors had a material interest in doing so: the success of their project depended on various things, including that it be legally compliant. Mr Aven, an experienced entrepreneur and developer, knew full well that obtaining all the permits was fundamental to the project's success, which is why he, on behalf of the Investors, put so much time, effort and money into having the right technical and legal experts on board. He recognized that Costa Rica has a very particular system, with multiple agencies and a particular emphasis on the protection of the environment. That is not something the Investors query, far from it; they appreciate the significance of environmental protection for a country such as

Costa Rica. And with his mind on the need to navigate the complex regulatory system in Costa Rica, Mr Aven recruited experts to assist.<sup>344</sup>

323. One requirement was to have what is termed in Costa Rica an “*Environmental Regent*” for the project (or its constituent parts). The person appointed for the main project site (i.e., the condominium section) was Mr Esteban Bermúdez from a well-reputed environmental consultancy, DEPPAT. Mr Bermúdez has made a statement for these proceedings and sets out in detail the work undertaken to liaise with the various agencies with some competence over the development of such projects. He also describes the roles of the various agencies in Costa Rica with competence in relation to developments such as Las Olas. It is clear from Mr Bermúdez’s statement (as well as the statements made by Mr Aven and Mr Damjanac) that an enormous amount of work was committed to the matter of acquiring all the relevant permits and to being engaged and open with the authorities. Mr Bermúdez summarizes the work he did at Las Olas, including the submission of 13 reports to SETENA between June 2010 and July 2012.<sup>345</sup> He notes from those reports that he “*never noted anything untoward with regards to tree felling or wetlands on the project site*”,<sup>346</sup> and that he “*never saw any evidence of environmental damage being caused or anything to suggest that the site was at risk of environmental harm*”.<sup>347</sup>

324. As Mr Bermúdez indicates, from time to time he needed to engage experts in particular specialist areas. One such appointment was the engagement of Mr Minor Arce Solano, the forestry consultant. Mr Arce addresses in detail his work in analyzing the Las Olas site as to whether there was on site a “*forest*” within the meaning of Costa Rican law, such that protections would be invoked. His critique of the work of MINAE, in its report of July 7, 2011 (ACOPAC-CP-099-11) is authoritative and compelling: in short, he is dismissive of that report on multiple grounds, from the methodology used to the definition of parameters. It is clear from Mr Arce’s analysis at the time and as set out in his evidence in this arbitration that the

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<sup>344</sup> Demonstrating detrimental reliance is obviously a concomitant element of proving that a foreign investor had good reason to hold legitimate expectations in respect of his treatment by host State authorities. As the Tribunal intoned in: CLA121, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Albania*, ICSID Case No. ARB/11/24, Award (May 15, 2015) ¶¶ 629-634, an investor’s contemporaneous conduct (i.e. prior to learning that his expectations had been dashed) may provide some insight into what the parties may have believed, before the dispute was submitted to arbitration.

<sup>345</sup> See Esteban Bermúdez Witness Statement ¶ 28

<sup>346</sup> *Id.* ¶ 31

<sup>347</sup> *Id.* ¶ 35

late assertion that there was a “*forest*” at Las Olas was utterly misconceived. In short, that MINAE report, which was the basis of the attack on the project, was substandard and unreliable, for reasons that ought to have been obvious to MINAE at the time. The Investors’ desire to comply with all proper requirements in relation to trees that were on the Las Olas site is also clear in Mr Damjanac’s Witness Statement, in which he refers to the commissioning of a study by Mr Arce on which trees could be cut under the provisions of the law and which could not.<sup>348</sup>

325. As a further demonstration of the Investors’ openness and good faith endeavors to comply with all applicable laws and regulations, Mr Damjanac refers to accompanying a representative of SETENA in mid-August 2010 on a site inspection, when that representative openly confirmed that there was no wetland on the site, a position made official shortly after with the issuance of SETENA Resolution No. D1-1362-2007-SETENA on September 1, 2010.
326. The Investors pre-emptively reached out to authorities even if they had only heard rumors about potential problems from the Government’s perspective. And they maintained an excellent working relationship with the authority responsible for determining whether their project was environmentally viable, SETENA, throughout.
327. As soon as Mr Aven, received notice from SETENA of alleged problems with the Condominium Section of the project, he, his staff and his advisors made contact with SETENA officials and took whatever steps were necessary to ensure that no SETENA question would go unanswered. In a similar vein, Mr Aven made himself equally available to the Prosecutor’s Office as soon as the news of criminal charges became known. It thus should have come as no surprise when SETENA issued its November 2011 Resolution, reconfirming the original Las Olas Environmental Viability.<sup>349</sup> Just as Mr Damjanac had been accommodating of the SETENA inspection request in mid-August 2010, SETENA officials were efficient in deciding, in August 2010, that there was no merit to the complaints being pressed by Mr Bucelato and his two allies in local government, Ms Monica Vargas Quesada and Ms Hazel Diaz Melendez.

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<sup>348</sup> See Jovan Damjanac Witness Statement ¶ 121

<sup>349</sup> See: CLA120, *Khan Resources Inc., Khan Resources B.V. & CAUC Holding Company Ltd. v. Mongolia*, PCA Case No. 2011-09, Award on the Merits, March 2, 2015 ¶ 350.

328. The intervention of officials and agencies other than the appropriate regulators in this case is reminiscent of the fact pattern in *Khan Resources v. Mongolia*, where the host State’s “*failure to re-register the license of a license holder whose application was compliant with [rules setting out the regulator requirements for granting] Mining and Exploration Licenses... constituted a breach of due process.*” The difference between the two cases is that, in the instant case, the licensing authority was actually willing to reinstate the qualified investor, but other officials their own agendas intervened so as to ensure that full compliance would not matter. Assume, *arguendo*, that the Mongolian licensing officials implicated in the *Khan* case really would have been pleased to see the rule of law triumph for the foreign investors, but that there were other officials – who were not directly responsible for maintaining the licensing relationship, and who possessed personal agendas at cross-purposes with the investors’ interests. Unbeknown to the investors, these other officials were able to work behind the scenes, first manufacturing an excuse to have the license suspended temporarily and then using their powers to ensure that the suspension would last long enough to be effectively permanent. Neither the licensing officials nor the investors were aware of these machinations until it became too late for either to do anything determinative about the impasse, ruining what otherwise could have continued to be a healthy, reciprocal regulatory relationship. The only proposition one would have to accept, in order to transform this hypothetical into reality, is that Mongolia is the type of place where a determined group of government officials, working behind the scenes, could subvert what would otherwise have been a healthy regulatory relationship with a foreign investor – in order to advance one or more personal agendas? Unfortunately, the Claimants in the instant case know the answer: if it could happen in Costa Rica, it is possible that it could happen somewhere else.
329. Mr Aven demonstrated the same level of openness with Prosecutor Martínez, going out of his way to meet him and invite him to see the project site for himself. He would even go so far as make a settlement offer to the Prosecutor’s Office that was more than fair, given the sham nature of the allegations.
330. An investor’s entitlement to hold legitimate expectations, about the ways in which he and his investments will be treated, is fundamentally rooted in the principle and practice of good faith. The Investors demonstrated their good faith from the day they

commenced the establishment of their investment in Costa Rica. They were entitled to expect as much from the Respondent in return. The manner in which a host State participates in a reciprocal relationship of good faith with a foreign investor is to promise, and provide, legal certainty to that investor in respect of his treatment.

331. Legal certainty is a fundamental value of the rule of international law. It does not amount to a *de facto* standstill obligation, nor does it constitute a guarantee against policy change. It means that the host State will stand by the commitments it makes to the investors, whether made expressly (for example in a concession agreement), or made manifest in the construction of its regulatory regimes.<sup>350</sup>
332. Before the likes of Monica Vargas Quesada, Hazel Diaz Melendez, Prosecutor Martínez, and especially Mr Bogantes, intervened, the Investors, SETENA, and responsible officials from Municipality of Parrita had an excellent working relationship. Acting in constant good faith, over a period of years, Mr Aven acquired legitimate expectations about how the establishment of his investment in the Las Olas Project would unfold – by participating in a complex, but transparent, licensing and permitting regime, along with his and Mr Damjanac’s counterparts at SETENA and the Municipality of Parrita.
333. Vouchsafed by the Constitution and laws of Costa Rica (in addition to the DR-CAFTA and applicable customary international law), the Investors reasonably expected that, upon obtaining the necessary certifications of environmental viability from SETENA, and then the necessary construction permits from the Municipality, they would be able to establish their investment in conformity with their (government-vetted) plans. Reasonably-held expectations also constitute legitimate expectations when the good faith participation of investors and host-State officials is present.
334. Once the Investors received the necessary certifications and permits from SETENA and the Municipality of Parrita, they were entitled to hold the legitimate expectation that they would be able to rely on the rights of action each expressly provided. In this

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<sup>350</sup> See, e.g.: CLA100, *Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability (December 21, 2010), ¶¶ 128-134; CLA122, *Micula and ors v Romania*, ICSID Case No ARB/05/20, Award and separate opinion (December 11, 2013), ¶ 678. See, also: CLA96, *Ioannis Kardassopoulos v Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award (February 28, 2010), ¶¶ 434-442, citing: CLA81, *Sempra Energy International v. Argentina Republic*, ICSID Case No. ARB/02/16, Award (September 28, 2007) ¶ 303; CLA54, *Teched* ¶ 134; and CLA79, *LG&E Energy Corp et al. v. Argentine Republic* ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006) ¶ 124-130.

case, unfortunately, the Investors were ultimately unable reasonably to rely upon the legitimate expectations represented in these certifications and permits. They have established a *prima facie* case as to their entitlement in this regard. As such, the strategic burden logically falls upon the Respondent to provide sufficient evidence to demonstrate why it should be permitted to renege upon the expectations that its own rules and conduct generated for the Investors in the first place.

**(ii) Manifest Failure to Accord Due Process in Administrative and Regulatory Decision-Making**

335. As noted further above, treaty interpreters enjoy the discretion to consider other relevant and/or applicable sources of international law in fulfilling their interpretative mandates. DR-CAFTA Article 10.22 vests this discretion in arbitrators by providing that the governing law of the Agreement includes “applicable rules of international law,” which include the customary international law rules of interpretation, as reflected in VCLT Article 31(3)(c). The other route does not involve exercising interpretative discretion so much as it concerns ensuring that one’s decision can be reconciled with *all* of the international obligations owed by the host State that could be relevant to its treatment of foreign investors. Chief among such other obligations are international human rights obligations.<sup>351</sup>

336. This is particularly true when treaty parties have included language that ranks obligations contained in extant treaties over those found in the new agreement. Under such a scenario, interpreters of the new treaty must ensure that they respect this choice.<sup>352</sup> The DR-CAFTA is just such an Agreement. The Parties affirmed their fidelity to existing obligations, and demonstrated the intent to avoid having any construction of the Agreement prevent “... the Central American Parties from maintaining their existing legal instruments of Central American integration.”<sup>353</sup> One

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<sup>351</sup> See, e.g.: CLA118, *Al-Warraq v. Indonesia*, Ad Hoc Arbitration [OIC Investment Agreement], Award, December 15, 2014, at ¶¶ 556-562. See, also: CLA100, *Total SA v Argentina*, op. cit. ¶¶ 129-130; CLA81, *Sempra*, op. cit. ¶¶ 331-332; and CLA94, *Toto Costruzioni Generali SpA v Lebanon*, Decision on Jurisdiction, ICSID Case No ARB/07/12, September 8, 2009 ¶¶ 152-168. But see, *contra*: CLA101, *Grand River Enterprises*, op. sit. ¶¶ 66-71, but also: ¶ 210.

<sup>352</sup> CLA103, *Roussalis v Romania*, Award, ICSID Case No. ARB/06/1, December 7, 2011, ¶¶ 315-318.

<sup>353</sup> DR-CAFTA Article 1.3 provides:

**Article 1.3: Relation to Other Agreements**

1. The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which such Parties are party.



of the centerpiece instruments of Central American integration is the American Convention on Human Rights. It thus stands to reason that no tribunal's construction of Article 10.5(1) should excuse a host State from treating foreign investors in any manner otherwise inconsistent with the commitments it has made in the ACHR, which is also known as the *Pact of San Jose*.<sup>354</sup>

337. In addition to providing due process guarantees, the ACHR also vouchsafes the right to use and enjoy rights of property. In this regard, Article 21(2) provides: “*No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*” The Claimants submit that they should be entitled to cite and rely upon doctrines and principles emanating from the practice and jurisprudence of the two bodies established to administer the ACHR: the Human Rights Commission and the Inter-American Court of Human Rights, including interpretations of other human rights treaties to which Costa Rica is a Party, such as the American Declaration of the Rights and Duties of Man or the UN-administered International Covenant on Civil and Political Rights.

338. The Respondent is a party to the International Covenant on Civil and Political Rights of 1966 (the “**ICCPR**”). Just as the DR-CAFTA is to be taken as being drafted with an eye on the ACHR, so it must also be taken as confirming the extant obligations set out in the ICCPR. Amongst the obligations parties to the ICCPR took upon themselves was the obligation to ensure that defendants in criminal proceedings are “*tried without undue delay*”<sup>355</sup> and heard “*by a competent, independent and impartial tribunal established by law*”.<sup>356</sup> These obligations are binding on the Respondent as a matter of international law,<sup>357</sup> and a foreign investor will fairly have the expectation that the Respondent will ensure that its prosecutorial machinery will meet these basic

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2. For greater certainty, nothing in this Agreement shall prevent the Central American Parties from maintaining their existing legal instruments of Central American integration, adopting new legal instruments of integration, or adopting measures to strengthen and deepen these instruments, provided that such instruments and measures are not inconsistent with this Agreement.

<sup>354</sup> CLA129, American Convention on Human Rights, done at San Jose, Costa Rica on November 22, 1969; OAS TS No. 36. Costa Rica deposited its instrument of ratification on April 8, 1970.

<sup>355</sup> CLA24, ICCPR, Article 14(3)(c)

<sup>356</sup> *Id.*, Article 14(1)

<sup>357</sup> See CLA118, *Al-Warraq v. Indonesia*, *op cit.*

standards. The history of the prosecution of Mr Aven and Mr Damjanac shows undue delay having been caused by the prosecution's cynical exploitation of a procedural loophole in order that the proceedings could be extended by causing the deletion of the entire first trial after the completion of the evidentiary phase in light of Mr Aven and Mr Damjanac having successfully established the multiple flaws in the case against them. The prosecution must have known that the case they presented was bound to fail, if only in light of the palpable lack of any intent on the part of the accused to have committed any offence given that the Las Olas project was fully permitted at the time of the alleged offences. The only conclusion one can reach as to the purpose of the continued criminal proceedings was that there was an illegitimate purpose on the part of the prosecutor in first bringing the matter as a criminal proceeding and then in maintaining it, even in the face of overwhelming evidence. The priority at all times was to keep the criminal proceedings going, regardless of the inevitability of their failure, since the ongoing proceedings themselves would harm the Las Olas project and its foreign owners.

339. The chronic problems with the Costa Rican criminal justice system are referenced by Fernando Zumbado, the Respondent's former ambassador to the United States and former representative to the United Nations, as well as a former minister of state. This is a witness with no material interest in the case, and with deep experience of, and loyalty to, Costa Rica. He says "*the course of the last seven years has demonstrated to me how the Costa Rican justice system is open to abuse by people seeking to further their own political agenda,*"<sup>358</sup> with a growing problem of civil matters being brought by prosecutors in the criminal courts.<sup>359</sup> This, when combined with the leisurely pace of criminal proceedings (Mr Zumbado refers to some cases dragging on for ten or 15 years), can result in the devastation of an innocent person's life by way of financial and reputational damage.<sup>360</sup> He looks on the attacks on the Las Olas project as being "*inexplicable and unacceptable*" and "*what has happened to Las Olas and Mr Aven is not normal.*"<sup>361</sup> He concludes that "*there is something very strange about Mr Aven's prosecution.*"<sup>362</sup> Mr Zumbado's critique, based on his own experiences of being attacked by way of misconceived criminal proceedings as well

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<sup>358</sup> See Fernando Zumbado Witness Statement ¶ 14

<sup>359</sup> *Id.*, ¶ 15

<sup>360</sup> *Id.*, ¶ 16

<sup>361</sup> *Id.*, ¶ 28

<sup>362</sup> *Id.*, ¶ 31

as observations on what happened to the Las Olas project, provides compelling corroboration of the complaints presented by the Claimants in this arbitration.

