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

Between:

DAVID R. AVEN, SAMUEL D. AVEN, CAROLYN J. PARK, ERIC A. PARK, JEFFREY S. SHIOLENO, DAVID A. JANNEY AND ROGER RAGUSO

(United States of America) (Claimants)

v

THE REPUBLIC OF COSTA RICA (Respondent)

CLAIMANTS' REPLY MEMORIAL

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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 Reply 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 Reply Memorial is submitted further to the Claimants' Notice of Intent to Submit a Claim to Arbitration dated September 17, 2013 (the "**Notice of Intent**"), their Notice of Arbitration dated January 24, 2014 (the "**Notice**") and their Memorial dated November 27, 2015 (the "**Memorial**").

3. In support of their claim, the Claimants rely on the witness statements of:

   (a) Mr. David Richard Aven ("**Aven 2**");
   (b) Mr. Jovan Dushan Damjanac ("**Damjanac 2**");
   (c) Mr. Manuel Enrique Ventura Rodríguez ("**Ventura 2**");
   (d) Mr. Nestor Morera Víquez ("**Morera 2**");
   (e) Mr. Esteban Bermudez Rodriguez ("**Bermudez 2**");
   (f) Mr. Minor Arce Solano ("**Arce 2**");
   (g) Mr. Mauricio Martin Mussio Vargas ("**Mussio 1**")
   (h) Mr. David A. Janney ("**Janney 2**"); and
   (i) Mr. Ohryn Valecourt ("**Valecourt 1**").

4. The Claimants also rely on the expert statements of:

   (j) Mr. Gerardo Barboza Jiménez ("**Barboza 2**");
   (k) Dr Ian C. Baillie (the "**Baillie Report**");
   (l) Dr Ricardo N. Calvo and Dr Robert Langstroth of Environmental Resources Management (the "**Calvo and Langstroth Report**");
   (m) Mr Luis Ortiz (the "**Ortiz Opinion**"); and
   (n) Dr Manuel Abdala of Compass Lexecon ("**Abdala 2**").

5. The Claimants also rely on the exhibits and legal authorities listed in the hyperlinked indexes attached hereto.

6. The subject-matter of this case is a real estate development project planned and started on Costa Rica's Pacific coast by a group of individual investors from the U.S.A. Much as the Respondent would wish it otherwise, this is not a story of impetuous or avaricious foreign investors prepared to skirt or subvert any rules that stood in the way of extracting maximum profits from the land, regardless of the environmental consequences. Rather, it is the story of a small group of individual investors who fell in love with the Esterillos Oeste region and were accordingly

committed to developing a project the right way. They were only too well aware that one of the biggest benefits of developing their investment in a manner consistent with the highest standards of quality and sustainability would be that the resulting project would attract their target clientele: eco-aware, upper middle class North Americans.

7. For all of the heat and light in the Respondent's Counter-Memorial, it is beyond dispute that the Claimants obtained all of the relevant permits to undertake this project from the various competent agencies in Costa Rica and that these permits were withdrawn partway through the project's construction process. The Claimants were anything but the reckless fools described in the Counter-Memorial: they were careful to make sure everything was in place for their project, and being sophisticated and prudent, they made sure to engage the right experts in order to develop the project.

8. In its desperation to avoid liability for the claims presented in this arbitration, the Respondent essentially contends that it was entitled to withdraw the permits on the basis that (a) the Las Olas site is environmentally important and sensitive due to the presence of wetlands and forests and (b) the Claimants failed to comply with their obligations under Costa Rican law. On analysis, the whole of the Respondent's case fails, and fails clearly. The Claimants have looked at all of the points raised by the Respondent, and can say that not one of those points survives a proper testing.

9. The substantial and authoritative rebuttal evidence filed with this Reply Memorial shows that the Las Olas site, whilst perfect for the type of residential development the Claimants planned and the Respondent originally permitted, has (and at the time of the work, had) no special features denoting an environmentally sensitive site. The expert evidence of Dr Calvo, Dr Langstroth, Dr Baillie and Mr Barboza, corroborated by the contemporaneous work of the two specialist Costa Rican agencies, SETENA and INTA, and the work of Mr Minor Arce, is overwhelming in proving that this site is as the Claimants described it: traditional cow pasture land, surrounded by properties that had already been developed for residential and tourism purposes. The development of this land represented no threat whatsoever to the environment of Costa Rica. The analysis of the Respondent's expert, Mr Erwin, is shown to be misconceived, incomplete and superficial. The Claimants set out in this Reply Memorial a comprehensive rebuttal, rooted in the evidence, of the Respondent's case on the environmental qualities of the Las Olas site, proving that this site was amenable to development in accordance with the Claimants' plans and the permits issued to them, without there being any threat to the environment. The plans of the

Claimants in this regard were similar to the plans of other developers in the locality, there being numerous residential developments in the areas adjacent to Las Olas.

10. As for compliance with Costa Rican law, the Tribunal will have noted that the Respondent invested considerable efforts in setting out a case based on allegations that the Claimants failed to comply with their obligations, with the effect that they cannot, in the Respondent's contention, avail themselves of protection under the DR-CAFTA. This arrangement of its defence is difficult for the Respondent to maintain as a matter of international law, a point addressed in Section II of this Reply Memorial.

11. As to the factual matters relating to compliance with local law, the Claimants have reviewed and considered carefully with local law experts the issues raised by the Respondent. The result of that review is set out in this Reply Memorial, and in the Opinion of Mr Luis Ortiz. In short, the Respondent's case on compliance fails in its entirety.

12. The Claimants took care at every stage to make sure they obtained all the required permits, and complied with all the obligations imposed on them. To do this, they spent large sums of money on engaging the best technical and legal experts available. The Respondent makes wide-ranging assertions of illegal behaviour against the Claimants, twisting and exaggerating Costa Rican law along the way. As the Tribunal will see from the evidence tendered, the extravagant assertions set out in the Counter Memorial are not borne out, and it is clear that the Claimants did everything they ought to have done.

13. The reward for their efforts was the ultimate destruction of their project, followed up with the aggressive and unjustified attack on Mr David Aven and Mr Jovan Damjanac through court proceedings. In Mr Aven's case, the Respondent went still further, with the issuance of an INTERPOL Red Notice, classifying him to the world at large as a fugitive from justice, when he was anything but a fugitive. These attacks had, and continue to have, a significant impact on Mr Aven and Mr Damjanac. Given the evidence before the Tribunal, the behavior of the authorities, and in particular the lead prosecutor, Mr Martinez, was clearly abusive, in that there was never evidence to bear out even the making of charges, let alone conviction, of either man.

14. The reference of Mr Aven's name to INTERPOL was especially egregious. Not only did the Respondent lack evidence against Mr Aven, the offense for which Mr Aven

was (entirely wrongly and without evidence) charged was relatively minor in nature, and was one for which Mr Aven (not having a criminal record) would not have been sentenced to serve a prison sentence in any event. The Respondent must realise that once a person's name appears on the INTERPOL Red List, that information is in the public domain and is picked up routinely by numerous third-party services, ensuring that the named individual's reputation is forever tainted. It seems that the Respondent's officials, despite the underlying circumstances, either wished Mr Aven to suffer such harm or proceeded unthinkingly and without any care as to those consequences. It was a classic case of the abuse of the INTERPOL system by a State.

15. The Respondent's abusive conduct is well-demonstrated by one of the items the Respondent seeks to use to make a case against the Claimants, namely the allegedly forged SETENA letter of March 27, 2008. The Tribunal will recall that this letter is alleged to have been forged for the benefit of the Claimants in relation to the environmental qualities of the Las Olas site. The Claimants have consistently said they do not know anything about the production of the letter and at no point have they relied upon it. Charges were brought by the Respondent's prosecutor, Mr Martinez, against Mr Aven for forgery but were belatedly abandoned; Mr Martinez admits in these proceedings, as he did in Costa Rica, that there was no evidence against Mr Aven to make out the charges and belatedly claims that the evidence points towards Mr Edgardo Madrigal Mora, a partner at the architect firm Mussio Madrigal, which begs the question as to why charges were brought in the first place. Despite the abandonment of those charges, the Respondent continues to suggest that someone in the Claimants' camp forged the document.

16. However, it has become clear, from an interrogation of the Respondent's own records, that the letter in question was put on the public records by Mr Steven Bucelato, the person who has been enthusiastically attacking the Claimants and their project for years. This is confirmed by a handwritten note found on the copy of the letter on the SETENA file made the day after the letter was dated. This information (which Mr Martinez must or should have known) means that it was impossible for the Claimants or their agents to have done what they are accused of. It confirms that the Claimants have been right all along on this issue, and all of the Respondent's innuendo about them having forged the document falls away. This is merely the most graphic demonstration of the vacuity of the Respondent's arguments against the Claimants – in this Reply Memorial, it is shown that the Claimants did everything properly and in accordance with law.

17. So, why would the Respondent, having issued permits to the Claimants for the work to be done, change tack so radically? A complete answer to that question will likely never be available, but at least some of the origins of the failure of the Las Olas project would appear to lie in the refusal of the Claimants to pay bribes to the likes of Mr Christian Bogantes, and in the self-serving desire of Mr Bucelato to wreck the project in any way he could. In the face of evidence to the contrary, figures such as Mr Martinez and Ms Vargas adopted an unthinking and aggressive position, refusing to consider that the environmental quality of the site had already been examined by SETENA, and that agency, specialist in the field, had already cleared the project for development. There was no real evidence to suggest that the assessments of SETENA (and later INTA) were wrong. In any event, the Respondent failed to follow mandatory procedures with respect to the lawful suspension of the project.

18. The Tribunal will have noted that the Respondent made a counterclaim in its Counter-Memorial. There is no legal basis for such a counterclaim, the law being addressed fully in this Reply Memorial. In any event, there is no factual basis for that counterclaim, which in reality is nothing more than a cynical, tactical ruse by the Respondent. It is an attempt to distract the Tribunal's attention from the real issues in the case and build an artificial image of the Claimants as wrongdoers.

19. The Respondent put forward a similarly groundless and cynical jurisdictional argument, to the effect that one of the Claimants, Mr Aven, was not really a U.S. national for the purposes of a DR-CAFTA claim. The argument is risible, being based on Mr Aven's possession of a second passport and ignores both international law on the topic and the overwhelming evidence that Mr Aven is very much a U.S. national, a fact well known to the Costa Rican authorities from the time of the project's inception.

20. On damages, the evidence tendered by the Respondent's expert, Mr Hart, does little to change matters. Dr Abdala has taken into account new evidence, and has adjusted his estimate of damages accordingly, but the changes are few in number and limited in effect.

21. The Claimants now present their arguments rebutting the case in the Counter-Memorial.

22. In **Section II**, the Claimants set out their rebuttal of the Respondent's position on the applicable law, including as to the question of Mr Aven's nationality, sources of law

on issues of jurisdiction and admissibility, issues relating to investment and the environment, the "*precautionary principle*" and the so-called "*principle of preventative action*", issues relating to Articles 10.5 and 10.7 of the DR-CAFTA.

23. In **Section III**, the Claimants rebut the factual position laid out in the Respondent's Counter Memorial. This includes on the exaggeration of the environmental sensitivity of the Las Olas site, the applicable regulatory regime (and how it is misrepresented by the Respondent in certain respects), the Claimants' compliance with the regime and the legality of their investment.

24. In **Section IV**, the Claimants apply the law to the facts and set out the position on damages in light of Dr Abdala's second report.

25. In **Section V**, the Claimants address the Respondent's so-called counterclaim.

26. And in **Section VI**, the Claimants set out their conclusion and their updated prayer for relief.

II. APPLICABLE LAW

A. David Aven is a National of the United States of America

(1) *"Investor of a Party"*

27. At paragraphs 259 to 261 of its Counter Memorial, the Respondent admits that, through its inclusion of the expression, "*dominant and effective nationality*," in the Article 10.28 definition of "*investor of a Party*", the DR-CAFTA Parties intended to incorporate by reference the applicable standards of customary international law for the treatment of multiple nationality in diplomatic protection cases, as reflected in the *Nottebohm Case (Liechtenstein* v. *Guatemala).*[1]

28. Notwithstanding its having made the admission however, the Respondent does not then provide an elucidation of the applicable law, i.e. the customary international law rules governing allegations of multiple nationality in diplomatic protection practice. It attempts to reply solely upon the reasons for decision found in an ICSID case, *Champion Trading et al* v. *Egypt*, instead. No attempt is made to address the fact that dispute settlement under the ICSID Convention is not merely *lex specialis* in respect of the customary international law treatment of claimant nationality; but is actually categorically inconsistent. The *lex specialis* character of ICSID arbitration is established under Article 25(2)(a) of the ICSID Convention and Article 29 of the ICSID Arbitration Rules, and its categorical inconsistency with the customary international law of diplomatic protection is established under Article 27 of the ICSID Convention and Article 33 of the ICSID Arbitration Rules.