340. Although it postdated the DR-CAFTA, the 2003 United Nations Convention Against Corruption (the “UNCAC”) also binds the Respondent. Under the UNCAC, the Respondent committed itself to various standards in relation to fighting corruption. These include obligations to apply suitable codes of conduct “*for the correct, honourable and proper performance of public functions*” by public officials<sup>363</sup> and to establish enforcement systems in order “*to maximize the effectiveness of law enforcement measures in respect of [offences of corruption]*”.<sup>364</sup> Given its binding nature at the international law level, foreign investors have a legitimate expectation that the Respondent will perform its UNCAC obligations and will pursue the battle against corruption. The evidence in this case suggests a rank failure by the Respondent in this regard, with multiple reports of bribe solicitation attempts by its officials being ignored. At best, the Respondent’s reaction to the reports of corruption by various public officials can be characterized as being blasé. Such a relaxed approach to a topic as serious as corruption is not only intolerable, it constitutes a breach of legal obligations binding the Respondent and a failure to meet foreign investors’ legitimate expectations.

341. Also as noted above, the general international law principle of due process also informs how the minimum standard of treatment should be applied in the circumstances of a given case. Such circumstances will necessarily always include consideration of the temporal context and the expression of host State authority identified as the source of harm suffered by the foreign investor. Considering temporal context means remaining alert to the possibility that different types of governmental conduct could strike an adjudicator of one generation much differently than they might another. Considering types of host State authority means classifying the function of State involved, based upon the traditional tripartite typology: judicial, legislative, and executive (i.e. administrative/regulatory).

342. In this case, only the conduct of officials exercising the executive function of the Costa Rican State is at issue. Thus the international standards traditionally considered

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<sup>363</sup> CLA56, UNCAC, Article 8(2).

<sup>364</sup> *Id.*, Article 30(3).

in cases where legislative or judicial functions have been exercised are not specifically relevant for the instant case. The same is true of the general attitudes of deference applicable for the scrutiny of decisions made by a democratically-elected legislative body (e.g. laws) or a well-functioning judiciary (e.g. judgments). No allegations have been made in this case that either a legislative instrument or a court judgment have occasioned a DR-CAFTA breach. As such, the parties must be careful not to rely upon doctrines developed for other branches of State, such as a restrictive interpretation of the denial of justice doctrine,<sup>365</sup> or the implicit amount of deference generally accorded to legislation adopted for a seemingly proper purpose in a free and democratic society. In contrast, this case strictly concerns the decisions and conduct of bureaucrats, who are governed as much by laws and regulations, or court decisions, as are the Investors.

343. A claimant establishes that a breach of Article 10.5 has occurred when it provides evidence that governmental decision-makers failed to conduct themselves in a manner consistent with the principle of due process. The three manifestations of the due process principle most applicable in this case are: (1) transparency; (2) notice; and (3) the right to be heard. Apart from the workings of SETENA, the record demonstrates that Costa Rica maintains an utterly dysfunctional and non-transparent ‘system’ – the very operation of which gravely impairs the Respondent’s ability to honor the legitimate expectations that its transparent and efficient approval process for the establishment of real estate projects would otherwise ensure. Indeed, the Investors’ plight graphically demonstrates the sharp contrast between Costa Rica’s approval process for real estate developments and the mischief that other players, whose role in that process runs from peripheral to non-existent, can make to frustrate the intended results of that process.

344. Monica Vargas Quesada, an official working in the Municipality’s Environmental Management Department, exemplifies the idea of a bureaucrat who had only peripheral involvement in the smooth-functioning approval process, but whose meddling constituted a gross violation of the Claimants’ due process rights. Ms

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<sup>365</sup> Indeed, DR-CAFTA Article 10.5(a) expresses the Parties’ intent that, in so far as the fair and equitable treatment standard is concerned, claimant-investors may explicitly rely on the doctrine of denials of justice to complain about treatment accorded by the host State through civil and administrative adjudicatory proceedings.]

Vargas was called as a witness in Mr Aven’s criminal trial, where she admitted that she had never actually set foot on the grounds of the Las Olas project. Nevertheless, the record includes “reports” drafted by Ms Vargas that appear simply to repeat the unsubstantiated complaints of individuals such as Mr Bucelato, against the Las Olas project, as though they were proven facts.<sup>366</sup> She did not stop there, however. Ms Vargas also instigated investigations, both by SINAC/MINAE and the TAA, again based upon the unsubstantiated complaints of Mr Bucelato.<sup>367</sup> In fact, Ms Vargas went so far as to fabricate a claim that the Municipality had never permitted any construction activity at the Las Olas site.<sup>368</sup> At no time during over a year of these activities did Ms Vargas notify the Investors that she was conducting any sort of investigation into work taking place on the Las Olas site. They were thus unable to comment on the incorrect conclusions she had drawn, because they were not even aware of her activities.

345. Indeed, seemingly unaware of the fact that the April 2011 SETENA Resolution only concerned the Environmental Viability finding that underpinned the Condominium Section of the Las Olas site, Ms Vargas took it upon herself to complain directly to SETENA officials – on more than one occasion in June 2011 – about what she apparently assumed was ongoing construction in contravention of its April 2011 Resolution.<sup>369</sup> The Municipality had actually been instructed by SETENA to revoke its concurrent construction permit, and had done so, but it had also lawfully continued to grant permits for construction on the site unaffected by the SETENA order, just as SETENA officials continued working with Las Olas officials on various other approvals sought for the site.<sup>370</sup> As a Municipal official, Ms Vargas was clearly working at cross purposes with her colleagues, all the while abstaining from simply contacting the Investors, who could have set her straight had they been alerted to her misguided involvement.

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<sup>366</sup> Exhibit C55, Monica Vargas First Report on Bucelato Complaint, April 26, 2009; Exhibit C70, Monica Vargas Second Report on Bucelato Allegations, June 16, 2010

<sup>367</sup> Exhibit C67, Monica Vargas Complaint to MINAE Monica, May 31, 2010; Exhibit C70, Monica Vargas Second Report on Bucelato Allegations, June 16, 2010; Exhibit C69, Monica Vargas Complaint to TAA and MINAE, June 15, 2010

<sup>368</sup> Exhibit C70, Monica Vargas Second Report on Bucelato Allegations, June 16, 2010

<sup>369</sup> Exhibit C131, Letter from Monica Vargas to SETENA, June 11, 2011; Exhibit C132, First Letter from Monica Vargas to SETENA claiming construction ongoing, June 28, 2011; Exhibit C133, Second letter from Monica Vargas to SETENA claiming construction ongoing, June 29, 2011

<sup>370</sup> Exhibit C85, Construction permits for the Condominium Section, September 7, 2010; Exhibit C135, Letter from Municipality Authorising Storm Drainage, July 8, 2011; Exhibit C85, Construction Permits, July 16, 2010

346. Ms Vargas's involvement was not harmless, by any means. Having been fed scurrilous information by Mr Bucelato, she was the one who instigated the TAA's initial investigations into the Las Olas site, with a complaint dated June 15, 2010. Thanks to the apparent intervention of the better-informed Mayor William Carajal Campos, Ms Vargas was forced to inform the TAA, only two months later, that, in fact, all of the Las Olas site permits were in order.<sup>371</sup>
347. Ms Vargas's name also came up in connection with another false claim by Mr Bucelato on November 1, 2011, this time defaming Mr Aven by alleging that he had procured the original findings of environmental viability from SETENA, in 2008, by submitting a falsified document.<sup>372</sup> How it was that Mr Bucelato could have come into possession of such false information remains uncertain. The Claimants note, however that Mr Bogantes had started looking into Las Olas at the end of August 2010, immediately after having had his second bribery demand rebuffed by Mr Aven.<sup>373</sup> The addressee of his letter was one Ms Hazel Diaz Melendez, the local Ombudsperson.
348. Ms Diaz played a very similar role in this administrative fiasco as Ms Vargas. In fact, the two officials were not only both apparently in close contact with Mr Bucelato, but also with each other. Ms Diaz open up her first investigation into the Las Olas site on July 20, 2010, on the same day she had received Mr Bucelato's false claims that Las Olas employees had back-filled wetlands and cut down a protected forest. Over the next month, she would demand an investigation from the Mayor's Office and make an official complaint to the TAA, each time repeating Mr Bucelato's lies without an ounce of independent verification – just as Ms Vargas had done.<sup>374</sup>
349. It was Ms Diaz's instigation of the Mayor that triggered his apparent involvement in setting his employee, Ms Vargas, straight, as evidenced by the letter sent by Ms Diaz, and Mayor Carajal, to Ms Vargas on August 18, 2010, in which the former was forced to admit that the Las Olas site actually had all of its permits in order. This communication, combined with the fact that SETENA had made quick work of the bogus Bucelato wetland and forest allegations she had forced it to answer with a

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<sup>371</sup> Exhibit C69, Monica Vargas Complaint to TAA and MINAE; Exhibit C81, Letter from Monica Vargas to TAA

<sup>372</sup> Exhibit C91, Letter from Hazel Diaz to SINAC, November 23, 2010

<sup>373</sup> Exhibit C80, Letter from Christian Bogantes at SINAC to Hazel Diaz, August 27, 2010

<sup>374</sup> Exhibit C76, Letter from Hazel Diaz to TAA, August 7, 2010; Exhibit C77, Letter from Hazel Diaz to Mayor, August 7, 2010

denunciation,<sup>375</sup> seems to have quieted Ms Diaz, but not for long. Within weeks of the Investors' having received the final construction permits for Las Olas, Ms Diaz reappeared on the record, this time championing **both** Mr Bucelato's defamatory allegations about the provenance of the 2008 Environmental Viability for the Condominium Section **and** reviving the same wetland and forestry allegations that had been determinatively addressed by SETENA just two months earlier.

350. In a letter to SINAC in San Jose, dated November 23, 2010, Ms Diaz demanded to know why Mr Bucelato had not received an official response to allegations, which she had apparently helped him also lodge with SINAC, that the same wetlands had been tampered with and the same protected forest cut down. Ms Diaz must have been well aware of the fact that the complaint, for which she was now demanding redress, had already been considered and rejected by the government agency actually responsible for ensuring environmental compliance at the Las Olas site: SETENA. To make matters worse, she also demanded a SINAC investigation into whether SETENA had been duped in 2008, as per Mr Bucelato's repeated defamatory theory, which she noted had been put to the Municipality (having been accepted by Ms Vargas).<sup>376</sup>
351. She would receive the response from SINAC, which she seemed to have both hoped for and feared, two days later. She was informed that SINAC did not regard the document "*identified*" by Mr Bogantes, in his late August correspondence to her, as valid. That was apparently enough for Ms Diaz, who – over the many months she had no devoted to promoting Mr Bucelato's scurrilous allegations – had never once notified the Investors of her activities, much less give them an opportunity to reply to them. On the same day she wrote back to SINAC, demanding that urgent action be taken to investigate how SINAC and/or SETENA had come to (at least in her estimation) participate in a grave environmental fraud. She also demanded that SINAC – not the responsible agency, SETENA – immediately suspend the Project's Environmental Viability.<sup>377</sup> Just for good measure, Ms Diaz would also write to SINAC on December 9, demanding that further investigations be undertaken by SINAC into Mr Bucelato's seemingly indestructible wetland and forestry allegations,

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<sup>375</sup> Exhibit C79, SETENA Report, August 19, 2010; Exhibit C83, SETENA Resolution, September 1, 2010; and Jovan Damjanac Witness Statement ¶¶ 100-103

<sup>376</sup> Exhibit C91, Letter from Hazel Diaz to SINAC forwarding Steve Bucelato's complaint, November 23, 2010

<sup>377</sup> Exhibit C92, Letter from SINAC to Hazel Diaz, November 25, 2010

which – Ms Diaz had apparently been apprised – had been filed afresh with the Municipality (again, through Ms Vargas) in November 2010.<sup>378</sup> She received a response from SINAC later that same day, in which it was confirmed that inspections were planned to address the wetland and forestry complaints, and that it was SINAC’s opinion that Mr Bogantes’s mystery report had, indeed, been falsified by means of forgery.<sup>379</sup>

352. In fact, employees from the MINAE regional office in Puriscal, including Mr Bogantes, had not been waiting for Ms Diaz to spring into action. Unbeknown to the Investors, they had apparently already conducted the first of four site inspections on December 6, with the remainder of inspections occurring on December 10, 17 and 21. They wasted no time in preparing an initial report, which was ready on January 3, 2011. Indeed, much time was apparently saved by keeping the investigations secret from the Investors and the professionals who represented them in their dealings with the Government on all environmental, design, engineering and construction matters. Of course these individuals would have been surprised to hear from Mr Bogantes and his colleagues anyway, given that the Las Olas project was fully-permitted by this point, and they had maintained close and reciprocal communications with the two agencies that actually were responsible for these matters: SETENA and the Municipality.

353. Just to be absolutely clear about what occurred between May and December 2010, apart from Mr Bogantes’s most unwelcome entreaties at the end of August, the Investors received no notification whatsoever from these other government officials with alleged concerns about the development of the Las Olas Project. Throughout 2010, and both before and after, the Investors maintained cordial and professional relations both with SETENA officials and officials from the Municipality’s construction permit and engineering departments. It would not be until well into 2011, however, that the Investors would finally receive notice that an entirely different relationship was also underway.

354. Essentially the polar opposite of their relationship with the government officials who were putatively responsible for regulation of their activities, this one was marked by

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<sup>378</sup> Exhibit C96, Letter from Hazel Diaz to SINAC, December 9, 2010

<sup>379</sup> Exhibit C97, Letter from SINAC to Hazel Diaz, December 9, 2010



dysfunction and distrust. Indeed, the relationship was so bad that the government officials leading it had either decided against even informing the Investors that it existed, or they were simply indifferent as to what the Investors might have to think or say about their intrigues. The key players in this one-sided relationship were initially Ms Diaz and Ms Vargas. The record suggests that both may have been working at the behest of Mr Bucelato, for whom they had been able to launch a number of duplicative and unwarranted investigations into the Los Olas Project, which eventually had the cumulative effect of first threatening and ultimately stranding and frustrating any meaningful use of the Claimants' investments.

355. As noted earlier, the Claimants are not entitled to found Chapter 10 claims on the Respondent's breach of obligations found in other DR-CAFTA chapters. They can, however, point to provisions elsewhere in the Agreement that can provide context for the interpretation of related Chapter 10 provisions. In short, provisions such as Articles 18.4 (concerning administrative measures of general application) and 18.5 (concerning appellate and review mechanisms) represent fuel for an inductive approach to interpreting the standards of Article 10.5 in context. The two aspects that they share in common are: (i) the duty to afford someone with a direct interest in decision-making an opportunity to be heard; and (ii) an understanding that decisions should be made on a rational, if not reasonable, basis. They confirm the conventional understanding of due process as being minimally composed of a requirement to make decisions that affect others rationally (i.e. not arbitrarily) and a requirement that everybody directly affected by a decision ought to at least be afforded an opportunity to provide informed comment before any decision crystalizes.

356. The only investigation of which the Investors had been apprised had been the cordial and professional mid-August visit to the site by a SETENA inspector – who had announced himself to Mr Damjanac and explained the purpose of his appearance to him. Apparently neither man had suspected that what had transpired was anything other than another complaint from the increasingly cantankerous Mr Bucelato. Neither Ms Diaz nor Ms Vargas apparently appeared on their radar at the time. Nor were they aware of the fact that a SINAC inspection had been completed by Mr Bogantes and Mr Manfredi earlier that summer, thanks to the efforts of Ms Diaz and Ms Vargas.