29. Nevertheless, the Respondent chose to rely on the reasons for decision it found in the *Champion Trading v. Egypt award*, presumably because that tribunal referenced the *Nottebohm Case* in its award. What the Respondent apparently failed to recognise is that the *Champion Trading* tribunal categorically rejected the claimants' attempt, in that case, to rely upon *Nottebohm* in demonstrating how the three individual claimants' dominant and effective nationality was American, not Egyptian.[2] Indeed, had the *Champion Trading* tribunal been prepared to ignore the prohibitions contained in Articles 25(2)(a) and 33 of the *ICSID Convention*, it would undoubtedly have ruled in their favour. This is because the three individual claimants had each

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1 CLA132, *Nottebohm Case (Liechtenstein v Guatemala)*, Judgment, 1955 ICJ Reports 4, 6 April 1955, at 24.

2 RLA-10, *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, at 16.

been born and lived his entire life in Connecticut. The only connection any of the claimants had to Egypt had been the investment made on his behalf, by his parents, when he was a minor.

30. In rejecting the customary international law approach, the *Champion Trading* tribunal instead fashioned its own legal test, which focused primarily on whether the claimants' father, who was not a party to the dispute, had elected to, or acquiesced in, his nationality being listed as Egyptian in business documents related to the investment, and whether he had used an Egyptian passport during his travels to the country to oversee the investment. While the Champion Trading Tribunal likely erred in adopting this approach, as opposed to merely applying Egyptian nationality law instead, for present purposes it should be enough to observe that ICSID nationality "jurisprudence" has nothing to offer as regards the customary international law rules governing nationality issues in the field of diplomatic protection.

31. The likely reason as to why the Respondent refrained from pursuing the appropriate line of inquiry, to assist the Tribunal in applying the customary international law standard for diplomatic protection in the instant case, is that doing so would extinguish its defence.

32. The International Law Commission has given serious consideration to the treatment of nationality in the field of diplomatic protection and, as such, its Draft Articles on Diplomatic Protection is arguably the only reasonable source from which to commence one's analysis in a nationality dispute under DR-CAFTA Article 10.28. In this regard, Article 6 of the ILC's Draft Articles on Diplomatic Protection provides: "*[a]ny State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.*" [3]

33. In other words, it was the consensus opinion of a committee of experts on customary international law – who were appointed by their respective States to serve on the ILC – that the respondent in a diplomatic protection case has no legal basis for contesting the jurisdiction of State A to espouse a claim against it on the ground State B may also possess its own right of espousal as well. This, of course, is the very scenario raised by the Respondent in the instant case.

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[3] CLA141, United Nations, *International Law Commission's Draft Articles on Diplomatic Protection*, 2006 available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf, accessed 1 August 2016, at 41.

34. The frivolous character of the Respondent's objection is further revealed in the ILC's commentary on Article 6:

> *Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions condition. In the Salem case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:*
>
> > *"the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the and codification endeavours, the weight of authority does not require such a case by referring to the nationality of the other power."*
>
> *This rule has been followed in other cases and has more recently been upheld by the Iran-United States Claim Tribunal. The decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.*[4]
> [Footnotes omitted]

35. The language of Article 10.28 is unambiguous on this issue. The reference to customary international law found in its definition of "investor of a Party" refers explicitly, and exclusively, to allegations of "*dual nationality*," where nationality A is that of the titular claimant State and nationality B is that of the respondent State. In choosing this language the DR-CAFTA Parties were obviously concerned about ensuring that standing to pursue claims under Chapter 10 would be limited to 'real' foreign investors, i.e. those truly in need of the protections promised in Chapter 10.[5]

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[4] *Id*. at 42-43.

[5] Logic dictates that specific language concerning dual nationality was required in order to eliminate the potential for different results accruing from identical claims being brought by dual nationals, simply because they made a different election under DR-CAFTA Article 10.16. Paragraph (3) of this provision vests claimants with the choice of arbitral rules that could allow such dual nationals to achieve standing to pursue claims under Chapter 10. Whereas the *ICSID Convention* prohibits claims by dual nationals, the UNCITRAL Arbitration Rules are silent on the subject. Absent a countervailing DR-CAFTA provision, dual nationals could accordingly obtain standing to pursue claims under the treaty for the breach of promises that were really only intended for the benefit of foreigners, not merely putative "foreigners" who actually enjoy the same degree of personal links to the host State that any other of its nationals enjoy.
The same language also serves to rationalize the approach to dual nationality applicable under the DR-CAFTA in respect of claims filed under the *ICSID Convention* and the *ICSID Additional Facility Rules*. The ICSID prohibition on dual nationality does not contemplate a "predominate

For example, the Article 10.28 reference to customary international law rules governing nationality for diplomatic protection would preclude an investor possessing the nationality of Party A from pursuing a claim against Party B in the event that his dominant and effective nationality was that of Party B.

36. For the same reason that the diplomatic espousal of such a claim would be precluded under customary international law, it would be precluded under the DR-CAFTA as well. The Article 10.28 reference to custom obviously demonstrates that the DR-CAFTA Parties were in agreement that merely putative foreign investors ought not to enjoy the protections offered under Chapter 10. Those protections were promised for the benefit of foreign investors, who have not had the benefit of the breadth and depth of experience with the local business and regulatory culture enjoyed by nationals of the host State. Proximity and experience typically provides local investors with intimate knowledge of the operation of legal and administrative regimes unavailable to their foreign counterparts. Offering foreign investors from other DR-CAFTA Parties the substantive protections contained within Chapter 10 encourages investment by remedying this otherwise chronic problem of transnational business.

37. It is also manifest, in this regard, that the customary international law reference found in Article 10.28 simply does not support the use for which the Respondent recommends it, i.e. a scenario in which the would-be "*investor of a Party*" possesses the nationality of a third State, in addition to the nationality of a DR-CAFTA Party *cum* claimant State – but ***not*** the nationality of the host State. Simply put, the dominant and effective (or "predominant") nationality standard found in the customary international law on diplomatic protection finds no application within the context of the instant case. Under applicable rules of customary international law, a host State cannot block claims espoused by a claimant State on the allegation that a third State would be better placed to make the claim instead.

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nationality" analysis, as does the customary international law standard for dual nationals seeking diplomatic protection. Indeed, Article 27 of the *ICSID Convention* precludes the exercise of diplomatic protection for claims submitted to arbitration under its auspices, which is why the DR-CAFTA Parties' inclusion, by reference, of the customary rules ensure conformity of treatment for dual nationals, without punishing legitimate investors deserving of protection in spite of the fact that they might possess the legal right to nationality of the host State, but none of the close ties that would put them on par with other resident nationals of that country.

(2) Status of Other Claimants' Claims in Relation to the Respondent's Treatment of David Aven

38. The other Investors have brought their claims both on their own behalf and on behalf of investment Enterprises that they individually and/or collectively own or control. As such, the Respondent is liable for any governmental treatment of David Aven, acting in his capacity as representative or agent of any of the Investors or any of the Enterprises in which they held a cognizable interest under the DR-CAFTA, regardless of Mr Aven's nationality.

B. The DR-CAFTA Is the Sole, Authoritative Source of Jurisdiction/Admissibility

(1) *"Covered Investments"*

39. In a transparent attempt to shift the strategic burden of proof, the Respondent has attempted to transform an unavailing defence on the merits into a credulous objection as to the Tribunal's jurisdiction. In support of this brazen act of sophistry, it misconstrues relevant doctrine concerning the so-called "*legality*" of foreign investments, at paragraphs 426 to 432 of its Counter Memorial. None of the awards or treaties cited supports the contention that alleged non-compliance with alleged municipal norms allegedly applicable within the context of a land rights permitting process can divest a DR-CAFTA tribunal of the jurisdiction to hear Chapter 10 claims concerning the treatment of a covered investment.

40. Article 10.1(c) provides that Chapter 10 "*applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; [and] (b) covered investments…*" Examples of investments not covered by Chapter 10 include: compulsory licences referred to in Article 10.7(5) and accompanying notes 4 and 5; certain forms of debt described in note 8; particular types of licence or permitting instruments described in note 10; and public debt as described in Annex 10-A. The only other examples of investments not "covered" within the meaning of Article 10.1(c) have been explicitly specified by Costa Rica in its Annex I Schedule, its Annex II Schedule, and paragraph 6 of its Annex III Schedule, each of which contains closed lists of reservations taken for measures that would otherwise contravene the Respondent's general obligation to accord rights of establishment to the investors of other DR-CAFTA Parties.[6]

[6] *See*, for example, Costa Rica's reservation, taken against Articles 10.3-10.4 and 11.2-11.4, which permits it to maintain measures that restrict the establishment of investments in the land and water

41. The Respondent does not even mention Article 10.1 in its pleadings, even though it actually prescribes the Tribunal's jurisdiction *rationae materiae*. Instead, it cites awards and jurisdictional decisions that are irrelevant in the context of the instant case. The examples the Respondent provides concern two types of case, neither of which is applicable to the instant matter: (1) treaty provisions under which the host State enjoys a general discretion to refuse or impose restrictions upon the establishment of investments; and (2) cases in which the claimant has allegedly committed a *de facto* abuse of rights, in order to obtain standing under a treaty in relation to an extant investment dispute. Moreover, even a cursory review of the cases cited indicates how they are not analogous to the instant case.

42. The Respondent begins with a citation to *Inceysa v. El Salvador*,[7] a bilateral investment treaty case in which the governing law included the law of the host State – clearly, arbitrations conducted under DR-CAFTA Chapter 10 do not feature the host State's law as governing law. Further, the *Inceysa* case concerned a pre-establishment tendering process to obtain a concession – not a permitting process conducted after a concession had already been obtained (and therefore an investment already established). In addition, the *Inceysa* Tribunal's findings reveal a starkly different fact pattern, which even involved deliberate concealment of the true investors in interest.[8] Finally, *Inceysa* was a case in which the host State had reserved discretion to admit investments through the inclusion of a "*in accordance with local law*" provision in the treaty at issue. No such gateway provision appears in the DR-CAFTA, or, indeed, in any other treaty based upon the US Model BIT.

43. Next, the Respondent cited *Plama* v. *Bulgaria*, a decision that turned upon the fact that the putative claimant-investor had concealed the identity (including the nationality) of the actual investors in interest.[9] Had this information not been concealed, the investment would not have been permitted. Because establishment had been procured by fraud, the tribunal regarded the claims as inadmissible under the governing law of the Energy Charter Treaty, which included "*applicable rules of*

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transportation businesses, both by number of available concessions and as to enterprises established under the law of Costa Rica that are at least 60% owned by "Central American nationals." A similar reservation is taken for investment in air transportation services (no more than 49% of contributed capital can be foreign, and effective control and management must be maintained by Costa Rican nationals). Costa Rica also took a general reservation against its MFN obligation to permit the establishment of investments in the aviation, fisheries and maritime services sectors, in respect of nationals from the United States and the Dominican Republic.

7 Counter Memorial, para. 427.

8 RLA-11, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICISD Case No. ARB/03/26, Award, 2 August 2006, para. 85.

9 Counter Memorial, para. 428.

international law." Procuring establishment by fraud was adjudged inconsistent with the general international law principle of good faith, and as expressed in the *nemo auditor propriam turpitudienem allegans* rule of customary international law (which the tribunal incorrectly regarded as a separate "*principle*" of "*international law*").[10]

44. With its decision, the *Plama* Tribunal thus indicated a potential, alternative approach to dismissing claims in cases where establishment had been procured by fraud – and accordingly contrary to municipal law – even in the absence of an explicit "*in accordance with local law*" clause in the applicable treaty. It did not, of course, establish a general international law principle that any finding of inconsistency with host State law, post-establishment, could provide an excuse for dismissing an otherwise meritorious claim brought under any investment treaty (regardless of what the specific obligations contained in that treaty may have provided).

45. The Respondent cites another non-DR-CAFTA case, *Yaung Chi Oo Trading* v. *Myanmar*, for this very proposition,[11] but the reference upon which it relies was not only *obiter dicta*, but also unaccompanied by any citation to authority or reasoned analysis.[12] Indeed, the reference is found in a paragraph in which the tribunal analyzes a treaty provision that expressly requires registration and approval for the establishment of an investment.[13] The dispute actually concerned the issue of whether an investor should have been required to obtain approval from the host State for an investment that had been established before the treaty – and its registration requirement clause – came into force.[14]

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10 RLA-12, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 143.

11 Counter Memorial, para. 429.

12 RLA-13, *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, para. 58.

13 Why the *Yaung Chi Oo Trading* Tribunal believed the juxtaposition it made below to be either valid or necessary remains unexplained in the remainder of the award:

> *58. The Tribunal notes that under Article II of the 1987 ASEAN Agreement, there is an express requirement of approval in writing and registration of a foreign investment if it is to be covered by the Agreement. Such a requirement is not universal in investment protection agreements: it does not apply, for example, under the 1998 Framework Agreement. In this respect Article II goes beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State. The Tribunal noted that a requirement of specific approval and registration already existed under the legislation of certain parties to the 1987 Agreement, especially those with centrally-managed economies. This was, and remains, the situation in Myanmar where no foreign investment can be made without specific approval of the Government of Myanmar acting through the FIC…*

14 RLA-13, *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, para. 53.

46. The Respondent concludes its strikingly non-exegetical analysis of the Tribunal's DR-CAFTA jurisdiction by quoting the award in *Fraport v. Philippines II*. Again, the issue in the *Fraport* case was not alleged non-compliance with a regulatory approval process after the investment had been established, but rather whether the act of establishment was itself tarnished by deception that was inconsistent with municipal legal requirements. And, again, *Fraport* was yet another case in which – unlike the instant matter – the treaty explicitly provided that for an investment to be protected it must have been made in accordance with the law of the host State.