357. The same was unfortunately also true of the investigation that was opened by the TAA that summer, instigated, yet again, by Ms Diaz and Ms Vargas. The TAA had received the unsubstantiated Vargas complaint on July 16, and the correspondingly unsubstantiated Diaz complaint on August 7. Rather than contacting the Investors, to inform them of the serious charges that had been made against them (wetlands and forests, again), the TAA President instead issued a formal resolution on August 12, appointing Ms Vargas to conduct a survey of the costs of the damage caused by the activities at the Las Olas Project site.
358. To be clear, the record does not indicate that he planned to have the TAA conduct its own investigation, or that it would solicit comments from the accused. Rather, it was apparently accepted as fact that the unsubstantiated allegations made by Ms Diaz and Ms Vargas were true. What is most distressing about the TAA's appointment of Ms Vargas, was she filed her complaint with the TAA less than a week after Manfredi and Bogantes had conducted their inspection and concluded that no wetlands had existed on the Los Olas Project site. She received her appointment from the TAA notwithstanding the fact that both SINAC and TAA are central government agencies operating under the same reporting relationship, through MINAE.
359. No doubt stirred by four unannounced SINAC site visits in December (the latter of which took place during the traditional, extended Christmas holiday season, during which the central government effectively shuts down), rumors apparently began flying about potential trouble with the Las Olas development. Appropriately enough, as soon as these rumors reached Mr Aven, he resolved to get to the bottom of them. Having been kept completely in the dark about the efforts of Ms Diaz, Ms Vargas, Mr Bogantes, as well as other MINAE officials, Mr Aven had no idea that the die had already been cast against him (with the completion of the new SINAC 'wetland and forest' report on January 3), when he had his lawyer contact SINAC directly, to ask whether it had any concerns, on January 6.<sup>380</sup>
360. Revealing nothing about the December investigations, or anything that had taken place over the past six months, during which a case had effectively been building, in secret, against him, SINAC officials disingenuously failed to indicate that anything untoward was suspected.

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<sup>380</sup> Exhibit C103, Letter from David Aven to SINAC

361. Instead, SINAC replied to this entreaty by requesting that SETENA investigate this allegedly forged report, which SINAC (wrongly) claimed SETENA had relied upon when issuing the Environmental Viability for the Condominium Section of the project. SETENA, reacting to claims of a fake document in its records, wrote to Mr Aven on January 17, 2011 asking for a ‘true’ copy of Mr Bogantes’ mystery document, SINAC 67389RNV5-2008.<sup>381</sup> Having been made aware of the forgery allegation by none other than Mr Bucelato himself a few weeks earlier, Mr Aven surmised that this was the basis for SETENA’s opaque request and reacted he accordingly. On February 9, 2011, Mr Aven responded to SETENA’s letter. All Mr Aven could do was honestly reply that he had no such document and that he could only assume that the accusations was all part of an elaborate ploy by Mr Bucelato to derail the Las Olas project.<sup>382</sup> In fact, it took Mr Aven over two weeks to reply to SETENA’s letter because – continuing, as ever, to operate in good faith – Mr Aven had instructed his staff and advisors to begin a comprehensive file review, so as to ascertain what SETENA’s cryptic request portended.<sup>383</sup>
362. Still keeping all of its activities secret from the Investors, and apparently unwilling to await Mr Aven’s reply to its request, SINAC officials filed formal, criminal complaints against Mr Aven and Mr Damjanac on January 28, 2011. Within less than a week’s time, Mr Bucelato had filed his criminal complaints on February 2,<sup>384</sup> which mirrored those of SINAC (unsurprisingly, of course, since the SINAC allegations had been modelled on the false allegations that Ms Diaz and Ms Vargas had been pushing for him for the better part of a year). SINAC also dutifully notified Ms Diaz of all of these developments on February 4, all the while choosing not to provide any notice, much less a right of comment or reply, to Mr Aven and the other Investors.
363. It was only on February 14 that Mr Aven was finally given at least a partial window onto what had been developing since the previous May, when SINAC issued an essentially symbolic resolution, purporting to enjoin the project from proceeding. Incredulous at this surprise development, and unaware of how deep its roots ran, Mr Aven responded by filing a petition for review of the decision, on the ground that the

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<sup>381</sup> Exhibit C104, Letter from SETENA to David Aven, January 17, 2011

<sup>382</sup> Exhibit C111, Letter from David Aven to SETENA, February 9, 2011

<sup>383</sup> See David Aven Witness Statement ¶ 149

<sup>384</sup> Exhibit C110, Bucelato Demand for criminal prosecution of David Aven, February 2, 2011

official who made it must have been incompetent. Signaling yet one more blow to the Investors' due process rights, the official SINAC review of Mr Aven's appeal of its administrative injunction was written by the same man who had signed the injunction as well, Luis Picado Cubillos.<sup>385</sup>

364. The coup de grâce of this tragic comedy, which embodied everything that was wrong about the secret process of “review” that had been going on for over ten months by that point, was delivered to Mr Aven on March 27, 2010 – in the form of written communication from Mr Bogantes. With this correspondence, Mr Bogantes delivered an official copy of the SINAC report that he and his colleagues in the local SINAC offices had recently contrived to produce, which fraudulently reported findings of evidence that wetlands had been destroyed by an unauthorized fill, and that an entire, protected forest of 400 trees had been illegally cut down, at the Las Olas Project site.<sup>386</sup> But, as described in more detail further below, that was not all.
365. As if to flaunt the fact that he enjoyed complete immunity from the strictures of due process, Mr Bogantes also chose to include a copy of the report that he and Mr Manfredi had prepared on July 16, 2010. Up until that day, Mr Aven had not even known of its existence, nor was he aware that the same official who had just orchestrated the shuttering of the Investors' project had actually stated, for the record on July 16, 2010, that it was his opinion that there were never any wetlands on the Las Olas project site. But that was before Mr Aven refused to pay the bribe demanded of him by Mr Bogantes, who was obviously only too pleased to demonstrate, in the same correspondence, that he had since changed his mind – with the fate of Las Olas in the balance.
366. It is almost inconceivable to think that in one small country, a clutch of determined bureaucrats could manage to conduct so many investigations of the same false and recycled allegations, whilst: (i) willfully ignoring determinative findings by agencies actually charged with managing the regulatory relationship with an investor; and (ii) stubbornly but effectively managing to avoid alerting the targeted investors that anything was afoot. These bureaucrats worked so efficiently, against the Claimants'

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<sup>385</sup> Exhibit C112, SINAC Notification, February 14, 2011; Exhibit C113, Motion for Revocation of SINAC Notification, February 23, 2011; Exhibit C114, State Response to Motion for Revocation, February 25, 2011

<sup>386</sup> Exhibit C117, SINAC Report, March 18, 2011

interests, that they succeeded in completely depriving them of any recourse, through which they might have forestalled the mandatory cease work orders and a zealously unbalanced criminal prosecution.

367. The sheer scope of this systemic miscarriage of administrative justice, which involved multiple agencies (whilst apparently excluding others) over the span of two years, has few analogues in modern arbitral practice.<sup>387</sup> For the better part of two years, a few overzealous and opportunistic local officials managed to thoroughly undermine what, for all outward appearances, appeared to be an enviably collegial regulatory relationship, between SETENA, certain municipal officials, and the Investors. That the officials involved in surreptitiously usurping SETENA, and annihilating the investment, apparently never suffered from an attack of conscience is both frightening and stupefying.

368. The Claimants submit that no excuse is sufficient to justify the unfair and inequitable treatment they received at the hands of one set of officials, particularly as they were apparently lulled into a false – but entirely reasonable and justified – sense of security about the progress and prospects for their investment. Whether SINAC and Municipal officials were either complicit or totally ignorant of these goings on does not matter. Neither is it necessary for the Claimants to prove that the ultimate root of this systemic betrayal of their good faith lay in the vengeance of a corrupt official whose solicitation of a bribe had been rightfully declined. The rank unfairness of the result suffices to demonstrate the fact that the Respondent utterly failed to accord treatment in accordance with the customary international law minimum standard of treatment and the standard of fair and equitable treatment, both as informed by the general international law principle of due process.

**(iii) Arbitrariness in the Exercise of One's Office**

369. Although virtually any of the above examples of the Respondent's manifest failure to accord treatment consistent with the general international law principle of due process could be viewed equally through the lens of arbitrariness, the conduct of Prosecutor

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<sup>387</sup> One example of similarly egregious treatment of a foreign investor was (CLA118) *Al-Warraq v. Indonesia*, ¶¶ 564-605 and 620-621, in which similarly systemic procedural irregularities, a seemingly willful ignorance as to the harm procedural irregularities would foist upon a foreign investor, and the taint of corruption (i.e. bribe requests with the promise of fixing all of the investors' troubles with the State), resulted in multiple breaches of the fair and equitable treatment standard. to multiple findings by the tribunal of breaches of the customary minimum standard and of the fair and equitable treatment standard.

Martínez typifies the very essence of arbitrariness in official decision-making. It is important to note, in this regard, that the municipal laws of Costa Rica do not envisage a strictly partisan role for its prosecutors. Indeed, Section 63 of Costa Rica's Code of Criminal Procedure provides:

In the exercise of its function, the Office of the Prosecutor will conduct itself in an objective manner, ensuring the effective implementation of the guarantees accorded by the Constitution, international law, communitarian values and national law. Prosecutors shall investigate not only the circumstances that substantiate the charge, but also those that would exonerate the defendant, and shall observe rules and procedures conforming with this standard, even if it favours the defendant.

370. The record indicates that, if Mr Martínez has any capacity to perform his role in an objective manner, it was not engaged with respect to the charges laid against Mr Aven. This is a prosecutor who displayed absolutely no interest in either investigating the allegations of attempted bribery involving the very official who was responsible for making his case, or in identifying who was responsible for effectively attempting to frame Mr Aven for the serious crime of proffering a false document to government officials for personal benefit.
371. Indeed, it would appear that Mr Martínez works for a Prosecutorial Service that not only shares his lack of interest in conducting a serious investigation into allegations of corruption against a senior regional official; it also houses employees who are willing to completely fabricate official records to disguise this lack of enthusiasm. How else to explain the fact that the record obtained from the Prosecutor's office indicates that officials were both unable to communicate with Mr Aven and able to communicate with Mr Aven in order to close the case? There is no evidence that any attempts were ever made by anyone in the Office of the Prosecutor to investigate the serious charges of corruption laid in writing by Mr Aven, concerning Mr Bogantes, after his initial attempts had been completely ignored by Mr Martinez. It was bad enough that officials falsely claimed that attempts to reach Mr Aven had been unsuccessful, but to have fabricated an entire conversation with Mr Aven provides reason to doubt the very professionalism of the Prosecutor's Office in Costa Rica.
372. Mr Martinez also displayed the very wrong sense of candor when, during his site visit to Las Olas, he told Mr Aven that he did not place any faith in the brand new INTA report that exonerated Mr Aven of any alleged 'wetland' charges. INTA employees are experts in soils, and soil testing can prove or disprove the existence of wetlands,

both in the recent past and in the present. Here, INTA had been asked to prepare a report by SINAC, in order to confirm the revised, 2011 wetlands finding. It was manifestly arbitrary for Mr Martínez to dismiss INTA's findings, presumably because they would not help him make a case against Mr Aven.

373. Equally as arbitrary and unsettling was the analogy Mr Martínez made when disregarding the fact that Costa Rican law does not prohibit the cutting of younger trees, based upon a measurement of their diameter. When challenged by Mr Aven to point out the forest of 400 trees he had been accused of illegally cutting, Mr Martínez pointed to a single stump, with a diameter below the threshold established under law and likened the cutting of a young tree to the murder of a young child. This remark managed simultaneously to demonstrate the Prosecutor's ability to be as arbitrary in his thinking as he was failing to retain any semblance of the objectivity prescribed for anybody holding his office.
374. Further, Mr Martínez exhibited extraordinary arbitrariness in choosing to rely primarily on a March 18, 2011 SINAC Report,<sup>388</sup> to attempt to make his case, which was not only contradicted by numerous other reports from independent institutions and individuals, but which was also the work product of the one person whose objectivity could not have been more in doubt: Mr Bogantes.
375. Even more disturbing, and arbitrary, was Mr Martínez's decision to press forward with his case against Mr Aven when, only two weeks before he obtained a court injunction – against the entirety of the Las Olas development – SETENA issued its resolution rescinding its April 2011 Resolution and reconfirming the original Environmental Viability, upon which development of the Condominium Section could now resume. In making its decision, SETENA had made factual findings that undermined the criminal claims entirely. SETENA officials had considered whether there was merit to the wetland and forestry charges, as well as whether its 2008 Environmental Viability for the Condominium Section had been procured under false pretenses by Mr Aven. The answer was obviously no on all counts.
376. As such, for any rational and impartial observer, SETENA's November 2011 Resolution should have been the end of all outstanding allegations. In sharp contrast,

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<sup>388</sup> Exhibit C117, SINAC Report, March 18, 2011

it appears as though Mr Martínez just took the decision in stride, giving no indication that he had any plans to alter his course. Such monomaniacal steadfastness remained on display throughout Mr Aven's criminal trial. Either such singular drive, or rank competitiveness, could satisfactorily explain Mr Martínez's decision to ask the judge for a continuance on December 19, 2013, when it was clear that sufficient time remained for counsel to make their closing arguments.

377. The single-minded will to win, or at least to avoid losing, was also on display the following month when Mr Martínez refused the reasonable request of Mr Aven's lawyer, Mr Morera, to waive a procedural rule that would otherwise require a mistrial to be declared, with an entirely new proceeding to follow. This ten-day rule, designed to ensure continuity in the judicial process, was never intended to provide the Prosecutor's office with a 'do-over,' if its initial case on the merits had been unavailing. It would have been in keeping with normal practice, and professional courtesy for Mr Martínez to have reciprocated the decision of Mr Aven's counsel, in not opposing the continuation request in the first place. Instead, it was just another in a long list of manifestly arbitrary decisions by Mr Martínez, which were inconsistent both with the customary international law prohibition against arbitrariness and any other conception of arbitrariness informed by the general international law principle of good faith.
378. It is not enough, in this regard, merely to claim that the courts can eventually remedy problems caused by even the most arbitrary of prosecutions. First, as noted further above, the DR-CAFTA Parties did not intend for the exhaustion of local remedies rule to be applied to cases pursued under Article 10.5 (and at least outside of cases in which the first impugned decision is that of a judge). Costa Rica must answer for the conduct of Mr Martínez if it is the will of the Claimants to waive all further rights to seek relief under municipal law, so that they can have their dispute heard before a DR-CAFTA tribunal, as per the express terms of Article 10.16.
379. Second, and more importantly, given the plodding pace of Costa Rica's courts, victory was not necessarily going to be achieved for the enemies and opponents of the Las Olas project once the charges against Mr Aven had been given a fair airing, or any problems with the Las Olas site being put to rights through remedial action. No, victory was achieved, for the likes of Mr Bogantes and Ms Vargas, simply by



ensuring that the project would be shut down for at least a year. The reputational damage arising from the laying of criminal charges, alone, could sound the death knell for an advanced, luxury real estate project. Leaving a project in legal limbo for any longer would mean the loss of staff and available contractors, the ageing of time-limited permits and the physical decay of the partially-completed project site.

380. In addition, if suspended for a sufficient period of time, partially developed project sites will also attract illegal squatters, something that has been happening over the past three months at Las Olas, seemingly without any interest – on the part of Costa Rican authorities – to assist in protecting the basic property rights of those whose land has been illegally occupied.

**(iv) Abuse of Rights in Bad Faith**

381. Commentators have distinguished between three types of abuses of right: (1) one that involves weighing the exercise of one right as against the concordant obligation to obey or exercise other, potentially conflicting rights; (2) one that involves the failure of a rights holder to exercise discretion honestly, sincerely and reasonably, in conformity with the spirit of the law and with due regard to the interests of others; and (3) one in which evidence of a lack of good faith (*bona fides*), or even the existence of bad faith (*male fides*) is manifest in the exercise of public authority.<sup>389</sup> This, unfortunately, is one of the rare cases that features conduct attributable to the host State that falls under the third category of abuses of right.
382. Thankfully for the rule of international law, few investment treaty cases actually involve allegations of corruption as a primary ground for claims that the host State has not acted in a manner consistent with the customary international law minimum standard of treatment. Of the few cases in which allegations of corruption arose, most involved host States challenging an investor's standing to pursue claims, on the ground that the investor had been engaging in corruption (almost invariably accompanied by an earnest stipulation that the corruption alleged by the respondent State occurred on a previous government's watch. Fortunately, the NAFTA Parties have again provided language elsewhere in the Agreement that could edify one's

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<sup>389</sup> CLA119, Andreas Ziegler and Jorun Baumgartner, "Good Faith as a General Principle of (International) Law" in: A. Mitchell, M. Sornarajah & T. Voon, eds., *Good Faith and International Economic Law* (Oxford: OUP, 2015) 9 at 30-31.

interpretation of Article 10.5. That language can be found in Section B of DR-CAFTA Chapter 18.