47. At this point it appears necessary to recall that public international law doctrine is not conditioned by *stare decisis*. Such necessity arises because of the manner in which the Respondent has consistently attempted to rely upon so-called "*case law*" to substantiate some of its more extravagant doctrinal claims,[15] with none more excessive than the proposition that alleged inconsistencies in a permitting process could serve as the basis for a jurisdictional objection to an otherwise meritorious claim over the maltreatment of an extant investment. Arbitral decisions and awards are most likely to provide useful guidance if their reasons for decision involve interpretation of the same treaty provisions at issue in the instant matter, or when they contain analyses of similar obligations and fact patterns that can be analogized to the circumstances of the instant matter.[16] The Respondent has wilfully ignored these precepts in attempting to build its case for a novel ground of jurisdiction based on alleged – and by no means substantiated – "*illegality*."

48. The Respondent is thus engaged in an audacious bid to change the dynamic of the instant case: from one in which the Tribunal is tasked with scrutinizing the legal and administrative processes Costa Rica maintained for real estate development – to determine whether it breached the DR-CAFTA – to one in which the Tribunal is instead tasked with determining whether the investors complied with the laws of Costa Rica while participating in those processes. The claimed basis for this shift is the revolutionary proposition that any host State can deprive an aggrieved foreign investor of standing under an investment protection treaty by pre-emptively alleging the investor has breached municipal rules.

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15 The Counter Memorial contains five references to so-called arbitral "*case law*," including one found in a quoted award, which the Respondent seeks to have the Tribunal follow as though each constituted binding authority.

16 CLA18, Georg Schwarzenberger, *The Inductive Approach to International Law* (Oceana Pubs: New York, 1965) at 72 *et seq*). CLA133, Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens & Sons: London, 1964) at 141-146.

49. The faultiness of this proposition begins with the fact that it has been asserted on the basis of only a few carefully curated cases, none of which are relevant. Indeed, none of these cases concerned the interpretation of a treaty with provisions similar to the DR-CAFTA. Each case cited involved circumstances in which deception as to the true identity of the investor was found to have subverted the decision to permit establishment. Moreover, both of the cases relied upon by the Respondent for the existence of a so-called "principle of legality" suffered not only from dubious doctrinal authority, but were also expressed in *obiter dicta*. Indeed, even if such a principle existed, it would obviously only apply to scenarios in which a putative claimant sought treaty protection for an investment the establishment of which had been procured by deceit (and therefore inconsistent with the laws of the host State).

50. The instant case has nothing to do with a scenario in which claimants obtained a concession by concealing the true identity or nationality of some third party who ought to be treated as the real investor. Indeed, there is no question whatsoever that the manner in which the Claimants established their investment, i.e. obtained the necessary concession rights or any other property rights in land, was in any way marred by deceit. More importantly, they broke no municipal law requiring them to obtain the host State's consent before investing (because no such law exists) and the DR-CAFTA contains no such provision, by which Costa Rica would be permitted to restrict their right to establish such an investment on the grounds of their foreign nationality.

51. It is obvious that the Respondent would very much like to avoid participating in a dispute over whether its mishandling of a land development permitting process, in addition to its failure to address the official corruption that exacerbated it, breached the international standards recalled in Articles 10.5 and 10.7 of the DR-CAFTA. It would much rather have the Tribunal consider, instead, its claims that the Claimants did not comply with the municipal laws of Costa Rica – never getting to the subject of how its officials acted in a manner inconsistent with its DR-CAFTA obligations. The Respondent's gambit must fail, however, because there is no basis in international law for the transformed enquiry it would prefer the Tribunal to pursue.

52. The Tribunal's jurisdiction is founded explicitly upon the relevant provisions of the DR-CAFTA, not on some nebulous conception of international law.

C. The Respondent's Untenable Theories of Allegedly Applicable Law

(1) Article 10.2(1) and DR-CAFTA Chapter 17

53. At paragraphs 440 to 441 of its Counter Memorial, the Respondent expresses its "*hope*" that the Tribunal would read Article 10.2(1), and then construe it in such a fashion as to subordinate "*Chapter 10 and the protection contained therein… to other Chapters to the extent they refer to the standards of protection afforded to any investment.*" Obviously, to do so would blatantly misconstrue the express language of Article 10.2(1), which requires one to first find that an "*inconsistency*" exists between Chapters, before concluding that the provisions of another Chapter shall prevail "*to the extent of the inconsistency.*"

54. The language of Article 10.2(1) mirrors that of NAFTA Article 1112, which has been the subject of consistent interpretation by NAFTA tribunals. The *Canfor v. USA* tribunal characterised Article 1112 as an "*underride clause*," intended to serve as a "*safety-valve for overreaching interpretations of other Chapters of the NAFTA in relation to the investment provisions in Chapter Eleven.*" It also stressed that the clause was "*limited to 'any inconsistencies,'*" which the tribunal construed as being "*confined to differences in text, possibly as interpreted…*"[17] The bottom line, in all cases in which Article 1112 has been invoked, is that it cannot be used to weaken the protections afforded in the investment chapter unless the moving party can prove that a specific conflict or inconsistency exists as regards the construction of an investment provision *vis-à-vis* the construction of a provision found in a different chapter of the treaty.[18] And, in this regard, "*an overlap is not necessarily a consistency.*"[19]

55. Indeed, *Ethyl v. Canada*, the first NAFTA decision ever rendered, included reference to Article 1112, upon which the respondent had broadly but obliquely relied, not unlike the Respondent in the instant case. Canada had essentially claimed that all NAFTA investment protections could be overridden under Article 1112, on the premise that the treaty also included trade provisions that might also be relevant to the measures at issue. In rebuking Canada for engaging in such feeble argumentation, the *Ethyl* tribunal, which was chaired by Karl-Heinz Böckstiegel, stated: "*Canada cites*

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17 CLA142, *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, paras. 226-227.

18 See, e.g.: CLA140, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003, para. 71; CLA138, *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, at para. 62. *See* also CLA137, *Pope & Talbot v. Canada*, UNCITRAL, Decision on Preliminary Motion by Government of Canada, 26 January 2000, paras. 26 & 33.

19 CLA92, *Cargill, Inc. v. Mexico*, ICSID Case No ARB(AF)/05/2, 18 September 2009, para. 148.

no authority, and does not elaborate any argument, however, as to why the two necessarily are incompatible, Canada confines itself in this regard to a reference to Article 1112, which simply requires that "In the event of any inconsistency between this Chapter [11] and another Chapter [e.g., 3], the other Chapter shall prevail to the extent of the inconsistency."[20]

56. The Claimants submit that a similar rebuke would be in order in the instant case, given the Respondent's abject failure to delineate any examples of inconsistency upon which its general Chapter 17 override argument could be justified. As the Tribunal in *S.D. Myers v. Canada* observed, to interpret NAFTA Article 1112 which is identical in wording to DR-CAFTA Article 10.2(1) so as to obviate investment protections because the provisions of another Chapter might also apply to the measures in dispute (albeit necessarily within the context of a separate, State-to-State dispute) would simply "*not [be] sustainable on a proper interpretation of the NAFTA.*"[21]

57. Moreover, it is readily apparent that no inconsistencies exist as between Chapters 10 and 17 of the DR-CAFTA, and certainly at least not within the context of the instant case. In determining whether an inconsistency exists, regard may be had to the allied concept of "*incompatibility*," which appeared often in the Vienna Convention on the Law of Treaties. For example, Article 59(1)(b) of the Vienna Convention provides that treaty provisions can only be properly deemed "*incompatible*" if they "*are not capable of being applied at the same time*."[22] As the Claimants already demonstrated in the Memorial, there is no reason to suppose that holding the Respondent to account for its breaches of Articles 10.5 and 10.7 would, in any way, be inconsistent with the provisions of Chapter 17. Indeed, doing so would be entirely consistent with both the intent and express terms of the relevant provisions of that Chapter.[23]

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20 CLA135, *Ethyl Corporation v. Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, para. 63.

21 CLA43, *S.D. Myers v. Canada*, UNCITRAL/NAFTA Tribunals, First Partial Award, 13 November 2000, para. 297.

22 Indeed, as the relevant Drafting Committee Chairman observed at the time: "*In the view of the Drafting Committee, the mere fact that there was a difference between the provisions of a later treaty and those of an earlier treaty did not necessarily mean that there existed an incompatibility within the last phrase of paragraph 3.*" Official Records, Second Session, 91st Meeting, A/CONF.39/C.1/SR.91 at 253, para. 37, extract available at: http://legal.un.org/diplomaticconferences/lawoftreaties-1969/docs/english/2ndsess/a_conf_39_c1_sr91.pdf, accessed 1 August 2016.

23 Memorial, paras. 251-256.

(2) Article 10.11 – Investment and the Environment

58. The Respondent refers to Article 10.11 on four occasions: paragraphs 10, 445, 624, and 631 to 632 of its Counter Memorial. On the first and third occasions, the Respondent complains that the provision was not mentioned in the Memorial. The second occasion involves a passing reference to the provision, without any included analysis. The final occasion also involves no analysis, but rather the peculiar demand that the provision be construed as "*an interpretation rule*" that ought to be used to construe paragraph 4(b) of Annex 10-C "*to mean that any action taken by the State to enforce its laws and regulations to ensure that investment in its territory is carried out in compliance with environmental concerns should not be considered as an indirect expropriation except when they are discriminatory.*" A reasoned explanation for this incredible conclusion was also not forthcoming from the Respondent in its Counter Memorial.

59. On its face, Article 10.11 is a hortatory provision confirming the uncontroversial proposition that investment protection has always been capable of being maintained in synchronicity with environmental protection. Hence, the provision reads: "*Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*" That the provision is of hortatory effect is easily demonstrated in the fact that one could substitute the description of any legitimate public policy goal for the term "*environmental concerns*" and still bring about the same result, with the overriding caveat remaining that the measure must still be consistent with the remainder of the Chapter.

60. Thus, far from vesting the Respondent with some sort of interpretative trump card – to be played whenever it can style an impugned measure or its ill-treatment of a DR-CAFTA investor as being somehow related to "*environmental concerns*" – the plain language of Article 10.11 indicates that, even when "*environmental conc*erns" are involved, the host State must always conduct itself in a manner consistent with the commitments it made in Chapter 10 regarding the treatment of foreign investors and their investments. In other words, in agreeing to Article 10.11, the DR-CAFTA Parties not only reaffirmed their commitment to the proposition that sound investment policy is not inconsistent with sound environmental policy, and *vice versa*; they also adopted the proposition that "*environmental concerns*" cannot be invoked as an

excuse to act in a manner inconsistent with the obligations they undertook for the benefit of DR-CAFTA investors and their investments in Chapter 10.

(3) The "Precautionary Principle" and the So-Called "Principle of Preventative Action"

61. At paragraph 467 of the Counter Memorial, the Respondent makes the scurrilous allegation "*that Claimants hope the Tribunal will disregard...*" what it refers to as the "*rules, principles, and framework*" underpinning the process by which Costa Rica regulates real estate development within its territory. Nothing could be further from the truth. As described elsewhere in this Reply Memorial, and canvassed extensively in the Memorial, the Claimants are counting upon the Tribunal to take note of the applicable "*rules, principles, and framework*" – as they chiefly informed the basis of the Claimants' legitimate expectations, which were dashed by the Respondent when its officials variously failed to abide by them.

62. Between paragraphs 468 and 471, the Respondent goes on to cite a handful of international instruments, almost all clearly of no more than declaratory effect, in addition to a single book edited by Philippe Sands and some others, for the proposition that some amorphous "*burden of proof*" ought to be shifted to the effect that a "*person who wishes to carry out an activity [must] prove that it will not cause harm to the environment.*"[24] Unfortunately, the Respondent fails to explain either how the Tribunal should go about incorporating these alleged principles into its interpretative analysis, or the particular end to be achieved in so doing.

63. Presumably the Respondent intended to have the Tribunal construe these two so-called principles as having achieved the status of general principles of law, which should therefore also be construed as "*applicable rules of law*" for the purposes of DR-CAFTA Article 10.22(1), which provides that the governing law of the dispute will be the Agreement and applicable rules of international law. But neither of these so-called principles has attained the status of general principles. Although the Respondent does its best to place a brave face on the subject, citing a hopeful passage from the book written by Sands *et al*,[25] the bottom line is that even these authors admitted in the same book that both the ICJ and the WTO Appellate Body have

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[24] Counter Memorial, para. 471.

[25] Counter Memorial, para. 471 citing RLA-37, Phillipe Sands, *Principles of International Environmental Law*, 2nd ed., at 273 and 290.

refused to make that very finding with respect to "*precaution,*" when presented with the opportunity.[26]

64. As regards the prevention norm, the same authors explain that it has been recognized as a binding principle in two State-to-State disputes, in both cases concerning State responsibility for transboundary pollution. They go on to explain that this "*preventative principle*" does not "*arise from the application of respect for the principle of sovereignty,*" but is rather aimed at preventing pollution by imposing a general obligation of due diligence upon States. "*Broadly stated, it prohibits activity that causes or may cause damage to the environment in violation of the standards established under the rules of international law*." The principle is thus manifested in municipal law through "*the adoption of national commitments on environmental standards, access to environmental information, and the need to carry out environmental impact assessments in relation to the conduct of certain proposed activities.*"[27] In other words, it has no specific application in the instant case, which neither concerns State liability for transboundary pollution nor a State's general obligation to implement appropriate regimes for the purposes of conducting environmental assessments. Indeed, the closest this principle comes to the instant case is in demonstrating how the Respondent's lack of transparency deprived the Claimants of access to relevant environmental information on a timely basis.