383. At the very least, the fact that the Parties resolved to devote an entire section of Chapter 18 to the subject, rather than a single provision, points to the Parties consensus belief that corruption in government administration is so fundamental a malfeasance that it violates *l'ordre public*. Article 18.7 could hardly be more clear: “The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment.” The section commits the Parties to establish municipal anti-corruption regimes and to cooperate internationally on its elimination. The section even includes a solemn commitment to “endeavor to adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery or corruption.” Given the deplorably disingenuous manner in which the Prosecutor’s Office quietly disposed of Mr Aven’s report of Mr Bogantes’ corruption, it appears that Costa Rica simply does not take its obligations under Article 18.8 seriously.
384. For the avoidance of doubt, the Investors also claim that the conduct described below satisfies the less onerous test applicable in cases of ‘ordinary’ abuses of right, which involve the arbitrary, capricious or discriminatory exercise of discretion. As with the fair and equitable treatment standard, generally, it is not necessary to produce evidence of what was actually on the mind of the public official responsible for the impugned decision, much less that his thoughts were of a malevolent kind. Rather, it is sufficient that his exercise of discretionary authority has produced a result that is *manifestly* arbitrary, capricious or discriminatory. When such intentions have been demonstrated in the evidentiary record, however, it behooves an adjudicator to consider whether mere compensatory damages are sufficient – a subject addressed further below, in the Damages Section of this Memorial.
385. Mr Aven was confronted not once, but twice, with demands for the payment of substantial bribes, from two individuals who exercised the sovereign authority of Costa Rica. One of them, Ovideo, held office in the Municipal government entitled to grant, or withhold, the construction permits that were obviously essential for the success of the investment. That his attempt to extort payment in exchange for refraining from exercising his authority against the interests of the Claimants occurred is beyond doubt. Mr Aven’s evidence is unequivocal on this point. This man, Ovideo,

was prepared to exercise his public authority in a manner diametrically opposed to his constitutional responsibilities, and to international public policy.

386. When Mr Ovideo solicited a bribe from Mr Aven, he placed him in an almost untenable position. There was never any doubt that Mr Aven would refuse, but in so doing he was necessarily taking a calculated risk, over which the fate of his, and the other investors,' multi-million-dollar investment lay in the balance. Maybe Ovideo was just bluffing, to see if he could extract a rent from a wide-eyed Gringo. That would have been just as bad as the alternative, from the standpoint of international law, but if it was just a bluff, it only made sense for a foreigner to decide against pressing any claim, in favor of getting on with his business. But there was also the potential for retribution, in which case the Investors would ultimately need to report the incident and rely upon the good faith of Costa Rican authorities to remove the offender from office.
387. The same dilemma confronted the Investors on the two occasions that Mr Bogantes attempted to extort an equally large sum for himself, in exchange for his promise to simply exercise the authority of his Federal office in good faith. Obviously anybody willing to forsake the public trust placed in him as an environmental regulator is not the sort of person who should be expected to keep his promises in the best of circumstances. Be that as it may, Mr Aven's incredulous reaction to, and firm rejection of, this second bribe demand, demonstrate that he was, again, being placed in a virtually untenable position. He knew that, by doing everything by the book, he would obtain all the necessary approvals from SETENA, so as to be ultimately entitled to receive the appropriate construction permits from the Municipality. He also knew that both SINAC and SETENA had already signed off on the matters that pertained to their responsibilities under Costa Rica's regulatory regime.
388. What Mr Aven did not know, outrageously, was that there were officials who were not just capable of derailing the progress of his investment, but who were already actively engaged in achieving that very end. At the moment that Mr Bogantes appeared in his office in late August 2010, Mr Aven had no way of knowing that Las Olas had just survived concerted attacks by two officials, Ms Diaz and Ms Vargas, whose efforts had only just been stymied, respectively, by SETENA and the

Mayor.<sup>390</sup> Mr Bogantes obviously sensed that he possessed a strategic advantage so strong that he could leverage a personal-pay-day worth several hundred thousand dollars from it. He knew what Ms Diaz and Ms Vargas were determined to achieve, and he apparently perceived that he was perfectly placed to either frustrate, or abet, that agenda, which they apparently also shared with Mr Bucelato.

389. Upon being rebuffed by Mr Aven's categorical refusal to participate in activity that was prohibited by law both in Costa Rica and the United States, it is apparent from the record that Mr Bogantes went straight to work undermining everything the Investors had been striving to establish. He wrote to Ms Diaz, informing her that he would be looking into what he claimed to be suspicious documentation underlying the project's Environmental Viability for the Condominium Section, in 2008. He also told her that, although it might take some time, he was also requesting the entire file from the Municipality and would see what he could do.<sup>391</sup> Over the proceeding seven months, Mr Bogantes managed not only to conjure up a bogus claim concerning the provenance of the 2008 Environmental Viability, but also to resurrect the 'wetlands' and 'forest' allegations that SETENA was then just days away from conclusively terminating – thanks, in part, to his own participation in an evaluation of the Investors' land undertaken less than two months earlier.<sup>392</sup>

390. The record indicates that it was Mr Bogantes who originally “*discovered*” the allegedly forged document, which would be used to undermine the 2008 Environmental Viability, and to briefly implicate Mr Aven in a serious crime.<sup>393</sup> And it was Mr Bogantes who communicated to Mr Aven, on March 18, 2011, the contrived findings of the SINAC “investigation” which was commenced in December 2010 by the very same local SINAC officials who would never receive the special “*pension*” that Mr Bogantes had instructed Mr Aven to pay a few months earlier.

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<sup>390</sup> See Jovan Damjanac Witness Statement ¶ 104; Exhibit C83, SETENA Resolution, September 1, 2010

<sup>391</sup> Exhibit C80, SINAC Letter to Hazel Diaz, August 27, 2010. Also, Mr Bogantes made a request for the Municipality's files on the same date.

<sup>392</sup> Exhibit C83, SETENA Resolution, September 1, 2010. Further, during his testimony at Mr Aven's criminal trial, Mr Bogantes claimed that he had only been “*the driver*” on that day. In retrospect, he may have been remembering the event in exactly the way that had materialized, given how – his bribe demand having been rejected – he would spend the rest of his time undermining the finding made on that day.

<sup>393</sup> Exhibit C80, SINAC Letter to Hazel Diaz, August 27, 2010. Mr Aven was originally charged with forging a SINAC document, although that charge was subsequently dropped by the Prosecutor.

391. No doubt intending to make a particular point of how he had triumphed over the Investors, it was also on March 18, 2011 that Mr Bogantes decided to deliver to Mr Aven a copy of the July 2010 SINAC Report that he and Mr Manfredi had completed the previous year. This was the first indication that any of the Investors would have had that an investigation had even taken place. Mr Aven would have likely been expected to mark the date of that report, which found that there were no wetlands on the Project site. It was dated July 16, 2010, little more than a month before Mr Bogantes's bribery demands were made. Accompanying that Report was the newer SINAC report, which had also been prepared without any notice to the Investors, and which disingenuously provided the opposite result. It appears manifest that Mr Bogantes was sending a not-so-subtle message to Mr Aven and the other Investors: that they would have been better off, financially, had they just played ball with Mr Bogantes.
392. In abusing his discretion, so as to visit retribution upon the Investors who had spurned his bribery demands, and upon Mr Aven in particular, Mr Bogantes's conduct represented the epitome of high-handedness. It was terrible enough that Mr Bogantes was willing to breach the trust placed in him by the people of Costa Rica, by accepting bribes to ensure that the Project would not be interrupted by any unexpected obstacles. That he further forsook his public duties by contriving a means of punishing Mr Aven and the other Investors was worse. The manner in which he chose to deliver his message of superiority to Mr Aven must shock the senses of any adjudicator. When it came time for Mr Bogantes to perjure himself at Mr Aven's criminal trial, that his attempts were so transparently poor only makes it worse for the Investors to think that he nonetheless got away with it. Ultimately, Mr Bogantes's display of selfishness and deceit did not only do a deep disservice to the Claimants, and to the rule of law; it also deprived members of disadvantaged communities near the Las Olas project site of one more opportunity to obtain the gainful employment that, for many, remains sorely needed.

**D. CAFTA Article 10.7(1)**

**(a) Expropriation Means Substantial Interference with Investment**

393. CAFTA Article 10.7 provides, in relevant part:

## **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.

...

Note to Article 10.7

Article 10.7 shall be interpreted in accordance with Annexes 10-B and 10-C.

## **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, 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, do not constitute indirect expropriations.

394. The orthodox test for determining whether a measure, or combination of measures, constitutes an indirect expropriation is whether it 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. In other words, 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 investment.<sup>394</sup> As the ICSID tribunal in *AIG Capital Partners v. Kazakhstan* stated:

Expropriations ("or measures tantamount to expropriation") include not only open deliberate and acknowledged takings of property (such as outright seizure or formal or obligatory transfer of title in favour of the Host State) but also covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected benefit of property even if not necessarily to the obvious benefit of the Host State.<sup>395</sup>

395. The focus of any expropriation analysis is on level of interference with, or consequent deprivation of, the investor's ability to maintain and derive economic benefits from its investment because of the fundamental value ascribed by international law to individual rights of private property as constituting vested rights in the municipal legal order. Thus, in cases of indirect expropriation 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 return.

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<sup>394</sup> See, e.g.: CLA99, *Alpha Projektholding GMBH v Ukraine*, Award, ICSID Case No ARB/07/16, IIC 464 (2010), 20th October 2010, despatched 8th November 2010, ¶ 408; CLA126, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, [a.k.a. "Vivendi IIP"] Decision on Argentina's Request for Annulment of the Award, ICSID Case No ARB/97/3, IIC 446 (2010), 3rd August 2010, ¶ 7.5.24; CLA48, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶ 107; CLA47, *CME Czech Republic BV v Czech Republic*, Ad Hoc Trib., Final Award, 14 March 2003, ¶ 604; CLA27, *Starrett Housing Corporation, et al. v. Government of the Islamic Republic of Iran, et al.*, Interlocutory Award, Iran-U.S. Cl. Trib. Rep. 4, 1983, 154.

<sup>395</sup> CLA55, *AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, October 7, 2003, ¶ 10.3.1; CLA54, *Tecmed*, ¶ 114; and CLA42, *Metalclad*, ¶ 103.

396. This conclusion is reinforced by the DR-CAFTA Parties' inclusion of paragraph (2) in Annex 10-C, which confirms that expropriation must arise in relation to "interference with a tangible or intangible property right or property interest in an investment." It is also supported by the Parties' decision to expressly provide, in sub-paragraphs (g) & (h) of the Article 10.28 definition of "investment," that investment must be construed as including:

- (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;

397. It is thus manifest that host State conduct, which has the effect of substantially interfering with a foreign investor's use of permits granted in respect of property rights he exercises in an investment, deprives him of the use and enjoyment of that investment and, as such, constitutes an indirect expropriation of his investment, contrary to DR-CAFTA Article 10.7(1).

398. Interference, and corresponding deprivation, are "substantial" if such circumstances remain in place for more than a "merely ephemeral" period of time.<sup>396</sup> Whether any amount of time should be regarded as only "ephemeral" is a question of fact that must be found in light of the circumstances of each case. Moreover, the relevant question is not whether any investor, or any reasonable investor, could be reasonably expected to be capable of recovering from the deprivation visited upon him by the host State, but rather whether the claimant-investor would have been able to recover given the financial exigencies and commercial/market circumstances actually at play in his case.

**(b) Paragraph (4) of Annex 10-C on Indirect Expropriation**

399. The instant case is an example of indirect expropriation, as described in the *chapeau* of paragraph (4) of Annex 10-C. In a note to Article 10.7, the Parties expressed their preference that the provision should be interpreted in accordance with the terms of

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<sup>396</sup> CLA30, *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Eng'rs of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984) 225-226. See, also: CLA43, *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.



Annex 10-C. Thus, the remaining two sub-paragraphs of paragraph (4) are relevant to the Tribunal's work in the instant case.

400. Sub-paragraph (b) demonstrates that the object of the Parties' inclusion of paragraph (4) in an interpretative Annex was to allay concerns that Article 10.7 not be used by large, multinational corporations to roll back legitimate environmental and health measures, simply by threatening the less wealthy Parties with a Chapter 10 arbitration. Adding such comfort language was not problematic for the Parties' negotiators because it has never been true of customary international law that "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" would normally be regarded as being constitutive of indirect expropriation.
401. Unsurprisingly, then, nothing in sub-paragraph 4(b) should, or could, change the manner in which Article 10.7(1) is construed, or at least properly construed. In this regard, the Claimants note the Parties' use of the term, "non-discriminatory regulatory actions" in the sub-paragraph. First, it is unclear why the Parties elected to use the term, "actions," rather than "measures," as only the latter has been defined in the Agreement. If the purpose of the sub-paragraph was to actually alter what would otherwise have been an interpreter's construction of Article 10.7(1), reason suggests that they would have used the same expression found in that provision: "measures tantamount to expropriation."
402. It is also notable that the Parties referred to such actions as potentially being "non-discriminatory." Given the context, it would appear that this was a reference to the kind of "non-discrimination" associated with expropriation, rather than the concept of discrimination on the basis of nationality, which is addressed elsewhere in the Agreement. This distinction is not only important because it demonstrates that the Parties did not intend for paragraph (b) to alter the meaning of the terms found in Article 10.7; it also speaks to the relative "rarity" of cases in which indirect expropriation occurs. The most serious of the public concerns about providing investors with the means to pursue international arbitration over expropriation was that laws and regulations of general application could be confused for measures tantamount to expropriation. In other words, the concern was not over the concept of

indirect expropriation, *per se*, but rather the possibility that the norm could be expanded through litigation.

403. Whether this concern was valid is not relevant for present purposes. What matters is that the concerns – which paragraph (4) of Annex 10-C was included to assuage – were not about cases in which measures of creeping or indirect expropriation were adopted with the aim of impacting a single investor or investment, but rather of cases in which a measure of general application was at issue. In other words, the worry was not over run-of-the-mill cases of discriminatory expropriation [i.e. “actions” that singled-out one investor or investment], but over cases in which not targeting or singling-out was present. And *that* is what the Parties meant when they wrote, in sub-paragraph (4), that findings of indirect expropriation would only be made in “rare circumstances.”<sup>397</sup> Given that the case at hand involves the much more common claim of expropriation, in which a single investment bears the brunt of the governmental “actions” to be scrutinized, sub-paragraph (4)(b) is not relevant to the Tribunal’s work.
404. For the same reasons, the purpose of sub-paragraph 4(a) is also not to alter how Article 10.7(1) ought to be interpreted. Much like sub-paragraph (b), sub-paragraph (a) only purports to explain how the Parties expect Article 10.7(1) should and would have been construed in the first place, i.e. had the Annex not existed. As such, the provision provides helpful – albeit unremarkable – guidance as to what to expect from a tribunal as it interprets and applies Article 10.7(1) in a case of alleged indirect expropriation.
405. Of particular interest in the instant case are the Parties’ implicit adherence to the principle of proportionality, in recalling how the extent of alleged economic harm must be considered in relation to other factors, such as the relative amount of interference involved and the “extent to which the government action interferes with

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<sup>397</sup> The Claimants also recall how, if one were to engage in measuring the relative rarity of measures that might constitute indirect expropriation, the appropriate sample size would not be limited to examples from other dispute settlement cases, but rather to the panoply of measures that are applied – without harm – in the normal course of business and regulation worldwide, and therefore without any need for international dispute settlement. While trite, the Claimants nevertheless note that international dispute settlement, logically, is a rare event in the regular course of life for most investors and regulators. Hence, it should also be unsurprising to discover that what might be perceived as “rare” in the broader scope of things will not necessarily be “rare” in the place where disputes are resolved. Put another way, the very fact that a matter has become the subject of arbitration necessarily renders it “rare” within the wider context of daily business transacted worldwide between and among investors and host States.

distinct, reasonable investment-backed expectations.” Of even greater importance is the Parties’ admonition that another factor for consideration is “the character of the government action.” Here, the character of the actions under consideration have been tarnished by the taint of corruption, tied to none other than the public official who was responsible for engaging the host State in that same action under consideration.