65. Moreover, the Respondent does not acknowledge the *lex specialis* effect of Annex 10-B, which specifies that the only "*customary international law principles [sic.]*" applicable in relation to the construction of Article 10.5 are those "*that protect the economic rights and interests of aliens.*" Thus, even if the Tribunal were to take the leap invited by the Respondent, to designate the "*precautionary principle*" and/or "*preventative principle*" as general principles of international law capable of application pursuant to Article 10.22(1), and even if either of those principles were actually relevant to the instant dispute, it would still be inappropriate to rely on them because neither can be rightly construed as "*protect[ing] the economic rights and interests of aliens.*"

66. Simply put, it is the Respondent's obligation to demonstrate that its conduct was not inconsistent with the obligations it undertook in DR-CAFTA Articles 10.5 and 10.7. It does not satisfy this strategic burden by attempting to convert the case into one in which the question is whether the Claimants acted consistently with Costa Rican law.

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[26] CLA149, Phillipe Sands, *Principles of International Environmental Law*, 2nd ed., at 228.
[27] *Id*. at 201-202.

67. To be sure, nobody disputes Costa Rica's rights or responsibilities either with respect to the implementation of international environmental law norms in its municipal legal order or its duty not to use lax enforcement to attract foreign investment. More to the point, neither proposition is disputed because neither is relevant in the instant matter. As much as it might otherwise prefer, this case concerns whether Costa Rica complied with its obligations under DR-CAFTA Articles 10.5 and 10.7 when certain of its officials effectively blocked a commercial real estate project that the designated officials had approved for development. It has nothing to do with whether officials complied with the *1972 Stockholm Declaration on the Human Environment*, or whether the Respondent's legislative or regulatory rule makers ever weakened environmental standards to attract investment.

D. Article 10.5

68. Again, at paragraphs 472 to 475 of its Counter Memorial, the Respondent engages in wishful thinking, apparently believing that if it merely states that the Claimants have not sufficiently articulated their claims the Tribunal will take it at its word. The Respondent's manifest aim, in this regard, is to set up a straw man that would prove much easier to defeat than the claims found in the Memorial.

(1) Frustration of Legitimate, Investment-Backed Expectations

69. At paragraphs 479 to 480, the Respondent implies that the Claimants relied primarily upon the reasoning of the *Tecmed* Tribunal in articulating the international law basis for their entitlement to see Costa Rica provide compensation for causing them to rely, to their detriment, on the legitimate expectations that they would be able to act on the permits granted to them, and to be free from being shaken down for payment by corrupt local officials. The fact is that, between paragraphs 283 and 292, the Claimants cited no fewer than ***18*** sources, providing a thorough and balanced description of the norm.

70. The Claimants then proceeded to apply the norm to the context of the instant case between paragraphs 322 and 334, citing more than a dozen additional authorities, as well as many references to both documentary evidence and evidence of the specific conduct of government officials. The Claimants are accordingly mystified by the Respondent's allegation, found at paragraphs 474 to 475 of the Counter Memorial, that they had somehow neglected apply the norm to the evidence on the record. Given the utter dearth of authorities cited by Costa Rica as regards the content and character

of the legitimate expectations/detrimental reliance norm, the Claimants submit that the Respondent is obviously the party that has failed to articulate a coherent position in relation to the evidence on the record on this issue.[28]

(2) Failure to Accord Due Process

71. The Respondent's submissions on the customary international law norm of due process can be found at paragraphs 573 to 577 of the Counter Memorial. All four paragraphs, however, are devoted to criticism of a single case cited by the Claimants. The Claimants' argumentation on the general international law principle of due process, as manifested in customary international law norms related to the protection of the rights and interests of aliens, *cum* foreign investors, is set out at paragraphs 313 to 321. These submissions included an analysis of how the obligations Costa Rica undertook in Article 17.3 could be considered by the Tribunal in its formulation of how the principle of due process ought to be construed in the circumstances of the instant case.[29]

72. Because the Respondent restricts itself to demonstrating why certain factual elements of a single case cited by the Claimants, *al-Warraq v. Indonesia*, do not appear to be analogous to the facts of the instant matter – at least as the Respondent sees them – the Claimants have nothing to rebut with respect to the content and character of the due process principle, as first stated in the Memorial. As regards the *al-Warraq* case, the Claimants referred to it on three occasions. On two of those occasions, it was merely one of a number of cases cited for the general proposition that an investment

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[28] The Respondent cites two sources for its position, which is devoted to attacking the *TecMed* Award: a general survey published in 2015 by UNCTAD and an article by Zachary Douglas. The general editor and primary proponent for publication of this "sequel" series of UNCTAD publications was Anna Joubin-Bret who, since leaving UNCTAD, has sought work as arbitrator or counsel from respondent States, including a brief stint as partner at Foley Hoag, which works exclusively for respondents in international investment disputes. See: http://www.joubin-bret.com/documents/CV_EN.pdf. The lead author of the study was Dr. Peter Muchlinski, an academic who is perhaps known today for serving as one of the first signatories of a 2010 public manifesto that called for the abolition of investor-State treaty arbitration. See: http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010, accessed 21 July 2016. For his part, Mr. Douglas is a prominent international lawyer with a stellar reputation for the work he has undertaken exclusively on behalf of respondent States, originally as counsel and now increasingly as party-appointed arbitrator. See: https://www.matrixlaw.co.uk/wp-content/uploads/2016/03/Zachary-Douglas-QC.pdf, accessed 21 July 2016.

[29] See paragraphs 319-321 of the Memorial. In this regard the Claimants would like to stress that, unlike the Respondent (which appears to think that, under Article 10.2(1), the entirety of Chapter 17 can effectively be read into [or rather, over] Chapter 10), the Claimants recognize that one must adhere to the accepted conventions of customary international law on treaty interpretation, whereby the text contained within one section of the treaty may be drawn upon to provide context for one's interpretation of another section of the treaty – although not if the result would be inconsistent with the plain and ordinary meaning of the terms under consideration.

treaty tribunal ought to have recourse to the international law on human rights as part of its consideration of the construction of minimum standard provisions, such as DR-CAFTA Article 10.5.[30] The only other reference made to *al-Warraq* in the Memorial was an illustrative footnote, not provided to support the applicability of the principle of due process, which is beyond dispute. Rather, it was provided as a discursive demonstration of just how rare it is for a host State to fail so abjectly, in upholding its duty to ensure that the administrative/regulatory processes it maintained, and the officials responsible for them, did not act at such cross-purposes as to produce a result inconsistent with the principle of due process reproduced in Article 10.5.[31]

(3) Arbitrariness in the Exercise of Public Authority in Criminal Proceedings

73. At paragraphs 568 to 572 of its Counter Memorial, the Respondent argues that the Claimants' claims based upon its breach of the customary international law prohibition against arbitrariness ought to be barred on the basis that the Claimants have failed to exhaust local remedies. In support of its position, the Respondent cites a single award, rendered under a bilateral investment treaty between Greece and Albania, *Pantechniki* v. *Albania*.[32] The sole arbitrator in *Pantechniki* dismissed the case on the basis of inadmissibility, because the claimant had elected to pursue relief before municipal courts, thereby triggering a fork-in-the-road clause in the treaty under which the claims had been made. In *obiter dicta*, the arbitrator noted that recourse might eventually be had, again, to relief under the treaty, but only if the claimants' chosen means of seeking relief turned out to be unsatisfactory owing to a denial of justice being committed within the context of those proceedings.[33]

74. This was the only case cited by the Respondent as authority for its proposition. It would appear manifest that it does not support either the proposition that a claim for breach of the prohibition against arbitrariness must be deemed to be a claim for denial of justice, or that, assuming that the claim has been so transformed, a DR-CAFTA claimant must "*exhaust local remedies*" before taking her complaint to a Chapter 10 tribunal. Indeed, it seems that the only relevant lesson to be had from the reasoning of Arbitrator Paulson in the *Pantechniki* Award is that all such determinations "*must perforce be made on a case-by-case basis*," and perhaps his accompanying

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30 Memorial, footnotes 351 and 357.
31 Memorial, footnote 387.
32 Counter Memorial, para. 568, citing *Pantechniki S.A. Contractors & Engineers v. Albania*, ICSID Case No. ARB/07/21, 30 July 2009, paras. 96 and 102.
33 *Id*. at para. 93.

admonition that remedies need not necessarily "*be pursued beyond a point of reasonableness*," which involved an allusion to an "*administrative*" (i.e. not a judicial) appeal as one possible example.[34]

75. The result in the *Pantechniki* case may also be instructive with respect to the Respondent's summary dismissal of the Claimants' argumentation on the inapplicability of an exhaustion rule in the instant case, which can be found at paragraphs 571 to 572 of the Counter Memorial. The Claimants' argumentation can be found between paragraphs 271 and 276 of the Memorial. In a nutshell, the Claimants' position is that, by the operation of DR-CAFTA Articles 10.16 to 10.18, the DR-CAFTA Parties established a *lex specialis* regime for the resolution of disputes under the treaty that perforce displaces the customary international law rule in favor of exhausting local remedies.

76. Article 10.18(3) is illustrative of the fact that the Parties must not have contemplated a need for any claimant-investor to exhaust local remedies, outside of cases in which the impugned measure was, itself, a judgment rendered by a lower municipal court:

> *2. No claim may be submitted to arbitration under this Section unless:*
>
> *…*
>
> *(b) the notice of arbitration is accompanied,*
>
> *… by the claimant's and the enterprise's written waivers* ***of any 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.*
>
> *3. Notwithstanding paragraph 2(b), the claimant …* ***may initiate or continue an action that seeks interim injunctive relief*** *and does not involve the payment of monetary damages* ***before a judicial or administrative tribunal of the respondent,*** *provided that the action is brought for the sole purpose of* ***preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration****.*

77. If the DR-CAFTA Parties had intended for claimant-investors pursuing claims such as those at issue in the instant case first to exhaust any and all local remedies before proceeding, there would have been no need to provide them with a right to maintain

[34] *Id*. at para. 96.

municipal proceedings in order to preserve their "*rights and interests during the pendency of the arbitration.*" After all, if claimant-investors were actually required to exhaust all of their remedies before going to arbitration under Chapter 10, they would not have any remaining "*rights and interests*" in need of preservation during the pendency of the arbitration.

78. The Respondent's position is thus inconsistent with the text of the DR-CAFTA, because its claim that the Claimants must be forced to exhaust any and all remedies available under the municipal law of Costa Rica would render the text of Article 10.18(3) superfluous. Such a result would be inconsistent with the *effet utile* (or effectiveness) principle, which serves as a corollary to the general rule of customary international law interpretation expressed in Article 31(1) of the Vienna Convention on the Law of Treaties, and which provides that "*a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.*"[35]

79. The Claimants provided an exposition of the customary international law on arbitrariness, as applied within the context of the economic rights and interests of foreign investors, between paragraphs 293 and 308 of the Memorial. The Respondent devotes one paragraph to the topic, paragraph 564, before setting out a truncated argument in favor of the alternative application of a norm that the Claimants did not plead, denial of justice. The Respondent's stratagem is thus an innovative twist on the straw-man approach to argumentation, not merely limiting itself to misconstruing the Claimants' case so as to make it easier to rebut, but rather concocting an entirely different claim against which to put its defense instead.

80. The Respondent commences its case for deeming the Claimants' arbitrariness claim to be a denial of justice claim, instead, as follows:

> *Claimants alleged that they have suffered a 'systemic miscarriage of administrative justice, which involved multiple agencies (whilst apparently excluding others) over a span of two years, [which] has few analogues in modern arbitral practice.' They further argue that "[i]n this case, the only the conduct of officials exercising the executive function of the Costa Rican State is at issue. Thus the international standards traditionally considered in cases where*

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[35] CLA136, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Appellate Body Report, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057, para. 133. *See* also: CLA134, *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3 at 21; CLA143, *Wintershall Aktiengesellschaft v. Argentina*, Award, ICSID Case No ARB/04/14, 8 November 2008, para. 108; CLA144, *Romak SA v. Uzbekistan*, Award, PCA Case No AA280, 26 November 2009, para. 195.

> *legislative or judicial functions have been exercised are not specifically relevant for the instant case."*[36]

81. The flaw in the Respondent's argument is that the first passage quoted was actually made in support of the Claimants' contention that Costa Rica had acted in a manner inconsistent with the principle of due process, not that it had acted arbitrarily. As explained at paragraph 314 of the Memorial, the methodology of application for the prohibition against arbitrariness ought not to be conflated with that of the principle of due process:

> *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).*

82. Thus, if it is the Respondent's contention that the claim for violation of the prohibition against arbitrariness ought to be deemed to be a claim for denial of justice instead, it does no good to cite a passage from the Memorial concerning the Respondent's breach of the principle of due process. The Respondent also strikes out, later in the same paragraph, when it states that Claimants then "*further argue[d]*" that the conduct impugned by their claims emanated not from the legislature or the judiciary, but rather from bureaucrats working in the Executive Branch. Not only did the Respondent have its timing wrong (as the second passage appeared before the first in the Memorial), its second citation came from the "*due process*" section of the Memorial too. Nothing meaningful can be said about the Claimants' argumentation concerning the customary international law prohibition against arbitrariness by quoting from its argumentation concerning the general international law principle of due process.