**(c) The Difference Between Lawful and Unlawful Expropriations**

406. CAFTA Article 10.7(1) is not a prohibition on expropriation. It simply outlines the manner in which an expropriatory measure can be lawfully adopted. In sum, the provision stipulates that any measure, or combination of measures, that substantially interferes with foreign investments, either directly or indirectly, must be adopted: (1) for a bona fide public purpose; (2) in a manner that provides the affected foreign investor with prompt, adequate and effective compensation; (3) in a manner that does not singled out a particular investor, or group of investors, for certain treatment (whether de jure or de facto); and which has been implemented in a manner consistent both with the principle of due process and any other norms expressed in Article 10.5. Indeed, as F.A. Mann observed in respect of the practice of codifying the customary rules on lawful expropriation in treaty standard, “the breach of an express treaty obligation itself constitutes an illegal act, i.e. an act without legal validity.”<sup>398</sup>
407. Thus, in theory, if conduct constituting a taking under Article 10.7(1) was undertaken in a manner consistent with all four of the conditions provided at sub-paragraphs (a) to (d) of that same provision, the expropriation was legal under customary international law and, as such, no additional compensation would need to be paid beyond the amounts prescribed under paragraph (2).<sup>399</sup> However, 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 paid.<sup>400</sup>

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<sup>398</sup> CLA35, F.A. Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990) at 241.

<sup>399</sup> Thus, in any case in which the host State disputes the fact that it has engaged in an indirect expropriation, the tribunal must consider whether merely awarding fair market value compensation in accordance with sub-paragraphs (2) – (4) of Article 10.7 is sufficient to render the wronged investor truly whole.

<sup>400</sup> As indicated in Article 14(3) of the International Law Commission’s Draft Rules on State Responsibility, the continuing failure of a State to bring itself into conformity with any of the international law obligations it has undertaken constitutes a *delict* under customary international law. It is evident that the CAFTA Parties were mindful of this customary norm in that, when drafting Article 10.7(1), as they chose to ensure

**(d) Application of Article 10.7 to the Facts of this Case**

408. At paragraph 17 of its notice of intent to defend the instant claims, the Respondent incorrectly cast the relevant question for resolution of the Investors' claims under Article 10.7. With all due respect, the test is not whether the investors possessed a "right to the value of their investment." The relevant question is whether the Respondent's conduct substantially interfered with the Investors' ability to make the best economic use of their "investments" in the territory of Costa Rica? The text of Article 10.7(1) leaves no room for doubt as between these contending propositions. It explicitly prohibits Costa Rica from adopting or maintaining measures that are "equivalent [in effect] to [the] expropriation" of covered "investments."
409. For the purposes of Article 10.7(1), and consistent with sub-paragraphs (h) and (g) of the Article 10.28 definition of "investment," the investments that have been subject to measures tantamount to expropriation were: a combination of "property rights" in land and "licenses, authorizations, permits and similar rights" that had been conferred by the Respondent in respect of how those property rights could be utilized – i.e. how they could be used by the Investors in realizing the highest and best use of the land in which those rights were held. Thus, as a practical matter, the Tribunal simply needs to decide whether the conduct outlined above prevented the Claimants from realizing their plans for developing Las Olas?
410. The Claimants submit that the answer to this question is manifest. Because of the unlawful conduct outlined above, the Investors were prevented from developing the Las Olas resort community. It is a matter of simple causation. Either the Respondent's unlawful conduct prevented the Claimants from utilizing the construction permits granted to them or it did not.
411. The DR-CAFTA Parties have expressly provided that breaches of Article 10.5 may also constitute violations of Article 10.7(1)(d). It is strictly a binary matter of degrees of interference. The Claimants submit that the evidentiary record only admits of one factual finding – *viz.* that the Respondent's wrongful so substantially interfered with their ability to fully utilize the combination of property rights and government permits

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that the scope of Chapter 10 extended not only to measures "*adopted*" by a Party relating to investors or their investments, but also to measures "*maintained*" by Parties to the same effect.

they held in Costa Rica that the result was tantamount to expropriation. The alternative scenario would be a finding that the deprivation brought about by Costa Rica's unlawful conduct did not meet the 'tantamount to expropriation' threshold. The evidence, however, simply does not support such a conclusion.

412. Moreover, as the Respondent would remain internationally responsible for the same wrongful conduct under Article 10.5, the Respondent would remain responsible for a breach Article 10.5(1). As described further below, the standard of compensation under applicable international law would also remain unchanged. The Respondent would be required to render compensation to the Investors sufficient to make them whole. As making them whole would necessarily involve placing them back in the position they would have occupied today, had the wrongful conduct never occurred, Costa Rica would still be providing them with enough compensation to make it as if the Las Olas Project had either never been halted, or had been restarted just as soon as the cancelled construction permits had been re-issued by the Municipality, immediately upon having heard that SETENA had re-instated the relevant certificate of environmental viability. The problem with this scenario is that it never happened. The construction permits were never renewed – for which the blame falls exclusively on the Respondent.
413. Indeed, it is not difficult to draw the lines demonstrating proximate cause between the three categories of wrongful conduct outlined for Article 10.5, above, and the fact that construction permits were never renewed (nor should have been revoked in the first place):
- (I) From between at least April 2009 to February 2011, the Respondent simultaneously maintained two entirely contradictory regimes, both of which enjoyed sufficient discretionary authority to either encourage Las Olas to thrive (in a manner consistent with Costa Rica's high standards for environmental sustainability) or to destroy it (in a manner wholly inconsistent with fundamental conceptions of fairness, transparency or due process). And the only difference between February and March 2011, from the Claimants' perspective, is that the Respondent had finally drawn back the curtains to reveal, for the first time, the regulatory abomination that had long been intent on destroying their investments.

But for the decisions repeatedly taken, by officials such as Vargas and Diaz, and of organizations such as SINAC and the TAA, to hide their investigations from the Investors, and to not permit them to either learn of, or reply to, the

accusations made against them, the falsity or those allegations could have been proved long before any interruption to the Project would have occurred.

But for the evident disposition, held by each of Bogantes, Diaz and Vargas – to remain wilfully blind as to the fact that Las Olas was being developed in accordance with all applicable laws and regulations, and to subvert SETENA’s exercise of supervisory authority over the Project – Bucelato’s false accusations would have not been resuscitated, or found their way into a criminal investigation. As such, development of Las Olas would have continued through to completion.

Had SETENA, and responsible officials in municipal government, been permitted to do their jobs, it is evident that the healthy, professional, and cooperative relationship each had maintained with the Investors and their representatives ensured that any unseen obstacles or concerns would have been resolved amicably and that therefore the Project would have most likely been completed on-time, and on-budget.

- (II) The record contains such a litany of unreasonable and unjustifiable decisions taken by Prosecutor Martínez, from which the only reasonable conclusion to draw was that he was motivated by some form of discriminatory animus against Mr Aven. His apparent animus, or studied indifference, was magnified by the various ways in which he effected abuses of right in prosecuting him.

Moreover, the record does not provide so much as a single example of the Prosecutor’s office handling Mr Aven’s complaints with any diligence. Rather, it reveals examples of deliberate manipulation and misrepresentation of the administrative records kept by the Office of the Prosecutor and by the local MINAE office, when under the direct supervision of Christian Bogantes.

Assume, *arguendo*, that Prosecutor Martínez had never been assigned the Aven and Damjanac files, and that a prosecutor who was scrupulous about maintaining the objectivity required of her by law. Under this scenario, the Investors’ claims today would only concern: (i) the time and expense to which they were put in 2011, until SETENA’s reinstatement resolution had been issued; and (ii) reputational damage to the Las Olas brand. However, because the prosecutor was somebody whose conduct suggests that, if anything, he was diligent about disobeying his objectivity obligation, any further development of Las Olas was forestalled.

- (III) Mr Bogantes’ malicious and deceitful conduct abetted the respective crusades upon which Ms Diaz and Ms Vargas had already embarked. His or an unknown co-conspirator’s manipulation of 2008 MINAE records allowed him to frame Mr Aven for a falsification of documents charge, which went to the heart of the approvals required for the development of Las Olas to proceed. His or an unknown co-conspirator’s circulation of this fabrication to Diaz, and possibly also Bucelato, reinforced the likelihood that it would be used against Mr Aven, at a safe distance from its author(s).

Had Mr Bogantes possessed the honesty and integrity to stand by the July 10<sup>th</sup> report he had co-authored with Mr Manfredi, and had he not engaged in the

machinations that would eventually allow him to overthrow his own ‘no wetlands; no forest’ findings, development of Las Olas would have proceeded apace, with no interruptions.

414. Under each of these sad scenarios, the end of the causal chain is the same: the long-term shutdown of a luxury real estate and hotel development. The reputational harm that attaches to such closures simply cannot be overcome by the original developers. Any closure longer than one year in length affords only one option to the original developers: to sell at fire sale prices and acknowledge the loss for tax purposes. That the closure at issue in this case has lasted much longer, and that it also involved criminal charges, only intensifies the dreadfulness of the outcome.

#### **IV. QUANTUM**

##### **A. Damages relating to the destruction of the investment**

415. As set out above, the Government of Costa Rica has breached Article 10.7 and Article 10.5 in multiple ways. The Claimants are entitled, under applicable rules of international law, to be made whole for the harm inflicted upon them by this wrongful conduct.

##### **(a) Claimants Are Entitled to Compensation in the Amount of the Full Fair Market Value of Their Investments in Costa Rica, Frustrated by Conduct Attributable to the Respondent**

416. DR-CAFTA Article 10.7 expressly entitles the Claimants to compensation equivalent to the full fair market value of the investments subjected to interference tantamount to expropriation. The DR-CAFTA does not, however, specify the measure of compensation due in cases where the host State has either *unlawfully* expropriated an investor’s asset, or where it has violated other provisions of the Treaty. In the absence of explicit Treaty language, customary international law provides the relevant standard.<sup>401</sup>

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<sup>401</sup> See, e.g. CLA76, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006, ¶ 483 (“Since the Treaty does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international

417. The definitive statement of the customary international law standard for reparation can be found in the judgment of Permanent Court of International Justice's in the *Chorzów Factory* case:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that *reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.<sup>402</sup>

418. The *Chorzów Factory* standard is widely, if not universally recognized.<sup>403</sup> It has been codified in Article 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, pursuant to which, when restitution in kind is not possible:

[The] state responsible for an internationally wrongful act is under an obligation to compensate for the damages caused thereby . . . . The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.<sup>404</sup>

419. Where the object of reparation is to compensate for an unlawful expropriation, the customary international law standard includes, but is not limited to, the fair market value of the expropriated assets.<sup>405</sup> This customary international law standard is not

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law in the present case.”). See also CLA126, *Vivendi III*, ¶¶ 8.2.3-8.2.5; CLA78, *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007 ¶¶ 349-352.

<sup>402</sup> CLA12, *Case Concerning the Factory at Chorzów* (Germany v. Poland), Judgment of September 13, 1928, P.C.I.J. Ser. A., No. 17, at 47 (emphasis added).

<sup>403</sup> See, e.g.: CLA108, *Occidental Petroleum*, ¶ 792 (ICSID, October 5, 2012) (“The starting point is the principle of ‘full reparation’, expressed by the Permanent Court of International Justice in the *Chorzów Factory* case . . . .”); *ADC*, ¶ 493 (reviewing numerous decisions and concluding that “*there can be no doubt about the present vitality of the Chorzów Factory principle, its full current vigour having been repeatedly attested to by the International Court of Justice*”); CLA43, *S.D. Myers, Inc. v. Government of Canada*, Partial Award (UNCITRAL, 13 November 2000), ¶ 311; CLA126, *Vivendi III* Award, ¶ 8.2.4–8.2.5; CLA78, *Siemens*, ¶ 351; CLA62, *CMS*, ¶ 400; CLA33, *Amoco International Finance Corporation v. Government of Islamic Republic of Iran*, Award No. 310-56-3, Award, ¶ 191 (Iran-U.S. Cl. Trib., July 17, 1987).

<sup>404</sup> CLA44, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

<sup>405</sup> CLA86, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 775 (“*Full reparation entitles the unlawfully expropriated investor to restitutionary damages, which include, but are not limited to, the fair market value of the unlawfully expropriated investment as determined by the application of an appropriate valuation methodology.*”); See also CLA126, *Vivendi III*, ¶ 8.2.5 (“It is also clear that such a standard permits, if the facts so require, a higher rate of



limited to reparation for unlawful expropriations, but rather applies to *all* illegal acts, including a host State's breach of other treaty obligations. The *Lemire* tribunal, assessing the compensation owed to the claimant to redress the host State's violation of the U.S.-Ukraine Treaty's fair-and-equitable treatment provision, held that:

[The fair-and-equitable treatment provision] of the Treaty does not provide any rule regarding the appropriate redress in cases of violation . . . . The failure of Article II.3 of the Treaty to specify the relief which an aggrieved investor can seek does not imply that a violation of the FET standard may be left without redress: a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained. The *quaestio vexata* is how this economic harm is to be measured.

It is generally admitted that in situations where the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the Treaty.<sup>406</sup>

420. In other words, the purpose of an award of damages is the same no matter which of the treaty provisions Respondent is found to have violated: to place Claimant in the same pecuniary position in which it would have been if Respondent had not violated the Treaty.<sup>407</sup> If losses caused by breaches of Article 10.5 or other DR-CAFTA obligations have the character or effect of deprivation akin to that which would have been occasioned by an expropriation, it is not relevant whether nominal control over investment enterprises or title to property in land remains.<sup>408</sup> International investment

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recovery than that prescribed . . . for lawful expropriations.”); CLA33, *Amoco*, ¶ 197 (“[I]f the taking is lawful the value of the undertaking at the time of the dispossession is the measure and the limit of the compensation, while if it is unlawful, this value is, or may be, only a part of the reparation to be paid.”).

<sup>406</sup> CLA102, *Joseph Charles Lemire & Others v. Ukraine*, Award, ¶¶ 147, 149 (ICSID, March 28, 2011). See also: *Fuchs*, ¶ 532 (“The Georgia / Israel Treaty is silent on the standard of compensation applicable to breach of [the fair-and-equitable treatment provision]. However, Article 36 of the ILC Articles on State Responsibility . . . provides that a ‘state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution’ and that such compensation ‘shall cover any financially assessable damage, including loss of profits insofar as it is established.’”).

<sup>407</sup> CLA78, *Siemens*, ¶ 351; CLA126, *Vivendi III*, ¶ 8.2.4.

<sup>408</sup> See, e.g.: CLA80, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, Case No. ARB/01/3, Award, ¶¶ 243–244, 264–268, 359–363, 384–386, 450 (ICSID, May 22, 2007) (awarding US\$ 106.2 million for breach of fair and equitable treatment; applying fair market value approach because “the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line.”); CLA74, *Azurix Corp. v. Argentine Republic*, Case No. ARB/01/12, Award, ¶¶ 319–322, 442 (ICSID, July 14, 2006) (no expropriation because Claimant “did not lose the attributes of ownership,” but award of fair market value of \$165,240,753 for Respondent’s “fail[ure] to accord fair and equitable treatment to [Claimant’s] investment” and other treaty violations); CLA62 *CMS*, ¶¶ 263–264, 273–281, 409–411, 468 (Tribunal found no expropriation because Claimant still had “full ownership and control of the investment,” but awarded US\$ 113.2 million for “damages or compensation relating to fair and equitable treatment”); CLA108 *Occidental Petroleum*, ¶ 707 (“Having

tribunals are unanimous that an award of damages in the amount of the fair market value of the investment is appropriate in all cases “when interference with property rights has led to a loss equivalent to the total loss of investment.”<sup>409</sup>

**(b) Determining Fair Market Value**

421. Fair market value has been defined as “the price at which property would change hands between a hypothetical willing and able buyer and an [*sic*] hypothetical willing and able seller, absent compulsion to buy or sell, and having the parties reasonable knowledge of the facts, all of it in an open and unrestricted market.”<sup>410</sup> Similarly, the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment define fair market value as:

... an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.<sup>411</sup>

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found earlier in this Award that the Claimants’ investment in Ecuador has not been accorded fair and equitable treatment by the Respondent and has been expropriated by the issuance of the *Caducidad* Decree, the Tribunal will now determine, as mandated by Article III of the Treaty, the fair market value of this investment.”).