(4) Abuse of Rights

83. The Respondent did not dispute the Claimants' reliance on the proposition that the host State is responsible for acts of officials that constitute an abuse of right. It merely maintained, at paragraphs 593 to 596 of the Counter Memorial, the uncontroversial proposition that a tribunal will generally require "*clear and convincing*" evidence to find, as fact, that corruption occurred. Claimants agree, in particular, with the passage

[36] Counter Memorial, para. 566, citing Memorial, paras. 367 and 342.

from *Rumeli Telekom v. Kazakhstan* quoted by the Respondent at paragraph 594, which confirms that a tribunal may draw inferences as part of the fact finding process, when determining whether a bribe has, in fact, been solicited.[37] The Claimants advanced the same proposition with respect to the appropriate burden of proof regarding claims of abuse of right in which bad faith was present.[38]

E. Article 10.7

(1) Lawful Versus Unlawful Expropriation

84. At paragraph 612 of its Counter Memorial, the Respondent takes issue with the Claimants' proposition that all indirect expropriations established under the terms of Article 10.7(1) are perforce unlawful takings. It claims that "*recent arbitral case law*" contradicts this position, again relying implicitly on the false assumption that some sort of international investment law *stare decisis* exists, by virtue of which any legal conclusion contained in an arbitral award is transformed into an authoritative source of international law. It is perhaps unsurprising, then, that the Respondent decided that a single case citation would suffice.

85. What is surprising is that the case cited, *Venezuela Holdings v. Venezuela*,[39] does not even support the proposition that indirect expropriations are perforce unlawful under DR-CAFTA Article 10.7. The problem with the Respondent's argument is that the passage it relies upon actually addressed a dispute over whether compensation was offered within the context of a *de jure* expropriation, not an indirect expropriation. Although the claimant in that case had made a supplementary claim that it had also suffered an indirect expropriation, that was not what the *Venezuela Holdings* tribunal had in mind when it rejected the argument that Venezuela's alleged failure to name its price for the assets it had seized rendered the expropriation *per se* unlawful.[40]

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37 Counter Memorial, para. 594, citing: RLA-49, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para 221; but *see*: RLA-50, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 424.

38 Memorial, para. 384. Of course it also follows that the evidentiary standard involved in proving an abuse of right not associated with bad faith remains the ordinary balance of probabilities.

39 Counter Memorial, footnote 672, quoting RLA-1, *Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICISD Case No. ARB/07/27, Award, 9 October 2014, paras. 302-306.

40 Indeed, it is obvious from the facts of the *Venezuela Holdings* case that the very issue of whether compensation had, in fact, been made available to the claimant was strongly contested as between the parties, given how it involved a scenario in which an ICC arbitration had previously been held, which had even resulted in a damages award, with which the claimant was obviously unsatisfied.

86. The paucity of support for the Respondent's position is amplified by each case in which an indirect expropriation was found to be "*unlawful*" because the failure to provide compensation was perforce inconsistent with an investment treaty expropriation provision that required compensation to accompany the taking.[41] Such clauses are ubiquitous and include the expropriation provision found in every investment protection treaty based upon the US Model BIT, including DR-CAFTA Article 10.7.

(2) Manner and Level of Impairment

87. The Respondent's submissions on the level of impairment required to establish that an indirect expropriation has occurred, found at paragraphs 637 to 639 of the Counter Memorial, are not materially different from those made by the Claimants, found at paragraphs 394 to 399 of their Memorial. Indirect expropriation occurs when claimants are substantially deprived of practical ability to enjoy their investments. In the instant case, the relevant question is whether the Respondent's conduct, which has rendered the Claimants incapable of exercising the rights they had been granted for the development of their lands, constitutes a substantial deprivation in respect of the enjoyment of their investment? Put another way, has the Respondent's conduct effectively neutralized the Claimants' ability to enjoy (i.e. realize the inherent value of) their shared investment – not as unused former grazing land now beset by squatters, but rather as part of an approved commercial real estate development project?

(3) Annex 10-C

88. At paragraph 612, the Respondent attempts to reinvent the standard methodology for determining whether an indirect expropriation has occurred, claiming that the allegedly "*express exception provided in Annex 10-C.4(b) of the Treaty*" must be applied before the Tribunal has even determined whether an expropriation has occurred. It claims support for this preposterous proposition from the 2012 UNCTAD booklet that provides a general survey of expropriation at paragraph 613, but it is even apparent from the passage quoted immediately thereafter by the Respondent that

[41] See, e.g.: CLA123, *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, ICSID Case No ARB/06/2, IIC 739 (2015), Award, 16 September 2015, para. 255; CLA145, *RosInvest Co UK Ltd v. Russian Federation*, SCC Case No 079/2005, IIC 471 (2010), Final Award, 12 September 2010 at paras. 632-633. See, also: CLA146, *Burlington Resources Incorporated v. Ecuador*, ICSID Case No ARB/08/5, IIC 568 (2012), Decision on Liability, 14 December 2012, para. 395; and CLA148, *Guaracachi America Incorporated and Rurelec plc v Bolivia*, PCA Case No 2011-17, IIC 628 (2014), Award, 31 January 2014, para. 441 (the latter of which concerned a direct expropriation).

the DR-CAFTA Parties never contemplated such radical departure from practice. Indeed, even the respondent-biased author of the 2012 UNCTAD booklet on expropriation, upon which the Respondent has chiefly relied, considered Annex 10-C to be no more than an "*explanatory cause*." There is simply no plausible basis for regarding the Annex 10-C text as some sort of innovative, new exception to the traditional obligation to pay compensation for expropriations, whether direct or indirect.[42]

89. The Claimants have already outlined the correct analytical approach to construing and applying Article 10.7, which is, by far, the most ubiquitous of any investment treaty obligation.[43] They have also provided a cogent explanation of the purpose and meaning of paragraph 4(b) of Annex 10-C.[44] The Respondent disagrees, in the most derogatory of terms,[45] yet it is clearly unable to advance a reasoned alternative thesis. It operates on the basis of declaratory fiat, instead, insisting that paragraph 4(b) of Annex 10-C must be regarded as constituting an "express *exception*" to Article 10.7. Such a construction would be manifestly inconsistent with U.S. treaty practice, which informs the model agreement upon which the DR-CAFTA was based.

90. In this regard the Claimants draw the Respondent's attention to Vandevelde's acclaimed treatise on US investment treaty practice, in which the following informed observations about U.S. policy that led to the original drafting of the text of provisions such as paragraph 4(b) of DR-CAFTA Annex 10-C:

> *Paragraph 4(b) addresses in explicit terms the major concern that had prompted the preparation of Annex B – regulatory expropriations. It states that '[e]xcept 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*

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42 RLA-15, UNCTAD, Expropriation, Series on Issues in International Investment Agreements, 2012, at para. 86.

43 Memorial, paras. 393-398.

44 Memorial, paras. 399-405.

45 Counter Memorial, para. 624:

> *This novel theory behind the meaning of paragraph (4) has absolutely no legal basis or rational support under international law. Notably, much like large swathes of Claimants' legal analysis in their Memorial, absolutely no authority is provided to support how such a concoction is grounded in international law. No footnotes, no citations, mere supposition and creative writing. Alongside such deafening silence of authority, Claimants revert to pleading that "sub- paragraph (4)(b) is not relevant to the Tribunal's work". This strategy of forcing the Tribunal's head into the sand, resonates alongside the noticeable lack of attention afforded by Claimants to Article 10.11 ("Investment and Environment") – a provision which could not be more relevant to this case than any other in Chapter 10.*

> *expropriations.' **Paragraph 4(b) merely constitutes an observation**. It does not preclude a finding that non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate welfare objections [sic.] constitute an indirect expropriation. Rather, **it simply observes that, as an empirical matter, such actions will be found to constitute an expropriation only in rare circumstances**. In defending the Methanex claim, the United States had argued that, '[i]t is a principle of customary international law that, where economic injury results from a bona fide regulation with police powers of a State, compensation is not required.' The language of paragraph 4(b) indicates that the US view is not as categorical as the language from its earlier Methanex submission seems to indicate. **Paragraph 4(b) makes clear that non-discriminatory regulations within a state's police power may indeed constitute an expropriation**, even if the circumstances where this occurs are rare* [***Emphasis added***].[46]

91. Vandevelde's explanation was seconded in a review piece, published in 2013, in which Lee Caplan and Jeremy Sharpe, both of who were then employed as counsel in the U.S. State Department's Office of the Legal Advisor, where they worked served the United States in defending it against investment treaty claims:

> *Paragraph 4(b) … reflects the fact that, as one arbitrator observed, 'in the vast run of cases, regulatory conduct by public authorities is not remotely the subject of legitimate complaints' as regards expropriation.*
> *At the same time, the phrase, 'except in rare circumstances' makes clear that paragraph 4(b) **is not meant to create a blanket exception for regulatory measures, which could 'create a gaping loophole in international protection against expropriation**.' In addition, legislation or regulation in question must be 'designed and applied' to protect legitimate welfare objectives to be covered by the presumption of non-expropriation. Notably, paragraph 4(b) is distinct from the 'police power' exception to expropriation, which the United States has long recognized under customary international law. Given the absence of clearly defined rules governing when that exception will apply, disputing parties and tribunals may address that issue in arbitration. In that regard, paragraph 4(b) reflects the fact that arbitral tribunals remain reluctant to second-guess a State's decision **to enact economic legislation or pass regulations** to address a matter of public concern [**Emphasis added**].[47]*

92. Of course the instant case does not even involve allegations that Costa Rica has adopted a measure inconsistent with its DR-CAFTA Chapter 10.7 obligations. Rather, the dispute concerns how various Costa Rican officials, all of whom were employed in the Executive Branch of the State, carried out their duties – and, in some cases,

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[46] CLA150, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009) at 483.

[47] CLA147, Lee M. Caplan & Jeremy K. Sharpe, *United States, in: Chester Brown, ed., Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Pres, 2013) 775 at 791-792.

manifestly disregarded and/or subverted those duties – in a manner that resulted in treatment of the Claimants, and their investments, that was inconsistent with the Respondent's obligations under Articles 10.5 and 10.7 of the DR-CAFTA.

III. FACTS

A. The Respondent's Attempt to Substitute Hyperbole for Explanation in Response to the Evidence of Its Shambolic Treatment of the Investors

93. Rather than simply explaining how its officials could have failed so miserably in their treatment of the Investors and their investments, somehow managing to derail a real estate project they had already green-lighted for development, the Respondent has apparently decided to "respond" to hyped-up conspiracy claims that would be largely beside the point had they even been articulated in the Claimants' Memorial. And, in much the same vein, the Respondent has attempted to recast the events that led up to its officials derailing a project that certain of them had already approved, as a preposterous story of fraudulent misrepresentation – in which wily foreigners somehow managed to pull one over on seemingly gullible local regulators. The bottom line is that neither hyperbolic storyline can be reconciled with the evidence on the record.

94. One need only interrogate the Respondent's Counter Memorial and accompanying "evidence," in order to reveal a litany of false and unsubstantiated statements, contrived by the Respondent as a means to side-step the Claimants' actual claims. As demonstrated further, below, the Respondent has engaged in a painfully transparent, *post facto* attempt to re-write history, recasting the Claimants' allegations as wild conspiracy theory whilst conjuring a *post facto* case for regarding the investments as *per force* unlawful.

95. The Respondents' arguments are unattractive:

(a) The Claimants' claim is entirely justified and is not grounded on "*a profound misunderstanding*" of Costa Rican environmental law or a "*blatant misrepresentation of the facts*."[48] As the Claimants' Costa Rican law expert, Mr Ortiz, the Las Olas project architect, Mr Mussio, Mr Aven and Mr Damjanac make clear in their evidence, the project was at all times permitted and conducted in compliance with Costa Rican environmental law, for which the Claimants had the utmost respect. They Claimants did not choose "*to conclude that there are no wetlands and forest on the Las Olas Project site*"[49] – they did so on the basis of sound advice from local experts and the approval of the Costa Rican authorities. The Claimants undertook all the required

[48] Counter Memorial, para. 1.
[49] *Ibid.*

studies and tests and submitted them for approval to the relevant permitting authorities – SETENA, SINAC and the local Municipality. Those authorities themselves also concluded, based on a review of the Claimants' application and their own site visits, that Las Olas did not contain a wetland or a forest that should impede development of the Claimants' proposed project.

(b) The conclusion of Mr Erwin, the Respondent's environmental expert (whom the Respondent describes as a "*world-leading authority with over 40 years of experience in the investigation and analysis of wetlands and ecosystems in many countries*")[50] that "*there are not one but multiple wetlands and forestry vegetation at the Project site*"[51] is plainly wrong. Mr Erwin fails to consider the presence (or otherwise) of hydric soils in his analysis – one of the three requirements under Costa Rican law for a finding of wetlands; he mischaracterizes approximately 70% of the plant species on site as associated with wetlands, when they are not, as the Claimants' environmental experts, Dr Calvo and Dr Langstroth, explain in their report[52] and Mr Arce, the Claimants' forestry expert, explains in his Second Witness Statement;[53] and he grossly exaggerates the size of at least one of his supposed wetlands.[54] In any event, the Respondent has failed to offer one shred of evidence to support its claims that (i) "*such wetlands and forest have not emerged in the last few months – they were always there*"[55] and (ii) the Claimants' work on the project site affected these supposed wetlands and forest. The Respondent also conveniently fails to explain why its own environmental permitting authority confirmed the Las Olas Condominium site's entitlement to an Environmental Viability permit not once, not twice, but three times.[56]

(c) The reality of the situation at the Las Olas project site is described by the Claimants' environmental experts, Dr Baillie, Dr Calvo and Dr Langstroth, whose evidence together, based on thorough site visits and application of the relevant principles of Costa Rican law (as described by Mr Barboza and Mr Ortiz in their respective reports), determined that the only potential wetlands

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50 Counter Memorial, para. 2.
51 *Ibid.*
52 Calvo and Langstroth Report, para. 74.
53 Arce 2, paras. 45-46.
54 Calvo and Langstroth Report, paras. 65 and 81.
55 Counter Memorial, para. 2.
56 The Respondent issued Environmental Viability permits for the Condominium Site in November 2004 and June 2008 and reconfirmed the 2008 one, following temporary suspension pending investigation, in November 2011.

on the site are three depressional sites in the western portion of the Las Olas property, which coincide with the areas identified by Mr Mussio as environmentally sensitive areas, where no construction would occur.[57] Furthermore, a significant proportion of the largest of these depressions is located on the Easements, for which no Environmental Viability was required at this stage in accordance with the applicable law which permits the creation of easements and subdivision of lots without the requirement for an Environmental Viability, as explained by Mr Ortiz in his expert Opinion. In any event, this so-called wetland identified by Mr Erwin was not the subject of any of SINAC's various inspections and reports.

(d) As Mr Barboza explains in his Second Report by reference to the Costa Rican authorities' many inspection reports on Las Olas, there was no legitimate basis on which the Respondent could have concluded that there was a wetland or a forest at Las Olas in 2011. Mr Barboza explains how SINAC utterly failed to apply the applicable standards and methodology required by Costa Rican law in the identification and determination of wetlands,[58] including SINAC's failure to describe ecological characteristics existing at Las Olas that must be present in order to find a palustrine wetland. SINAC (1) failed to sample or identify hydrophilic vegetation; (2) failed to provide evidence of the existence of hydric soil and hydrology; and (3) ignored the opinion of its sister government agency, INTA, when INTA determined that the soils at the specific site at issue are not typical of wetland ecosystems.[59]

(e) The Respondent's claims that the project site was "*considered to be an environmental treasure, known for its wetlands and biodiversity*" and its "*richness*" are fairy-tales.[60] The only evidence the Respondent has for such assertions is that of Ms Vargas, who by her own admission is not qualified in wetlands determination or forestry and never even set foot on the property,[61] and the alleged complaints of neighbors of Las Olas, all spearheaded by the disgruntled Mr Bucelato, a retired musician with no environmental

57 Mussio 1, Annex, p. 44.
58 Barboza 2, para. 21.
59 Barboza 2, paras. 41-42.
60 Counter Memorial, paras. 3 and 291.
61 Vargas 1, para. 11.

qualifications, who had motive to sabotage the project and who was known to be a troublemaker.[62]

(f) There is nothing sinister about where and how the Claimants chose to commence construction on the project site. In accordance with local law, with Mussio Madrigal's plans that had been approved as part of the Environmental Viability process and with the lawfully obtained Municipality construction permits, the Claimants began work cutting roads into the land and installing drainage to deal with rainwater run-off. As the Respondent well knew, flooding had historically been an issue in the community and the soccer field in particular was known to flood. Working together with the Municipality, the Claimants donated materials to address this problem – one which the Claimants' environmental expert, Dr Baillie, believes to have been caused by the construction of the public roads around the project site, and not by anything the Claimants did.[63]

(g) The Respondent's dogged determination to see Mr Aven prosecuted and convicted for a crime he did not commit is apparent even in the Counter Memorial.[64] There is nothing about Luis Martinez's prosecution of Mr Aven that accords with Mr Aven's DR-CAFTA right to due process. Mr Martinez inexplicably failed to investigate bribery claims made in relation to one of the prosecution's witnesses and engineered a new trial when the first one was not going his way. He also insisted on prosecuting Mr Aven in relation to the Allegedly Forged Document (although he was later forced to drop that charge) in spite of an admission in this arbitration that he had no evidence to support such a charge.[65] In reality, as the Claimants will explain below, neither Mr Aven nor Mr Madrigal had anything to do with the Allegedly Forged Document, something that Mr Martinez well knew at the time – as there was a clear handwritten note on the back of the Allegedly Forged Document indicating that Mr Bucelato was the individual responsible for submitting it to SETENA only a day after it was allegedly created.

(h) The fact that the Claimants still own the project site has virtually no bearing on their claims in this arbitration. Whilst they retain title to the land, they

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62 Mussio 1, para. 35; Aven 2, para. 61; Damjanac 2, paras. 9-14.

63 Baillie Report, pars. 5, 24 and 80.

64 The Respondent states that "*[i]t should come as no surprise that once you commit a crime against the environment in Costa Rica, you will be tried for it.*" Counter Memorial, para. 5.

65 Counter Memorial, para. 550.

cannot develop it, as the Respondent's TAA injunction suspending works remains in place. The land is also beset with trespassers and squatters, whom the Respondent's authorities refuse to evict, in spite of the Claimants' many attempts to have this done.[66] Moreover, the lead investor, Mr Aven, has been attacked so effectively by the Respondent that he can no longer lead the project. Accordingly, any suggestion that the value of the Claimants' investment remains intact is risible.

(i) The Respondent's attempt to re-write the DR-CAFTA and the facts to make this case not about the protections afforded to investors by contracting State Parties but about "*the protection the State needs on issues affecting the environment*" is delusional. The Claimants have never denied Costa Rica's right to regulate to protect the environment, nor have they sought to encroach on environmentally protected areas. As explained in more detail in Section II above, the Respondent ignores the clear wording of Article 10.11 which provides that even when "*environmental concerns*" are at play, the host State must always act consistently with the commitments it made vis-à-vis the treatment of foreign investors and their investments in Chapter 10.

(j) The Respondent's two-pronged suggestion that the Tribunal does not have jurisdiction to hear the Claimants' claims, both because Mr Aven's dominant and effective nationality is Italian and because the Claimants' investment is unlawful, does not withstand scrutiny. It also (presumably deliberately) misapplies the applicable legal principles around lawfulness of an investment and attempts to shoehorn what is plainly a merits argument into the territory of jurisdictional objections. The so-called "*violations of Costa Rican law*"[67] on which the Respondent relies are utter fantasy:

(i) The Claimants did not breach their obligation of good faith in obtaining the requisite permits for the Las Olas project. The Respondent puts all its eggs in the Protti Report[68] basket, claiming that it constitutes conclusive proof that the Claimants were aware of the existence of wetlands on site in 2007. It does no such thing, as any respectable environmental expert would inform the Respondent. The Protti Report was apparently commissioned by Tecnocontrol

66 Ventura 1, paras. 23-28; Ventura 2, paras. 11-19.
67 Counter Memorial, para. 15.
68 R-11.

S.A., a sub-contractor of Mussio Madrigal (although Mr Mussio, the project's lead architect, has no knowledge of its genesis),[69] and was prepared by a hydro-geologist, who made no attempt to analyze the site for the presence of hydric conditions, hydric soils or hydric vegetation – the three requirements to establish the existence of a wetland under Costa Rican law. The Protti Report does not set out to identify wetlands, and nowhere in the Protti Report can a finding of wetlands be implied. In any event, the Respondent's argument assumes the presence of a wetland and a forest at the Las Olas site in 2011, neither of which can be established. The Respondent is simply clutching at straws.

(ii) The Claimants did not carry out works without the necessary permits in place, as both the Claimants' witnesses and the lack of any enforcement action by the Respondent demonstrate.[70] This is yet another example of the Respondent's transparent attempt to avoid its DR-CAFTA obligations.

(iii) The Claimants complied with their obligations to pay taxes and submit valuations certificates for the Concession, as Mr Aven's Second Witness Statement and the accompanying evidence confirm.[71] Yet again, the Respondent tries to re-write history in a vain attempt to avoid liability for its actions.

(k) In relation to the many ongoing investigations into the Las Olas project, about which the Claimants knew very little (if anything) at the time, the Respondent again distorts the Claimants' case, in order to answer one that it wished the Claimants had made. The Claimants have never suggested that the Respondent ought to have "*overlooked*" the complaints that were made, complaints that the Respondent loosely describes as "*premised on an accurate and justifiable belief that the Project site comprised wetland and forests*."[72] What the Claimants stated in their Memorial was that the manner in which the Respondent investigated those complaints amounted to a breach of the Claimants' DR-CAFTA fair and equitable treatment and full protection

69 Mussio 1, paras. 46-50.
70 Damjanac 2, paras. 24-26; Aven 2, para. 44-59.
71 Aven 2, paras. 38-40; C268 "*PAGOS REALIZADOS POR: LA CANICULA SOCIEDAD ANONIMA*" retrieved July 19, 2016.
72 Counter Memorial, para. 19.

and security standards. Instead of conducting a fair and measured investigation into legitimate complaints, the Respondent allowed the baseless complaints of an interested party to morph into several, separate rounds of full-blown investigations, spearheaded by a municipal employee who, by her own admission, had never even set foot inside the project site.[73] This, in spite of lawfully issued SETENA Environmental Viability permits for the Concession and the Condominium Section and Municipality-issued construction permits for the Concession, the Condominium Section and the Easements, upon which the Claimants were entitled in good faith to rely.

(l) The Claimants were not kept informed of the investigations as they occurred, in spite of the fact that their rights stood to be affected by the ultimate outcome, in breach of their due process rights under Costa Rican law.[74] First, the Respondent's attempts to downplay the absurdly dysfunctional inner workings of its own agencies rely on a mischaracterisation of the preliminary versus final acts doctrine under Costa Rican law, as the Claimants' expert, Mr Ortiz explains in his expert Opinion.[75] Second, the Respondent's claim that the various agency reports they produced as a result of these investigations were premised on information provided by the Claimants, and consequently that their findings were influenced by "*the distorted representation of the facts, due exclusively to Claimants' lack of good faith*," fatally ignores one crucial fact: the only reports produced on the basis of information provided by the Claimants were those of SETENA, which agency chose on three separate occasions – the third such occasion in full knowledge of the existence of the Allegedly Forged Document and the various conflicting agency findings as to wetlands and forests – to confirm its Environmental Viability permit.

96. Against this backdrop, the Respondent has gone to great lengths to spin the Claimants' legitimate complaints about an utterly dysfunctional regulatory system, in which approval from the designated authority for the environment, SETENA, is apparently no guarantee that development can actually proceed. The Respondent labels these complaints a "*perverse conspiracy*," wrongly suggesting that the Claimants believe that the handful of overzealous or corrupt officials named in their

73 Vargas, para. 11.
74 Ventura 2, paras. 8-10.
75 Ortiz Opinion, para. 16.

Memorial were all in cahoots.[76] No such allegation was made by the Claimants, and that is what is most frightening, and telling, about this story: that the system was so flawed that a foreign investor could not simply rely upon the SETENA Environmental Viability and Municipality-issued construction permits it obtained, in order to develop its investment.

97. As will be explained in more detail below, the crux of the Claimants' complaint about Ms Vargas, the Environmental Manager of the Municipality of Parrita, and Ms Diaz, Director for Quality of Life at the *Defensoria*, is overzealous and bad faith enforcement, facilitated by a grievously flawed system. The crux of the Claimants' complaint about Mr Martinez, and about the Prosecutor's Office generally, is arbitrariness and discrimination. The crux of the Claimants' complaint about Mr Bogantes of MINAE, is that he is a corrupt official who solicited a bribe from the Claimants on more than one occasion and then changed, or caused his office to change, its wetlands finding in relation to Las Olas, when his bribery attempts were rebuffed by the Claimants. The fact that it took the launch of this arbitration for the Claimants to uncover the truth about the provenance of the Allegedly Forged Document – that it was handed in to SETENA's office on March 28, 2008 (the day after it was allegedly created) by none other than Las Olas neighbor, Mr Bucelato[77] – something that the Respondent's officials apparently already knew – is evidence of how utterly non-transparent the Respondent's system is.

98. The fact is that the system is so unfair and non-transparent that it apparently did not take much (that is, refusing to pay a bribe to Mr Bogantes) to tip the balance against the Claimants. In the Claimants' contention, there is something seriously wrong with a regulatory regime in which apparently the only way to have confidence in the approvals one receives through official channels (i.e. SETENA) is to pay bribes to other officials in order to keep everything on track.

99. As outlined above, after alleging in its Counter Memorial that the Claimants had omitted to tell the entire story of their regulatory interaction with the Respondent, the Respondent promised to identify the crucial, missing details. However, what the Respondent did instead – from paragraphs 129 to 255 – was attempt to obstruct the simple facts of this case by unleashing a flood of misleading, insignificant and/or erroneous details.