<sup>409</sup> CLA79, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, Award (ICSID, July 25, 2007), ¶ 35 (“[Fair market value] is appropriate in cases of expropriation in which the claimants have lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment.”). See also: CLA62, *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No ARB/01/8 (May 12, 2005), ¶ 410 (noting that the standard of fair market value is the appropriate standard in cases of expropriation and possibly of other breaches resulting in long-term loss); CLA126, *Vivendi III* Award, ¶ 8.2.8 (“[T]he level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different from a case where the same government expropriates the foreign investment. The difference will generally turn on whether the investment has merely been impaired or destroyed. Here, however, we are not faced with a need to so differentiate, given our earlier finding that the same state measures infringed both relevant Articles of the BIT and that these measures emasculated the Concession Agreement, rendering it valueless.”).

<sup>410</sup> CLA80, *Enron*, ¶ 361 (ICSID, May 22, 2007). See, also: CLA87, *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, 3 November 2008, ¶ 263 n.99 (“Fair market value has been defined as: ‘the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.’”) (citation omitted); CLA62, *CMS*, ¶ 402 (same); CLA108, *Occidental Petroleum*, ¶ 707 (same).

<sup>411</sup> CLA37, World Bank Development Committee, Guidelines on the Treatment of Foreign Direct Investment, Guideline IV.5 (1992).

422. Authorities distinguish between lawful and unlawful expropriation in ascertaining the appropriate date of valuation. In the former case, treaties often expressly stipulate that the proper valuation date is “just prior to” or “at the moment of” expropriation; in the latter case, treaties are unlikely to specify the appropriate valuation date, leading tribunals to apply customary international law. In such circumstances, the prevailing view amongst tribunals today is that customary international law mandates use the date of the arbitral award, if any, as the proper valuation date.<sup>412</sup> The rationale behind the use of the date of the award for the valuation date lies in the fact that customary international law requires that an award of damages put the Claimant “in the same position as if the expropriation had not been committed”—and, in the case of unlawful expropriations, making the Claimant whole may and often does require valuation of the expropriated asset as of the date of the award.<sup>413</sup>
423. There are three generally accepted approaches to determining the fair market value of an asset: the income based approach, the market based approach and the asset based approach. In some cases multiple approaches are suitable,<sup>414</sup> while in others one approach may commend itself. Any analysis of the correct approach in a given case must obviously be context-specific, however. In the context of a commercial real estate development, the fair market value reflects the highest and best use of the land reserved for the project, which is often captured by a market based approach.<sup>415</sup>
424. However, as the tribunal in *Occidental v. Ecuador* observed, the “standard economic approach to measuring the fair market value”<sup>416</sup> today is the Discounted Cash Flow,

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<sup>412</sup> CLA76, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal October 2, 2006; CLA78, *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007; or CLA31, *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award June 5, 1990.

<sup>413</sup> See, e.g. CLA105 *Un glaube and Un glaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award dated May 16, 2012.

<sup>414</sup> See, e.g.: CLA113, *Teco Guatemala Holdings LLC v Guatemala*, Award, ICSID Case No ARB/10/17, December 18, 2013, ¶ 338.

<sup>415</sup> CLA40, *Compañía del Desarrollo de Santa Elena SA v Costa Rica*, Final Award, ICSID Case No ARB/96/1, IIC 73 (2000), (2000) 439 ILM 1317, February 17, 2000, ICSID, ¶ 70; and CLA90, *Waguilh Elie George Siag and Clorinda Vecchi v Egypt*, Award, ICSID Case No ARB/05/15; IIC 374 (2009), ¶¶ 574 and 580.

<sup>416</sup> CLA108, *Occidental Petroleum*, ¶ 708 (“[discounted] cash flows are appropriately determined by calculating the flow of benefits (“cash flows”) that the Claimants would have reasonably been expected to earn in the “but for” state of the world in which the termination of the Participation Contract hypothetically did not occur relative to the actual cash flow that the Claimants will derive subsequent to the termination. The difference between these two cash flow streams (the “but for” state of the world with no termination less the actual state of the world with contract termination), discounted to the date of the actual

or “DCF,” methodology, which calculates the present value of the future cash flows that an asset is expected to generate, and that have been foregone by the Claimant as a result of being deprived of its investments. DCF analysis recognizes that risk and the time value of money make “later” benefits of a given dollar amount in the future less valuable than receipt of the same dollar amount “today.” That is, the present value of future dollars is the discounted value of their future amount. DCF thus provides a reliable estimate of the value of an asset at any point in time: “Value today always equals future cash flow discounted at the opportunity cost of capital.”<sup>417</sup> Arbitral tribunals have invariably adopted at least some elements of a DCF analysis when determining the fair market value of an enterprise engaged in an activity that evidently reflected the highest and best use of the land being used by that enterprise to carry on its business.<sup>418</sup>

425. Highest and best use is determined by such factors as the land’s physical characteristics and proximity to amenities, utilities and an efficient market. However, also crucial to such determination will be the existence of any legal rights of use associated with the property rights held by the investors in that land. In the instant case, examples of such legal rights include SETENA’s certification of environmental viability and any construction permits granted by the municipal government exercising territorial jurisdiction over the land at issue. In other words, the use to which the land would be put (as permitted by any approved development) is a key driver of the highest and best use and, in the instant case, the land was to be used to operate a developed resort as a going concern. A DCF analysis is appropriate in this

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*contract termination, is the economically appropriate and reliable measure of the cumulative economic harm suffered by the Claimants as a consequence of the contract termination.”).*

<sup>417</sup> CLA114, Brealey, Richard C., Stewart C. Myers, and Franklin Allen, *Principles of Corporate Finance*, 11<sup>th</sup> Edition (McGraw Hill/Irwin: New York, 2014), 93.

<sup>418</sup> CLA80, *Enron*, ¶ 385 (“*Since DCF reflects the companies’ capacity to generate positive returns in the future, it appears as the appropriate method to value a ‘going concern’ as TGS. Moreover, there is convincing evidence that DCF is a sound tool used internationally to value companies, albeit that it is to be used with caution as it can give rise to speculation. It has also been constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law.*”); see also CLA106, *EDF International SA and ors v Argentina*, Final award, ICSID Case No ARB/03/23, June 11, 2012, ¶1188 (in assessing damages for a breach of the fair and equitable treatment standard, the tribunal noted that it was “*convinced that the DCF method is most suitable in [cases where]... [t]he enterprise under assessment is a ... company with a predictable revenue stream*”); CLA76, *ADC*, ¶ 502 (“*Like many other tribunals in cases such as the present one, the Tribunal prefers to apply the DCF method.*”); CLA62, *CMS*, ¶ 416 (“*DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets.*”); CLA111, *Phillips Petroleum*, ¶ 112 (stating that “*a prospective buyer of the asset would almost certainly undertake [a] DCF analysis to help it determine the price it would be willing to pay and that DCF calculations are, therefore, evidence the Tribunal is justified in considering in reaching its decision on value*”).

case, since it reflects the highest and best use to which the property would have been put had Costa Rica's actions not intervened.

426. However, a DCF analysis, whilst it captures the general risk of failure inherent in all enterprises, would not necessarily capture the increased risk attendant on the fact that the enterprise in question was at an early stage of development. A DCF valuation, suitably modified for this added risk factor, is therefore the most appropriate measure of the losses suffered by the Claimants in respect of their investment in the Las Olas project.

**(c) The Full Implications of Ensuring Compensation on the Basis of the Principle of Full Reparation**

427. As described above, the Respondent's acts and omissions constituted breaches of both Article 10.5(1) and Article 10.7(1). Because the Respondent's conduct constituted measures tantamount to expropriation, it was *per se* unlawful. Thus, if the tribunal were to only assess damages based upon the terms set out in paragraphs (2) to (4) of Article 10.7, the Claimants would not be made whole. The same rationale applies to breaches of Article 10.5, as conduct that is inconsistent with the treaty promises of a host State are, by definition, unlawful in the eyes of international law.

428. As such, the Claimants are entitled to receive compensation on the basis of the *restitutio integrum* principle. Being placed back into the position one would have occupied, but for the breach, means more than just being awarded the fair market value of one's investments as of the most opportune moment thereby benefitting the victim and ensuring that preventing the Respondent from enjoying any unjust enrichment with respect to the expropriated land. It includes whatever amount of compensation is required to ensure that the Claimants are made well and truly whole.<sup>419</sup>

429. Accomplishing this task involves ensuring that compensation additionally reflects any incidental amounts paid out by the Claimants to maintaining their interests in, or the fight for, their investment. Such examples include land taxes paid on lands that have been expropriated after January 1, 2009 (*de facto* or *de jure*) and all fees paid, and

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<sup>419</sup> Sergey Ripinsky, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008) 88

disbursements incurred, to obtain permits for land that can now never be developed. It also involves receiving compensation for any incidental expenses incurred as a result of, or in order to contest, the State's unlawful conduct.

430. One cannot “*wipe out all of the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*”, if such sums are not included in an award of damages. As Dolzer and Schreuer have observed:

Under this principle, damages for a violation of international law have to reflect the damage actually suffered by the victim. In other words, the victim's actual situation has to be compared with the one that would have prevailed had the act not been committed. Therefore, punitive or moral damages will not usually be granted.

431. This subjective method includes any consequential damage but also incidental benefits arising as a consequence of the illegal act. According to the Tribunal in *Petrobart v Kyrgyz Republic*:

... in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred.<sup>420</sup>

432. Accordingly, if the Tribunal determines that the Respondent's conduct was unlawful, for non-compliance with either of Articles 10.5(1) or 10.7(1), it should provide for full compensation of the Claimants' arbitration costs, counsel's fees and disbursements. But for the Respondent's unlawful conduct, such costs would never have been incurred.

433. Honouring the *restitutio integrum* principle may also require the Tribunal to exercise its discretion in choosing the valuation date that best ensures that full reparation is provided.<sup>421</sup>

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<sup>420</sup> CLA104, Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law*, vol. 2 (Oxford: OUP, 2012) 295, citing: CLA60, *Petrobart v Kyrgyz Republic*, Award, March 29, 2005, VIII.7, in *Stockholm Int'l Arb Rev* 2005:3, 45 at 84. See also: CLA59, *MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7, (May 25, 2004), ¶ 238

<sup>421</sup> See, e.g.: CLA76, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, October 2, 2006; CLA96, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Cases Nos., ARB/05/18 & ARB/07/15), Award, March 3, 2010; CLA93, *Mohammad*

**(d) The Claimants' damages related to the fair market value of their investment**

434. The Claimants have demonstrated above that the Las Olas project was shut down by agencies of the Government of Costa Rica without justification, and that the project remains shut down today. In the sections above, the Claimants have further demonstrated that the actions of Costa Rica are in breach of its obligations under the DR-CAFTA, in particular Article 10.5 and Article 10.7. As a result of those breaches of the DR-CAFTA, the Claimants' investment in Costa Rica has been completely destroyed. The question therefore becomes one of compensating the Claimants for Costa Rica's internationally unlawful acts.
435. As noted above, the Claimants position is that the damages awarded in respect of Costa Rica's breaches of the DR-CAFTA should be such as to wipe out the consequences of Costa Rica's internationally unlawful acts and to re-establish the situation that would have existed if the acts had not been committed.
436. In this case, the damage to the Las Olas project was suffered when the Municipality issued the Shutdown Notice, which was received by the Las Olas management in May 2011. At that point, the entire project was brought to a standstill and, due to the continuing injunctions placed on work at the project site, it remains shutdown today.
437. The Las Olas project was a potentially very lucrative investment opportunity for the Claimants. Costa Rica has a number of similar resort-style developments offering similar services: lot, home and condo purchases; rental services for those sites; time-share purchases; hotels; and associated services. The Las Olas project was not, therefore, a unique project. Rather, it was patterned on a number of other successful developments of luxury residential/tourist projects throughout the accessible coastal areas of Costa Rica.
438. However, what differentiated the Las Olas project from other similar projects was the location. As Mr Aven notes, Las Olas benefitted from its location directly on a pristine beach, with all areas of the project site lying between the main highway and the beachfront. The coastal area around Las Olas is not overburdened with resort

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*Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V (064/2008)), Partial Award on Jurisdiction and Liability, September 2, 2009.

developments, with any such developments nearby not benefitting from beach access. With the opening of the main highway to San Jose in 2010, Las Olas became a very easy one and a half hour drive from San Jose and the international airport, and it is not far from the Manuel Antonio National Park, one of the country's top tourist attractions.

439. Costa Rica's actions have prevented the Claimants from completing the development project they commenced. There can be no question that the Claimants would have completed the project had the various Costa Rican agencies not interfered with the lawfully-obtained permits and acted to shutdown the project.
440. The Claimants had overcome the first major obstacle of any development project: obtaining all the required permits to commence work. At the time of the shutdown they had received construction permits for the Easement Section and the Condominium Section, and shortly after the shutdown notice they received the construction permit for the redesigned beach club in the Concession area (having already received construction permits for the original design of the beach club).
441. The first two phases of the development work required the Claimants to install infrastructure in the Easement Section and in the Condominium Section. By the time of the Shutdown Notice, this work was already well underway, with five of the nine easements completed in the Easement Section (with all electrical, water and waste/drainage connections made), and the first one-third of the roads had been cut out in the Condominium Section. A video shot by Mr Damjanac shows the extent of the work carried out in the Condominium Section by 2010.<sup>422</sup>
442. By the time of the shutdown, the Claimants had spent around US\$ 2,920,000 on construction work, out of a total anticipated budget of around US\$ 8,900,000 to complete the infrastructure works and construct the beach club.<sup>423</sup>
443. The Las Olas project was planned to be self-funded, and the Claimants succeeded in meeting the funding required from their own resources until the Shutdown Notice was received in May 2011. However, the Claimants had taken the precaution of arranging a loan/line of credit for US\$ 8,200,000 with the Banco Centroamericano de

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<sup>422</sup> Exhibit C95

<sup>423</sup> See CLEX-081 and CLEX-022.



Integración Económica, Costa Rica, in case it became necessary to borrow funds to continue work on the project. At the time of the shutdown, this had not been necessary and funds were never drawn down under that loan.

444. As well as having started the infrastructure work necessary to complete phases 1 and 2 of the project, by the time of the Shutdown Notice the Claimants had also succeeded in selling a number of the lots in those phases. Despite being at a relatively early stage of development, with only infrastructure going in (albeit that the infrastructure was crucial to the development of the project as a whole) and with the beach club construction permits still being awaited (the beach club being the focal point of the development), the Claimants sold a total of 13 plots in 2010 and 2011. This was in addition to the 8 plots sold before the official re-opening of the project on 1 January 2010.
445. It is clear, therefore, that there was significant demand from purchasers of lots in the Las Olas development, even at an early stage of the project. As Mr Aven and Mr Damjanac point out, that demand would only have increased, especially as potential purchasers saw houses being built, streets being completed and the beach club going up.
446. Mr Aven, Mr Damjanac and Mr Janney all describe the different profit centers that were to combine to create returns for the investors in the Las Olas project. In summary, these were:
- (b) the sale of the lots;
  - (c) construction of the villas and the hotel/condo units;
  - (d) the construction of condos and time-shares sales of condo units;
  - (e) mortgages to home owners;
  - (f) time-share financing to time-share buyers;
  - (g) a rental sales program for home and condo owners that would involve renting out their unit when they were not there and splitting the income 60/40 (60% for the owner and 40% for the project);

- (h) the construction and sale of a hotel;
- (i) the rental of commercial space that would be built in and around the project;
- (j) a facility management company for the entire project; and
- (k) a real estate company to handle sales and re-sales of homes and condos.