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[76] Counter Memorial, para. 25.
[77] Exhibit C245, Allegedly Forged Document with handwritten note.

100. The simple, and enduring, fact is that SETENA was responsible for issuing an Environmental Viability designation to the Las Olas project (which it did) and the Municipality was responsible for approving the construction permits (which it also did). In spite of all the bogus, extraneous and unproven allegations levelled against the Claimants' development of the Las Olas project – both by Mr Bucelato, a jealous, would-be competitor, and by certain unqualified, incompetent and/or overzealous bureaucrats only too willing to add their two cents to the mix – at the end of the day, SETENA still maintained its finding of Environmental Viability in November 2011.

101. This finding, alone, demolishes the Respondent's defence, as it belies the fact that Respondent itself – acting through SETENA – has already determined that there was no destruction of, or threat to, legally protected forest or wetlands, and there was no evidence that the original Environmental Viability had been procured by fraud or the omission of damaging evidence. If any of these allegations, upon which the entirety of the Respondent's defence hangs, were true, SETENA would not have re-confirmed the Environmental Viability in November 2011.

102. Indeed, the only reason the Respondent has been forced to contrive such a fatally flawed defence is that it is apparently incapable of maintaining the kind of transparent and predictable regulatory regime for foreign investment that it promised it would provide to US investors under the DR-CAFTA. In a mature regulatory environment, the Claimants would have been able to proceed in reliance upon the SETENA Environmental Viability. In Costa Rica it is apparent that obtaining the necessary permits and permissions may never be enough.

103. The Respondent does not stop there. Not only would it have the Tribunal ignore and distort DR-CAFTA provisions and customary international law principles and accept as proof evidence which is clearly subjective and highly unreliable, it also resorts to wholly fabricated allegations against the Claimants for which it has little or no conclusive proof, including – to cite just a few:

(a) That Mr Aven, or Mr Madrigal, is responsible for the Allegedly Forged Document, in spite of clear evidence on the SETENA file pointing to Mr Bucelato;[78]

[78] Counter Memorial, paras. 219-220.

(b) That the Claimants failed to pay their taxes on the Concession despite their having done so year after year until the advent of this dispute, as the Municipality records indicate;[79]

(c) That the Claimants failed to submit valuation certificates for the Concession, despite the valuations appearing on the construction permits which the Municipality issued to the Claimants;[80]

(d) That the Claimants continued to work on the project site after they received the Municipality Shutdown Notice in May 2011. The only evidence provided are photographs of machinery on site, which Mr Damjanac explains in his Second Witness Statement was not active at the time.[81]

(e) That Mr Aven's Costa Rican attorney, Manuel Ventura, sent a WhatsApp message to the Mayor of Parrita informing him that the Claimants did not wish to pursue the eviction process. When asked to produce evidence of this particular allegation in document production, the Respondent tellingly failed to do so. As Mr Ventura (who has provided copies of his communications with the Mayor) explains, the allegation is simply not true;[82]

(f) That the Claimants only handed the Protti Report in to SINAC in 2011 after the Environmental Viability had been obtained and that this is evidence of a knowing attempt to conceal relevant information about the project site from the Costa Rican authorities. The only evidence the Respondent has produced in support of this particular allegation is a statement that "*the survey rests in the files of SINAC for Las Olas Project.*"[83] This allegation ignores the fact that SETENA reconfirmed the Environmental Viability for the Condominium Section in November 2011 and presupposes that the Protti Report told the Claimants anything about wetlands at Las Olas, which it did not.

(g) That the Claimants unlawfully fragmented the project site and commenced work on the Easements without an Environmental Viability from SETENA. With this allegation, the Respondent ignores the provisions of Costa Rican law cited by the Claimants' Costa Rican law expert, Mr Ortiz, which permit the division of large real estate developments into stages and which allow for

79 Counter Memorial, para. 310.
80 Counter Memorial, para. 313.
81 Damjanac 2, paras. 39-41.
82 Ventura 2, paras. 20-21.
83 Counter Memorial, para. 161 and footnote 145.

the creation of easements and the subdivision of lots fronting the public roads, without obtaining an Environmental Viability permit.[84] This simple procedure is explained in detail by Mr Mussio, the architect responsible for Las Olas' plans, in his First Witness Statement and confirmed by the project's Environmental Regent, in his Second Witness Statement.[85]

104. The Respondent also struggles to keep its own story straight. One minute it would have the Tribunal accept that although the Claimants had over 37 hectares of land, they deliberately "*chose to begin work in the small fraction that contained wetlands*" in flagrant disregard for the "*country that welcomed them, its laws and the environment*."[86] On the other hand, the Respondent would have the Tribunal accept the notion that *"[t]he area of wetlands and forest only covers a small portion of the Project Site,*"[87] such that it was possible for the Claimants to develop the rest of the property not affected by the alleged wetlands and forest and that by failing to do so, they are the authors of their own demise. In so doing, the Respondent ignores the fact that its criminal prosecutor, Mr Martinez, sought an injunction over the whole of the project site, not just the "*small fraction that contained wetlands.*"

105. In summary, the Respondent's defenses fail in their entirety. First, Mr Aven's dominant and effective nationality is US for all of the reasons described in his First and Second Witness Statements.

106. Second, the Claimants' investment was lawfully made. There is no substance behind the Respondent's allegations of wrongdoing with respect to the permitting or construction of the Concession or the Condominium Section of the site and the Respondent fails in any event to explain how any of these alleged offences causes the illegality of the Claimants' investment.

107. Third, the Respondent violated the Claimants' legitimate expectations as to the operation of Costa Rica's real estate development and environmental laws. The Claimants acted in good faith and with the utmost transparency in all their dealings with the Respondent. It is the Respondent that engaged in underhand tactics and concealment of evidence, as the facts of this case clearly show.

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84 Ortiz Opinion, paras. 107-112.
85 Mussio 1; Bermudez 2, para. 17.
86 Counter Memorial, para. 4.
87 Counter Memorial, para. 254.

108. Fourth, the Claimants' FET claim is grounded in a denial of due process. It is not the denial of justice claim the Respondent wished the Claimants had advanced and to which the Respondent – in the absence of anything to say in defense of its actions – devotes a lengthy but irrelevant section of its Counter Memorial. The Respondent contends that the Claimants' claim – for breach of the prohibition against arbitrariness enshrined in the DR-CAFTA's FET protection – is on the facts really a claim for denial of justice, and that Mr Aven must therefore "*exhaust local remedies*" before taking his complaint to a Chapter 10 tribunal. The reality is that the Claimants' claim is absolutely about denial of due process – Mr Martinez's willful persecution of Mr Aven and the authorities' failure to follow-up on Mr Aven's complaint against Mr Bogantes are just two examples of the Respondent's due process violations.

109. Fifth, with regard to the Claimants' indirect expropriation claim, the Respondent has failed to justify its actions, such that its defense must fail. Whilst the Claimants willingly accept the Respondent's ability to act in the public interest to protect its environment, that is a far cry from what the Costa Rican authorities did in the case of Las Olas. With no conclusive, authoritative evidence of wetlands or forest and a total disregard for the Claimants' investment, the Costa Rican authorities elevated empty claims made by unqualified neighbors and engaged in an ill-judged, over-zealous and abusive enforcement process which, once underway, all but ignored the findings of its own agencies – including SETENA when, critically, it concluded that the Environmental Viability should stand – in favor of its apparently unrelenting desire to bring the Claimants' project to a grinding halt. Crucially, the Respondent has never demonstrated how the Claimants' actions to date or its proposed plans for the project pose a threat to protected wetlands and forests at Las Olas. The Respondent's conduct was a far cry from a proportionate response to its allegedly perceived threat to the environment. Through these actions, and the Court ordered suspension of works, the Respondent unlawfully expropriated the Claimants' investment.

110. Finally, the Respondent's counterclaim must fail at law and in fact. First, as explained in Section V below, there is no basis for a counterclaim by a host State in the DR-CAFTA. Second, the Respondent has failed to demonstrate that the Claimants' actions caused harm to the environment.

B. The Respondent's Attempted Mythologization of the Las Olas Project Site

111. The Respondent's attempts to portray the Las Olas project site as some sort of pristine ecosystem are risible. As the Claimants' witnesses and experts confirm, the reality is

that the Las Olas site consists of overgrown pasture land, where for many years animals were put out to graze. This was also confirmed by Alberto Mora, a prosecution witness who was called at Mr Aven's criminal trial. Mr Mora testified that he grew up in the Esterillos Oeste community and grazed his cattle on the Las Olas property. He confirmed that there was never a wetland or a forest at Las Olas.[88]

112. This is substantiated by aerial photographs of the site, by the presence of vegetation that is typically seen where cattle have grazed and the witness evidence of Mr Bermudez, the project's Environmental Regent, Mr Arce, a forestry engineer hired to consult on the project, and the project's architect who was responsible for the project's Environmental Viability application. The site is not the "*rich*" ecosystem the Respondent claims,[89] nor is it "*land that had always been known for its wetlands and diversity of species*," as Ms Vargas claims[90] – a fact which is supported by SETENA's decision to issue the Environmental Viability for each of the Concession and Condominium Sections of the project, on several occasions.[91]

113. The Respondent's expert, Mr Erwin's, characterization of Las Olas as an "*ecosystem*" is hyperbolic rhetoric. In the First KECE Report, Mr Erwin's conclusions are fundamentally tainted by mischaracterizations, faulty methodology, and exaggeration.

(1) Critique of First KECE Report

114. One thing is clear: the First KECE Report is striking in its unsupported and unsubstantiated conclusions, as the Claimants' experts', Mr Barboza, Dr Calvo, Dr Langstroth and Dr Baillie, analyses confirm. Mr Erwin's conclusions are all post-hoc explanations, ones that the Respondent had never before proffered in support of its alleged forest and wetlands findings.

115. One primary difference between the Respondent's expert, Mr Erwin – who is *not* an expert on Costa Rican law regarding wetlands – and the regulatory scheme pertaining to wetlands described by Mr Ortiz and Mr Barboza in their expert reports is the accuracy of Mr Ortiz and Mr Barboza's explanation of the Costa Rican definition of wetlands.

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88 C272, Transcript of Mr Aven's criminal trial; C279, Video of Mr Aven's criminal trial.
89 Counter Memorial, para. 302.
90 Vargas 1, para. 180.
91 SETENA issued the Environmental Viability (EV) for the Condominium Section in November 2004 and again on June 2, 2008 and reconfirmed the latter EV in November 2011. SETENA issued the EV for the Concession on March 17, 2006 and renewed it on March 24, 2008.

116. In the First KECE Report, Mr Erwin stated that "*for the purposes of this report, we were instructed by legal counsel on the case that we should consider the following definitions under Costa Rican law: […]*

(a) *Definition of wetlands in the RAMSAR Convention […]*

(b) *Definition of wetlands in the Organic Law of the Environment of Costa Rica (Article 40) […]*

(c) *Definition of wetlands in the Regulations to the Law on Biodiversity of Costa Rica (Executive Order 34433) […]*

(d) *Definition of wetlands in the Fishing and Aquaculture Law number XX of Costa Rica (Article 2) […]*

(e) *Biological features that allow the identification of a wetland under Executive Decree 35803 – MINAE (Article 6) […]*[92]

117. Naturally, it benefits the Respondent to have an extremely broad definition of wetlands under Costa Rican law. But in Mr Erwin's report, having at his disposal five vastly different and divergent definitions of wetlands is tantamount to him utilizing no *definitive* standard in finding that the Las Olas property contains "*eight (8) distinct wetland systems located onsite within the Las Olas Ecosystem.*"[93] As next discussed, Mr Erwin's conclusion is wrong as a matter of fact, but to be clear, Mr Erwin also errs in his application of definitions of wetlands under Costa Rican law.

118. As Mr Ortiz explains in his expert Opinion, "*if SINAC finds out of the possible existence of a wetland within a private property its obligation is to make the in situ inspection to determine if in fact the land has the technical and scientific elements that the Executive Decree No. 35803-MINAET uses to define a wetland.*"[94] Under Executive Decree No. 35803-MINAET, the ecological characteristics that identify a wetland are explicitly laid out:

(a) Hydrophilic vegetation, composed of species related to aquatic and semiaquatic environments;

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92 *See* First KECE Report, at pp. 7-9.
93 *See id.* at para. 55.
94 Ortiz 1, at para. 29.

(b) Hydric soils, defined as "*soils that develop in conditions with a high level of humidity reaching the point of saturation*"; and

(c) Hydric condition, characterized by the climatic influence of a specific area, considering geomorphical process, topography, soil material, and other processes or events.

119. For the avoidance of doubt, Executive Decree No. 35803-MINAE provides the technical criteria that must be followed to "*determine and mark out a specific area of land as a wetland*."[95] This definition is paramount because, in the case of Las Olas, there was no existing record of any wetland or Wildlife Protected Area ("**WPA**") within the site.