447. These profit centres were all included in a series of business plans and projections put together by the Las Olas project team.<sup>424</sup> The Las Olas team had the experience and expertise necessary to implement these various profit centres. Mr Damjanac carried out extensive market research throughout 2010 which fed into the conclusions and projections in the business plan of December 2010.

448. The Claimants submit with this Memorial an expert report by Dr Manuel Abdala of Compass Lexecon, which provides a valuation of the project as at May 2011, the date of the Shutdown Notice. In order to do so, Dr Abdala has valued the Las Olas project as it was in May 2011, just before the Shutdown Notice: a going concern under development. Using standard valuation methodology, Dr Abdala calculates the price a willing purchaser would be prepared to pay to a willing seller for the Las Olas project in its then state in May 2011, in other words, the fair market value of the investment. This leads to a valuation of US\$ 73,900,000.

449. However, as noted above, Costa Rica is obliged to provide full reparation for its internationally unlawful acts, so as to wipe out the consequences of those actions. Had Costa Rica not taken the action it has done against the Claimants' investment, the Claimants would be in possession of the project today.

450. The true reparation due to the Claimants, therefore, is the value of the Las Olas project as at the current date, since, but for Costa Rica's actions, the Claimants would today have a fully-permitted and operational project with a monetary value. Dr Abdala has therefore provided a valuation as at 30 November 2015. This valuation, however, assumes that no further work on the project was carried out between the time of the Shutdown Notice and November 2015. In essence it freezes the project in time as at May 2011, but updates the macroeconomic data and discount rate to

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<sup>424</sup> See Exhibits C46, Las Olas Investor Summary March 15, 2008; C53, Las Olas Announces SETENA Permit June 15, 2008, and C100, Las Olas Business Plan December 20, 2010.

November 2015, providing for the project to be sold now, rather than in May 2011. This leads to a valuation of US\$ 96,100,000. Naturally, had it not been for the Government's actions, the project would have continued to have been developed between May 2011 and November 2015, thereby increasing the value as at November 2015. Dr Abdala's valuation is therefore inherently very conservative and robust.

**(i) Valuation methodology**

451. As noted by Dr Abdala, in the case of real estate, the fair market value concept *“implies that willing buyers and sellers would have identified the highest and best uses of the land, contingent on the legal permits, the physical characteristics of the location and the underlying economic and market conditions.”*<sup>425</sup>

452. However, as at the date of valuation in May 2011, because of the early stage at which the Costa Rican agencies shut down the project, the project had not yet been completed and development was still ongoing. Of course, a project at such a stage of development still has a market value and can be sold to a hypothetical willing buyer. However, as Dr Abdala recognizes, in such a situation the hypothetical willing buyer will apply a discount to account for the fact that the project has not been completed and that there are, therefore, risks inherent in the project's pre-operational status.<sup>426</sup> It should be noted, however, that the Las Olas project was only pre-operational in the sense that the physical works were ongoing and that some of the various profit centres were not yet operational. The project was operational in the sense that it was already selling lots to purchasers, and such lot sales form the bedrock of the operation of the project.

453. This issue is addressed by a leading authority on the valuation of companies, Professor Damodaran, who proposes a two-stage approach to dealing with the risk of failure inherent in any pre-operational project.

454. The starting point of the valuation of a project such as the Las Olas project is that a discounted cash flow analysis, an assessment of anticipated income from the completed project, provides the best means of valuing the project assuming it has been completed and become fully operational (in other words the highest and best use

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<sup>425</sup> See Expert Report of Manuel Abdala, ¶ 50.

<sup>426</sup> See Expert Report of Manuel Abdala, ¶ 53.

of the land). Of course, any hypothetical buyer of such a project will have foremost in mind, when assessing value, the anticipated future income to be generated by the completed project.

455. To adjust this value for the fact that there is a risk inherent in any purchase of a pre-operational project, Professor Damodaran calculates a “distress value” which is equivalent to the value of the project if a sale was forced because the project failed and had to be abandoned as a going concern (also described by Dr Abdala as the “land value”). Professor Damodaran calculates the fair market value of the project by averaging the distress value and the going concern value, weighted by reference to the probability that the project would succeed.<sup>427</sup>
456. This is a realistic means of valuing a pre-operational project which accords with the reality of a sale situation: whilst any hypothetical purchaser would start an assessment of value with the anticipated income to be generated from the completed project, he or she would then reduce that value to take account of the risk that the project would fail and they would be forced to sell in a distressed situation. Of course, a hypothetical buyer would want to push the estimated value closer to the distress sale situation, whilst the hypothetical seller would want to push the estimate value closer to the going concern value. Ultimately, the hypothetical buyer would have to come to a view on the probability risk of failure, in order to assess what level, between those two values, he or she would be prepared to pay for the opportunity to purchase the project.
457. Dr Abdala adopts this valuation approach, which must be seen as a robust, realistic and effective means of arriving at the true fair market value of a pre-operational project.

**(ii) Value as a going concern**

458. In assessing the value of the project as a going concern (in other words, on the assumption that the project succeeded), Dr Abdala relies on the latest contemporaneous business plan, dated December 20, 2010 (five months before the Shutdown Notice), to determine what the finished project would look like, both in terms of the physical infrastructure and buildings, and the various profit centres.<sup>428</sup> He

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<sup>427</sup> See Expert Report of Manuel Abdala, ¶ 55.

<sup>428</sup> See Expert Report of Manuel Abdala, ¶ 83.

then derives a model to assess the economics of that project, which is provided in native Microsoft Excel format to the sake of transparency and verification.<sup>429</sup>

459. Dr Abdala has either verified assumptions by reference to contemporaneous third party documents, or carried out his own independent research, in order to arrive at robust and conservative assumptions for inclusion in the model. A number of key assumptions are taken from analysis of comparable sites and projects in Costa Rica, a standard method for assessing real estate and development projects.<sup>430</sup>
460. Dr Abdala splits the project profit centres into five main groups: development and sale of lots; construction and management of houses; construction and management of condominiums; sales and administration of time shares; and the construction and sale of a 114 room hotel. Three of these groups are further divided into separate elements. Having assessed the income to be generated from these various profit centres,<sup>431</sup> Dr Abdala applies a discount rate arrived at by calculating the Weighted Average Cost of Capital for the particular investment, accounting for sector risk, country risk and the balance between debt and equity.<sup>432</sup>
461. Using the above approach Dr Abdala calculates the value of the project as a going concern, as at May 2011, to be US\$ 93,100,000.<sup>433</sup>
462. As at November 2015, the value of the project as a going concern is US\$ 123,900,000.<sup>434</sup>

### (iii) Land value

463. As described by Dr Abdala, the Land Value seeks to ascertain the value of the land and assets if the project failed to become a going concern: “[t]he value that [the Claimants] would be able to obtain would essentially be the value of the property as partially developed land, with its environmental and construction permits in place as well as a portion of the lots already sold to third-parties, and with certain

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<sup>429</sup> See CLEX-003.

<sup>430</sup> See Expert Report of Manuel Abdala, ¶ 83.

<sup>431</sup> *Id.*, Sections IV.4.1.a to IV.4.1.e.

<sup>432</sup> *Id.*, ¶ 117 and Appendix C.

<sup>433</sup> *Id.*, ¶ 119, Table 6.

<sup>434</sup> *Id.*, ¶ 119, Table 7.

*infrastructure and urbanization works [i.e. infrastructure works] completed and others in progress.*<sup>435</sup>

464. In October 2009, an independent Costa Rican land appraiser, Mr Victor Calderon, conducted an appraisal of the property, which took account of the fact that the environmental viability had been granted and some urbanization work (on the first two easements) had been started.
465. Dr Abdala adjusts Mr Calderon's 2009 appraisal to account for: (i) the date of valuation being May 2011 rather than October 2009; (ii) the fact that Mr Calderon's appraisal assumes that all the urbanization works had been completed, which was not the case in May 2011; and (iii) the value of the Easement Section, which was not included in Mr Calderon's appraisal.<sup>436</sup>
466. This analysis results in a Land Value of US\$ 35,490,987 as at May 2011.<sup>437</sup>
467. As at November 2015, the Land Value is US\$ 39,441,702.<sup>438</sup>

**(iv) Probability of success**

468. As proposed by Professor Damodaran, Dr Abdala assesses the probability that the Las Olas project would succeed by reference to the average survival rate of new businesses, adjusted for the fact that this project was in the real estate sector.<sup>439</sup>
469. However, the survival rate of new businesses does not account for the fact that a number of businesses which close do so not because they have failed but because which close due to a planned exit strategy or a voluntary sale. On average, 34% of closures are voluntary and 66% can be attributed to failure.<sup>440</sup>
470. The overall probability of success of the Las Olas project is therefore calculated by Dr Abdala to be 68%.

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<sup>435</sup> *Id.*, ¶ 65.

<sup>436</sup> *Id.*, ¶¶ 122 – 124.

<sup>437</sup> *Id.*, ¶ 125, Table 8.

<sup>438</sup> *Id.*, ¶ 125, Table 9.

<sup>439</sup> *Id.*, ¶¶ 68 – 72.

<sup>440</sup> *Id.*, ¶ 74.

471. Dr Abdala applies this probability of success to weight the average between the going concern value and the Land Value. This gives a total valuation of US\$ 74,400,000 in May 2011,<sup>441</sup> and US\$ 96,700,000 in November 2015.

**(v) Residual value of the land**

472. A valuation of the Claimants' losses must take into account any residual value attached to the land in its current state (i.e. with the permits unable to be pursued as a result of the shutdown of project on the argument that wetlands exist on the project site). Dr Abdala has calculated the residual value of the land in this scenario as being US\$ 444,089 at May 2011 and US\$ 478,402 at November 2015.<sup>442</sup>

**(e) Conclusion on the Claimants' damages for the destruction of their investment**

473. Taking all of the above into account, Dr Abdala concludes that the damages attributable to Costa Rica's actions amount to US\$ 74,000,000 for a valuation date of May 11, 2011, and US\$ 96,200,000 for a valuation date of November 30, 2015.

474. As a measure of the reasonableness of Dr Abdala's valuation, reference can be had to the award in *Marion Unglaube v Republic of Costa Rica*.<sup>443</sup> This is intended merely as a check of reasonableness, not because the facts of the two cases are necessarily analogous, beyond the fact that the Unglaube case involved the valuation of beach-front property intended to be divided into residential lots. However, the value per square metre of the Las Olas project implied by Dr Abdala's valuation is US\$ 239/m<sup>2</sup> as a going concern, or US\$ 191/m<sup>2</sup> as of May 2011.<sup>444</sup> By comparison, the value per square metre implied by the award in the Unglaube case was US\$ 413/m<sup>2</sup>, almost 90% higher than Dr Abdala's valuation of the Las Olas project as a going concern, and 1.3 times the value of the damages calculated by Dr Abdala. In the circumstances, Dr Abdala's valuation must be seen for what it is: a robust and conservative valuation of the Las Olas project.

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<sup>441</sup> *Id.*, ¶134, Table 11.

<sup>442</sup> *Id.*, ¶ 128.

<sup>443</sup> Exhibit CLA105, *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20, Award May 16, 2012.

<sup>444</sup> See Expert Report of Manuel Abdala, ¶ 135.

475. In addition to the above damages, numerous purchasers invested money in the Las Olas project by purchasing lots. As Dr Abdala notes, due to the failure of the project the Claimants have been unable to provide the agreed upon infrastructure development, and the Claimants may be liable to reimburse the amounts collected for the sale of the lots, together with interest and penalties. Insofar as such payments are to be made by the Claimants, they must be included in the damage estimates as consequential losses.

**B. Moral damages due to Mr Aven**

**(a) Applicable law of moral damages**

**(i) Measure of damages**

476. International law allows compensation for moral damage. The text of Article 31 “Reparation” of the ILC Articles on State Responsibility is clear: “1. *The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.* 2. *Injury includes any damage, whether material or moral, caused by the internationally wrongful action of the State.*”<sup>445</sup>

477. The International Law Commission has emphasized in its Commentary to Article 36 precisely that: “[n]o less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation....”<sup>446</sup>

478. A progenitor of the fundamental precept underlining the Commission’s statement is located in the *Chorzów Factory* case, where the Permanent Court of International Justice affirmed: “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible,

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<sup>445</sup> Exhibit CLA44, International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts*, annexed to GA Resolution 56/83, December 12, 2001, Article 31, p. 91.

<sup>446</sup> Exhibit CLA44, International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts*, annexed to GA Resolution 56/83, December 12, 2001, Art. 36, p. 101, para. 16.



*payment of a sum corresponding to the value which a restitution in kind would bear...*<sup>447</sup>

479. The obligation to provide compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation dates back to the *Lusitania* cases, decided by the United-States-Germany Mixed Claims Commission in 1923. Such injuries, the Umpire stated, “[a]re very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated...”<sup>448</sup> As the *Lusitania* cases made clear, due to its nature moral damage is more frequently suffered by natural persons.
480. The principle that moral damages caused by an internationally wrongful act are capable of being compensated was recently confirmed by the International Court of Justice in the *Diallo* case, in which the court determined that the DRC’s wrongful conduct, including *inter alia* that Mr Diallo was made the object of unsubstantiated accusations and was wrongfully expelled from and denied access to a country where he had long-time resided and engaged in significant business activities, caused Mr Diallo “significant psychological suffering and loss of reputation.”<sup>449</sup>
481. In any event, the basic principle of State responsibility is that a State must make full reparation for any injury (whether material or moral) caused to another State or, as it is the case here, to a foreign investor. This principle has been applied by investor State dispute settlement tribunals in respect of claims by companies for damage done to a business’s reputation, credit, and goodwill.
482. An ICSID tribunal granted moral damages for the first time in the *Benvenuti & Bonfant v. Congo* case in which a dispute arose in respect of a joint venture between an Italian company and the government of Congo. On moral damages (“*préjudice moral*”), Bonfant claimed lost opportunity to work, loss of capital and credit “with suppliers and banks”, and intimidation and dispersal of managerial and technical personnel. The Tribunal directed a moral damages award for the “*certainly*

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<sup>447</sup> Exhibit CLA12, *Factory at Chorzów* (Germany v Poland) (1928), PCIJ (Ser A) No 17, at para. 125.

<sup>448</sup> Exhibit CLA69, *Opinion in the Lusitania Cases* (November 1, 1923), 7 UNRIAA 32 (2006), p. 40.

<sup>449</sup> Exhibit CLA107, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation owed by the DRC to the Republic of Guinea, ICJ, Judgment, June 19, 2012, para. 21.

*disturb[ing]*” measures to which the government of Congo subjected the firm and its personnel.<sup>450</sup>

483. In *Desert Line Projects LLC (“DLP”) v. The Republic of Yemen*, another ICSID tribunal awarded moral damages to the claimant. In addition to economic damages, the investor claimed moral damages on the grounds that its executives and officers had been subjected to harassment and threats by third-parties, as well as by the Yemeni military. The tribunal held: “*Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them.... [T]he respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature.*”<sup>451</sup> The *DLP v. Yemen* tribunal went on to indicate that moral damages in that case were “*substantial since it affected the physical health of the Claimant’s executives and the Claimant’s credit and reputation*”.<sup>452</sup>
484. More recently, in *Al-Kharafi & Sons Co. v. Libya*, a case concerning a breach of contract for the building of a seafront resort, an ad hoc tribunal awarded moral damages to the claimant company for injury to its reputation in the stock market, and in the business and construction markets of Kuwait and around the world. The tribunal recognized the claimant as “*highly qualified in the execution of huge investment projects and is renowned worldwide in this field*”<sup>453</sup> and concluded entitlement for compensation was based on “*damage to [the claimant’s] worldwide professional reputation after the Defendants’ abusive cancellation of the important project that they previously approved its established and investment, by the Plaintiff,*

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<sup>450</sup> Exhibit CLA25, *Benvenuti and Bonfant SRL v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award (August 15, 1980), paras. 4.95 and 4.96, 1 ICSID Reports 330, 360-361 (1993).

<sup>451</sup> Exhibit CLA85, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (February 6, 2008), paras. 289-290.

<sup>452</sup> *Id.* ¶ 290.

<sup>453</sup> Exhibit CLA110, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Ad Hoc Tribunal, Final Arbitral Award (22 March 2013), p. 369.

*for a period of 83 years, and for the execution of which the Plaintiff had negotiated and entered into contracts with international companies.”*<sup>454</sup>

485. Even in those cases where the tribunals rejected the claims for compensation for intangible loss, they did not question the possibility of recovering moral damages in investment arbitrations. Furthermore, according to one commentator: *“Insofar as exceptional circumstances in Desert Line are concerned, it seems that these circumstances are not part of the applicable legal standard and simply describe the gravity of the situation at hand.”*<sup>455</sup>
486. In truth, such *“exceptional circumstances”* have no impact on the principle of compensation of moral damage, but only on the forms or degrees of reparation due. That is to say, the question of gravity does not operate as a pre-condition for the award of moral damages. Thus, the amount of compensation should be proportionate to the seriousness of the offence committed by a State and its degree of responsibility.
487. Concerning the quantum, and as has been observed by commentators: *“[G]iven the subjective nature of valuation of most types of moral injury, arbitrators seem to enjoy almost an absolute discretion in the matter of determining the amount of moral damages.”*<sup>456</sup>

**(b) Moral damages due to Mr Aven arising from Costa Rica’s actions**

488. The quantification of the harm caused to an individual by actions taken against him or her in breach of international law is therefore a challenging exercise. However, it is typically measured by reference to the individual’s ability to generate present and future income, although this measure underestimates the severe emotional impact on an individual of measures taken by a host State for which there must be some form of compensation.

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<sup>454</sup> *Id.*

<sup>455</sup> Exhibit CLA89, Borzu Sabahi, *“Moral Damages in International Investment Law: Some Preliminary Thoughts in the Aftermath of Desert Line v. Yemen”*, in *Liber Amicorum: Thomas Wälde: Law Beyond Conventional Thought* (CMP Publishing 2009), p. 260.

<sup>456</sup> Exhibit CLA84, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of Comparative and International Law 2008), p. 312.

489. In this case, Mr Aven describes the emotional toll that Costa Rica's actions have placed on him and his family.<sup>457</sup> This is not a case where Government agencies have interfered merely with the investment itself. In fact, the appropriate response to a situation in which wetlands have allegedly been identified on a property which has received full construction permits would be to challenge, or cancel, the permits themselves. Instead of taking that approach, however, Costa Rica launched criminal proceedings against Mr Aven and Mr Damjanac, and sought, and obtained, an injunction from the criminal court hearing that case shutting down the project (subsequent to the Shutdown Notice).
490. Not content merely with charging Mr Aven and Mr Damjanac, the Costa Rican authorities then issued an INTERPOL Red Notice against Mr Aven and requested his extradition from the United States.
491. An INTERPOL Red Notice has ramifications far beyond the notice itself such that, even if a Red Notice is later withdrawn (as it has been in this case), the fact that one had been issued at all becomes a serious impediment to an individual carrying on business or even taking simple administrative steps such as opening a bank account.
492. Various worldwide databases pick up and record INTERPOL Red Notices, one example being WorldCheck.<sup>458</sup> Such databases are used by financial institutions, and other organizations, to perform background checks on individuals. Once a Red Notice has been issued, it is noted against the individual's name in these databases and that reference will not be removed simply because the Red Notice itself is withdrawn.
493. One concrete example of the impact of Costa Rica's actions on Mr Aven is the fact that he lost the opportunity to partner with Google and Facebook in relation to an iPhone and android application with which he is involved.<sup>459</sup>
494. As a result of Costa Rica's actions, therefore, Mr Aven has suffered considerably, both emotionally and financially, beyond the specific impact on the investment itself. He is suffering from post-traumatic stress disorder and severe migraines as a result of the criminal charges, and has had his freedom of movement curtailed.

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<sup>457</sup> See Witness Statement of David Aven, ¶ 248; see also Witness Statement of Carol Park, ¶¶ 20 and 21.

<sup>458</sup> <https://risk.thomsonreuters.com/products/world-check>

<sup>459</sup> See Witness Statement of David Aven, ¶ 244.

495. In the circumstances, Mr Aven submits a claim for moral damages in the sum of US\$ 5,000,000.

### C. Interest

496. The principle of full reparation also requires that the Claimants be awarded interest on any historical damages at a rate that fully compensates for the delay in receiving the fair market value of each of their investments. Accordingly, Article 38(1) of the Draft Articles on State Responsibility provides that “[i]nterest on any principal sum due . . . shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.”<sup>460</sup> Interest ought then to accrue from the date of the illegal act until full and final payment of the award.<sup>461</sup>

497. The payment of an appropriate rate of interest thus keeps Claimants whole because the award must reflect the forgone value of not having access to the funds represented in the damages due, for the period between State responsibility and actual payment of a damages award.

498. As Dr Abdala explains, in order to provide full compensation, interest should be calculated at the project WACC, since this is the proper measure of the opportunity costs of their investments.<sup>462</sup> In this regard, the Claimants note that Article 10.7 provides that the rate of interest to be applied to a damages award is one that would be “commercially reasonable” in the circumstances. Dr Abdala provides a calculation of the interest applicable to bring the project value as at May 2011 up to the end of November 2015, which amounts to US\$ 29,500,000.<sup>463</sup> Interest will be updated as the arbitration progresses.

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<sup>460</sup> CLA44, Draft Articles, Art. 38(1). See, also CLA79, LG&E, ¶ 55 (“[I]nterest is part of the ‘full’ reparation to which the Claimants are entitled to assure that they are made whole.”); CLA78, Siemens, ¶ 396 (“[I]n determining the applicable interest rate, the guiding principle is to ensure ‘full reparation for the injury suffered as a result of the internationally wrongful act’”); or CLA48, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, April 12, 2002, ¶ 175.

<sup>461</sup> *Id.*, Art. 38(2) (“Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”); CLA79, LG&E, ¶ 55 (explaining that “interest recognizes the fact that, between the date of the illegal act and the date of actual payment, the injured party cannot use or invest the amounts of money due”). See also CLA48, *Middle East Cement Shipping*, ¶¶ 174-175; CLA38, *SPP v. Egypt*, ¶ 235 (“The prevailing jurisprudence in international arbitrations is to the effect that interest runs until the date of effective payment, and this conclusion is supported by doctrinal opinion.”).

<sup>462</sup> See Expert Report of Manuel Abdala, ¶¶ 132 and 133.

<sup>463</sup> *Id.*, ¶ 134, Table 11.

499. The Claimants therefore request an award of both pre-award and post-award interest at the calculated WACC for the project.

## **V. CONCLUSION**

500. The Claimants and those with whom they worked had high hopes for the Las Olas project. They saw an opportunity for developing something that would be of economic benefit for them and also for the people of the region and for Costa Rica generally. Had it not been for the program of attacks launched by elements within Costa Rica's State apparatus, Las Olas would today be a complex providing holiday and retirement homes for many, and through them, employment opportunities and improved social infrastructure for people in the area. The project was stymied by the determined, targeted interference of a few, some of them motivated (as the record confirms) by corruption. The Respondent has had the chance to correct the excesses of those few, but it has passed up that chance. Worse, it has chosen to aggravate the dispute and compounded the situation by bringing baseless, abusive criminal proceedings against the two people most actively involved with the development of Las Olas, namely David Aven and Jovan Damjanac.

501. The Claimants would have much preferred to have seen their project realized, as they had planned. They committed their money, their time and their efforts toward that end. Their hope was always that the development of Las Olas would be successful. But having been defeated in that objective, by the illegitimate acts of those acting for the Respondent, they were left with no choice but to hold the Respondent to account for the losses they have suffered. In this arbitration, the Claimants have tendered substantial evidence, which more than sufficiently makes their case as to the culpability of the Respondent and the damage they have suffered as a result. They will, in due course, answer any rebuttal arguments the Respondent seeks to make, and they stand ready to answer any requests or queries the Tribunal may have. Until then, they summarize their claims as set out below.

The Claimants respectfully seek an Award for the following:

- (i) A DECLARATION that the Tribunal has jurisdiction over the claims presented by the Claimants;
- (ii) A DECLARATION that the Respondent, for the reasons set out herein or any of them, breached Article 10.5 of the DR-CAFTA Treaty;
- (iii) A DECLARATION that the Respondent, for the reasons set out herein or any of them, breached Article 10.7 of the DR-CAFTA Treaty;
- (iv) A DECLARATION that the Respondent, by reason of any breach or breaches of Articles 10.5 and 10.7 of the DR-CAFTA Treaty found by the Tribunal, damaged the Claimants and caused them to suffer loss;
- (v) AN ORDER that the Respondent pay to the Claimants damages in the sum of US\$ 74,000,000, plus interest at the WACC calculated by Dr Abdala up to the date of the award to make a total of US\$ 103,500,000 at today's date or, in the alternative, AN ORDER that the Respondent pay to the Claimants damages in the sum of US\$ 96,200,000, or such other sum as the Arbitral Tribunal may find owing in respect of the value of the Las Olas project;
- (vi) 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 Arbitral Tribunal may find owing;
- (vii) 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;
- (viii) AN ORDER that the Respondent pay interest on all and any 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;

- (ix) 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 Arbitral Tribunal, ICSID, legal counsel, expert witnesses and consultants; and
- (x) Such other relief as the Tribunal may consider to be appropriate.

Respectfully Submitted on this 27<sup>th</sup> day of November 2015



George Burn  
**Vinson & Elkins R.L.L.P.**



Louise Woods



Alexander Slade

Todd Weiler, SJD



## ANNEX A

### **Project Lands resulting from 9 October 2007 and later sub-divisions of land at Las Olas**

- i. Property No. 156477-000, Survey Map No. P-1244758-2007; this property is currently owned by Las Olas Lapas Uno, SRL, controlled by the Claimants.
- ii. Property No. 156478-000, Survey Map No. P-1244759-2007; this property is currently owned by Iguanas de Esterillos Oeste, S.A., and is controlled by the Claimants.
- iii. Property No. 156479-000, Survey Map No. P-123382-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No.162394-000, Survey Map No. P-1823619-2015
  - b. Property No.162395-000, Survey Map No. P-1212061-2008
  - c. Property No.162396-000, Survey Map No. P-1216935-2008
  - d. Property No.162397-000, Survey Map No. P-1212060-2008
  - e. Property No. 162398-000, Survey Map No. P-1219947-2008
  - f. Property No. 162399-000, Survey Map No. P-1212059-2008
  - g. Property No. 162400-000, Survey Map No. P-1212058-2008
- iv. Property No. 156480-000, Survey Map No. P-1233381-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 159930-000, Survey Map No. P-1212802-2008
  - b. Property No. 159931-000, Survey Map No. P-1212822-2008
  - c. Property No. 159932-000, Survey Map No. P-1212170-2008
  - d. Property No. 159933-000, Survey Map No. P-1212825-2008
  - e. Property No. 159934-000, Survey Map No. P-1212829-2008
  - f. Property No. 159935-000, Survey Map No. P-1212832-2008
  - g. Property No. 159936-000, Survey Map No. P-1212835-2008
  - h. Property No. 159937-000, Survey Map No. P-1212840-2008
- v. Property No. 156481-000, Survey Map No. P-1233383-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 162480-000, Survey Map No. P-1212172-2008
  - b. Property No. 162481-000, Survey Map No. P-1212171-2008
  - c. Property No. 162482-000, Survey Map No. P-1212317-2008
  - d. Property No. 162483-000, Survey Map No. P-1212316-2008
  - e. Property No. 162484-000, Survey Map No. P-1212421-2008
  - f. Property No. 162485-000, Survey Map No. P-1212422-2008
  - g. Property No. 162486-000, Survey Map No. P-1212424-2008
  - h. Property No. 162487-000, Survey Map No. P-1212425-2008
- vi. Property No.156482-000, Survey Map No. P-1233420-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 159552-000, Survey Map No. P-1522416-2011
  - b. Property No. 159553-000, Survey Map No. P-1212842-2008
  - c. Property No. 159554-000, Survey Map No. P-1212845-2008
  - d. Property No. 159555-000, Survey Map No. P-1212848-2008
  - e. Property No. 159556-000, Survey Map No. P-1213911-2008

- f. Property No. 159557-000, Survey Map No. P-1213913-2008
- g. Property No. 159558-000, Survey Map No. P-1212850-2008
- h. Property No. 159559-000, Survey Map No. P-1212855-2008
- vii. Property No. 156483-000, Survey Map No. P-1223330-2007; this property is owned by Cerros de Esterillos del Oeste, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 159795-000, Survey Map No. P-1212782-2008
  - b. Property No. 159796-000, Survey Map No. P-1212405-2008
  - c. Property No. 159797-000, Survey Map No. P-1219592-2008
  - d. Property No. 159798-000, Survey Map No. P-1212797-2008
  - e. Property No. 159799-000, Survey Map No. P-1219594-2008
  - f. Property No. 159800-000, Survey Map No. P-1219491-2008
  - g. Property No. 159801-000, Survey Map No. P-1219591-2008
  - h. Property No. 159802-000, Survey Map No. P-1219490-2008
- viii. Property No. 156484-000, Survey Map No. P-1223337-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 159607-000, Survey Map No. P-1216875-2008
  - b. Property No. 159608-000, Survey Map No. P-1212040-2008
  - c. Property No. 159609-000, Survey Map No. P-1216876-2008
  - d. Property No. 159610-000, Survey Map No. P-1212041-2008
  - e. Property No. 159611-000, Survey Map No. P-1216877-2008
  - f. Property No. 159612-000, Survey Map No. P-1216878-2008
- ix. Property No. 156485-000, Survey Map No. P-1223334-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 159847-000, Survey Map No. P-1212783-2008
  - b. Property No. 159848-000, Survey Map No. P-1212784-2008
  - c. Property No. 159849-000, Survey Map No. P-1212785-2008
  - d. Property No. 159850-000, Survey Map No. P-1212798-2008
  - e. Property No. 159851-000, Survey Map No. P-1218169-2008
  - f. Property No. 159852-000, Survey Map No. P-1212800-2008
  - g. Property No. 159853-000, Survey Map No. P-1218170-2008
  - h. Property No. 159854-000, Survey Map No. P-1218172-2008
- x. Property No. 156486-000, Survey Map No. P-1223333-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 158408-000, Survey Map No. P-1210563-2008
  - b. Property No. 158409-000, Survey Map No. P-1212994-2008
  - c. Property No. 158410-000, Survey Map No. P-1212995-2008
  - d. Property No. 158411-000, Survey Map No. P-1212996-2008
  - e. Property No. 158412-000, Survey Map No. P-1210556-2008
  - f. Property No. 158413-000, Survey Map No. P-1210558-2008
  - g. Property No. 158414-000, Survey Map No. P-1211573-2008
  - h. Property No. 158415-000, Survey Map No. P-1211574-2008
- xi. Property No. 156487-000, Survey Map No. P-1223331-2007; this property is owned by Mis Mejores Años Vividos, S.A., controlled by the Claimants. It was later subdivided into the following properties:
  - a. Property No. 158360-000, Survey Map No. P-1209984-2008
  - b. Property No. 158361-000, Survey Map No. P-1209985-2008

- c. Property No. 158362-000, Survey Map No. P-1209987-2008
- d. Property No. 158363-000, Survey Map No. P-1209988-2008
- e. Property No. 158364-000, Survey Map No. P-1214958-2008
- f. Property No. 158365-000, Survey Map No. P-1214959-2008
- g. Property No. 158366-000, Survey Map No. P-1214960-2008
- h. Property No. 158367-000, Survey Map No. P-1209983-2008
- xii. Property No.156488-000, Survey Map No. P-1244756-2007; this property is owned by 3101479152, S.A., and, it is not controlled by the Claimants.
- xiii. Property No. 156489-000, Survey Map No. P-1244755-2007; this property is owned by 3-101-567250, S.A., and, it is not controlled by the Claimants.
- xiv. Property No.156490-000, Survey Map No. P-1244757-2007; this property is owned by Sand Group Investments, S.A., and, it is not controlled by the Claimants.
- xv. Property No.156491-000, Survey Map No. P-1244760-2007; this property is owned by Bosques Lindos de Esterillos, S.A., and, is controlled by the Claimants.