120. As Mr Barboza has already made clear in his First Expert Report, and makes explicit again in his Second Expert Report, SINAC's determination of a wetland at the Las Olas site in 2011 was also devoid of any evidence fulfilling the three criteria enumerated above. Now, the Respondent seeks to absolve itself of its previous arbitrary determination with the post-hoc justifications in the First KECE Report. Unfortunately for the Respondent, (1) the First KECE Report is rife with misstatement and exaggeration; and (2) the First KECE Report, which largely deals with conditions of the Las Olas site at present (and not as the site appeared in 2011) cannot, and does not, explain the failure of SINAC to apply its own law in determining a wetland in 2011.

121. Furthermore, the Respondent's expert utterly fails to address any of the second criteria – soils, a failing which the Respondent apparently now recognizes and intends to address, since it has already indicated to the Claimants that it is planning a second site visit to Las Olas for soil surveying purposes.[96] As discussed below, the Claimants' soil expert, Dr Baillie, explained that Mr Erwin completely failed to include any primary data about the soils in his report. Indeed, in paragraph 55 of the First KECE Report, Mr Erwin states that "*the hydric soils indicator was also used onsite to a limited extent*." This is hyperbolic, as Dr Baillie points out that Mr Erwin considered only five uncaptioned photographs of topsoil samples that were too

95 *Id.* at para 98.

96 Here, it is necessary to note that the Respondent's counsel has contacted the Claimants' counsel requesting to conduct a second site visit of the Las Olas project. In its request, the Respondent proposes to "*dig two to four soil pits in each of [alleged] Wetlands 2 to 8 using a hand auger*," as well as "*two similar pits in uplands*" and "*ten soil pits in [alleged] Wetland No. 1*." This request proposed to visit the site during the same week as the submission of this Reply Memorial, but now will take place between 30 August 2016 and 1 September 2016. Doubtless, the Respondent realizes that the First KECE Report is deficient for not addressing this issue in the first place.

shallow to determine whether the soils are hydric or not.[97] Moreover, the Claimants' environmental experts, Dr Langstroth and Dr Calvo, are plain regarding Mr Erwin's rife mischaracterization of species found on the site as "*wetland*" species, where the First KECE Report fails to give references to substantiate their assertions and it appears to make conclusions based on their "*professional opinion*" alone.[98]

(a) The First KECE Report's failure to present soil data and attempt to discredit INTA, its own soil agency, is telling.

122. As Mr Barboza and Mr Ortiz each emphasize in their expert reports, Executive Decree No. 35803-MINAE explicitly provides that the presence of "*hydric soils, defined as those that develop on land with a high degree of moisture up to the degree of saturation"* is an "*essential characteristic that an area must have to be considered a wetland*."

123. As noted above and explained more fully in the expert report of Dr Baillie, the First KECE Report contains no significant data about soils (nor really any primary data except for botanist data). Tellingly, Mr Erwin misleadingly states in his report that "*the hydric soils indicator was also used onsite to a limited extent*." But thereafter, the only indication that soils were considered by Mr Erwin at all is the inclusion of five uncaptioned photographs of topsoil samples in the First KECE Report. Such conclusory assertions are only the tip of the iceberg regarding Mr Erwin's convenient disregard for soil data in his report.

124. In addition to failing to present data on soils itself, the First KECE Report then goes on to critique INTA's May 2011 soil report on Las Olas. The Respondent's arguments seeking to discredit INTA's findings are, again, misplaced (and bizarre, given that the Respondent seeks to undermine its own governmental authorities when their findings do not suit the Respondent's case).[99]

125. The First KECE Report dismissively states that "*INTA does not have the competence to make assessments on the existence of wetlands,*"[100] and fails to acknowledge that INTA is the principal soils institution of the government of the Republic of Costa Rica, the competent authority in Costa Rica charged with defining and identifying

97 *See* Baillie Report, at para. 71.
98 *See* Calvo and Langstroth Report at para. 68.
99 *See* First KECE Report, at paras. 112-117.
100 *See id* at para. 112.

hydric soils, and the authority to which Mr Martinez turned when he needed a determination on the existence of wetlands in 2011.[101]

126. Indeed, it appears that the Respondent resorts to undermining its own government agency because it must discredit INTA to credibly support its claims. As Mr Barboza explained, "*the official Costa Rican entity for the classification of soils, INTA, at the request of SINAC, determined that the specific terrain in study was not the hydromorphic type. Therefore, based on the soil studies done by INTA, there is no argument to sustain the existence of wetlands at the site*."[102] Because the Respondent cannot credibly argue that the SINAC March 2011 finding of wetlands properly considered the INTA findings, the Respondent is forced to "double down" on SINAC's wrongful rejection of INTA's findings.

127. As Mr Barboza further explains in his First and Second Expert Reports, SINAC's March 2011 Report "*failed to provide evidence of the existence of hydric soil and hydrology*" and specifically "*failed to present any arguments or evidence refuting INTA's findings.*"[103] In other words, Mr Barboza, a former SINAC officer himself, concluded that SINAC officials should have (but failed to) "*characterize the condition of the soil*" and "*sample the soil to determine whether or not it was hydromorphic.*"

128. The First KECE Report also criticizes INTA's application of the Costa Rican Land Evaluation methodology in its effort to fortify SINAC's arbitrary March 2011 finding of wetlands.[104] As Dr Baillie explains, the Costa Rican Land Evaluation methodology is the most practicable way of identifying hydric soils in the field in Costa Rica.[105] The First KECE Report also questions several of INTA's conclusions about the existence of wetland soils on the site even though these were made by a very experienced national soil scientist under the employ of the Respondent's own agency (whereas Mr Erwin and his team lack such credentials).[106] In short, Mr Erwin's attempt to disregard the INTA conclusions lacks credibility.

129. In the absence of data on the presence of hydric soils, as explained by Dr Baillie, the First KECE Report is not justified in its sweeping assertions that there are numerous and extensive wetlands on the site. In particular, the depiction of extensive wetlands

101 *See* Baillie Report, at para. 72.
102 *See* Barboza 2, at para. 42.
103 *See* Barboza 2, at para. 41.
104 *See id* at para. 115.
105 *See* Baillie Report at para. 72.
106 *See* First KECE Report at paras. 111-114.

in the eastern part of site[107] does not accord with Dr Baillie's thorough first-hand examination of the site (conducted in June 2016), and Dr Baillie's systematic soil observations in the area, as described in his report. As Dr Baillie explains, the eastern part of the site consists of "*undulating terrain of convex hills, rectilinear slopes and narrow valley floors . . . [and] the soils of the valley floors are imperfectly drained, and not hydric*."[108]

130. The First KECE Report also errs by indicating that there are extensive wetlands in the western part of the site in its Appendix 8. As explained by Dr Baillie,[109] the areas delineated by Mr Erwin as wetlands are valleys. According to the soil studies drawn by Dr Baillie in June 2016, these valleys have imperfectly drained non-hydric soils, and are therefore not wetlands. As Dr Baillie explains, the small scale of the map exhibited in Appendix 8 of the First KECE Report does not accurately capture the conditions of the land upon a thorough site visit.

(b) The First KECE Report's Mischaracterization of Wetland Species

131. The Respondent in its Counter Memorial spends a great deal of its prose on Costa Rica's general biodiversity, emphasizing Costa Rica's "*500,000 species of plant and animal life*" and its "*incredible Noah's Ark*." But when it comes to describing Las Olas, the Respondent is left with only hackneyed generalizations that "*the area . . . is known for its biodiversity and rich ecosystems"*[110] citing the First KECE Report. Indeed, in the First KECE Report, Appendix 9, Mr Erwin identified 97 plant species, 46 of which he notes are "*wetland*" species.[111]

132. But as Dr Calvo and Dr Langstroth explain in their expert report, Mr Erwin provides no indication of where he obtained this information regarding the classification of wetland species, and Mr Erwin's lack of references and citation has left Dr Calvo and Dr Langstroth to conclude that the "*wetland*" specification was "*based on [Mr Erwin's] professional opinion*."[112]

133. After close scrutiny of Mr Erwin's lengthy tables purporting to classify wetland species, the Claimants can only conclude that this is another case of the Respondent's

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107 *See id* at Appendix 7, p 15.
108 *Id.* at para. 73.
109 Baillie Report, para. 74.
110 Counter Memorial, para. 107.
111 First KECE Report, at Appendix 9.
112 *See* Calvo and Langstroth Report at para. 68.

irresponsible exaggeration. Using the objective measure of the United States Department of Agriculture wetland indicator database, Dr Calvo and Dr Langstroth evaluated Mr Erwin's classifications and concluded that "*KECE incorrectly attributed 31 of the 46 species as wetland species. Nearly 70% of the species they call wetland species are not wetland species*."[113]

134. In addition to the observations of Dr Calvo and Dr Langstroth, Dr Baillie also immediately recognized the misleading nature of Mr Erwin's botanist data in the First KECE Report. Dr Baillie noted that the First KECE Report includes a list of the plant species identified,[114] but contains limited data on frequency. While the First KECE Report lists many wetland species, Dr Baillie notes that it is "*not clear whether these are obligate or facultative hydrophilics.*"[115] In particular, Dr Baillie explains that "*some indication of the ecological status of* Paspalum fasciculatum *would be useful*," as it figures prominently in the text and photos of the First KECE Report as an indicator of wetland. As Dr Baillie notes, *Paspalum fasciculatum* appears to have a "*fairly wide hydrological range*" and is "*found in pastures on imperfectly drained non-hydric soils*."[116] Mr. Arce, a forestry engineer with over 31 years' experience in the field, is equally critical of Appendix 9 of the KECE Report, citing failings in KECE's methodology for classification and errors in the categorization of tree species as exclusive to wetlands.[117]

135. At bottom, it is disappointing that the Respondent insists on making unsubstantiated claims regarding the categorization of species at the Las Olas site as "*wetland species*," and chooses to manipulate and exaggerate environmental data to make its case against the Claimants.

(c) The First KECE Report's blatant mischaracterization of Barboza's First Expert Report.

136. The First KECE Report is also rife with mischaracterizations of Mr Barboza's First Expert Report. Mr Erwin wrongly asserts that one of the purposes of Mr Barboza's First Expert Report was "*to determine whether wetlands existed on the property*."[118] As Mr Barboza explains in his Second Expert Report, his First Expert Report never

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113 Calvo and Langstroth Report, para. 74.
114 *See id* at Appendix 9, pp 103-106.
115 Baillie Report, at para 80.
116 *Id.*
117 Arce 2, para. 46.
118 First KECE Report, at para 74.

sought to evaluate the *present* ecological conditions at the site.[119] Rather, Mr Barboza performed an analysis of different documents issued by state authorities such as SINAC and INTA with regard to the existence or nonexistence of wetlands on the Las Olas site in 2011.[120]

137. Mr Barboza was quite clear that the scope of his report was not to perform a site visit to Las Olas, or to collect primary data on the present condition of the site in regards to present hydrological conditions or soil analysis.[121] Rather, Mr Barboza's review was document focused, emphasizing whether SINAC's initial findings were sound and could be substantiated with the evidence it had collected at the time.

138. This primary purpose of Mr Barboza's analysis - to evaluate the *process* and *propriety* of SINAC's March 2011 determination of wetlands on the Condominium Section of Las Olas and whether its determination was in accordance with Costa Rican law - is clearly described in both his First and Second Expert Reports. Yet, the First KECE Report completely misses the point in purporting to find fault with Mr Barboza's methodology in this regard.[122] As Mr Barboza himself states in his Second Expert Report:

> "*it is surprising that someone who claims to have such high professional qualifications reaches such biased conclusions on questions completely outside the scope of work done, particularly when my report (page 27) contains a list of documents that were available for its preparation . . .Since the scope of my First Expert Report never included the generation of new evidence, much less a determination of the current condition of the site of the Las Olas project or a determination of the existence of a wetland, the assertions of the First KECE Report are unfounded.*"[123]

139. Mr Barboza also addresses the First KECE Report's accusation that he failed to "*reference . . . technical information such as existing site topographical information or geological reports*"[124] in his Second Expert Report. After reiterating that it is outside the scope of his report to evaluate *existing* site information, as Mr Barboza explains, the touchstone of the analysis of whether a wetland exists is the tripartite criteria of "*hydrophitic vegetation*," "*hydric soils*," and "*hydrology*" under Executive

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119 *See* Barboza 2, at paras. 5-9.
120 *See id*, at para 2.
121 *See* Barboza 2 at para 12-13.
122 *See* First KECE Report at para 118.
123 *See* Barboza 2 at para 13.
124 *See* First KECE Report at para. 118(a)(iv).

Decree No. 35803-MINAE.[125] According to Mr Barboza, topographic and geological reports or photointerpretation "*only supplement the principle [sic] information to identify a wetland*"[126] since the tripartite criteria is clear and topographic or geological data "*do not, by themselves, demonstrate any of the technical-legal criteria*."[127]

140. The First KECE Report's clear mischaracterization of Mr Barboza's findings only serve to undermine its credibility in asserting that "*the site consists of upland forests, wetland forests, ravines, wetlands, developed areas (consisting of infrastructure, filled/ditched/cleared wetland areas, and a house), and disturbed areas*,"[128] as further discussed below.

(d) The First KECE Report's unsubstantiated conclusions regarding the site's "*multiple wetlands*."

141. Given its exaggerated findings discussed above, it is no surprise that the First KECE Report shows disregard for the fact that three criteria are required under Executive Decree No. 35803-MINAE, namely (1) "*Hydrophitic vegetation,*" (2) "*hydric soils,*" and (3) "*hydric conditions.*" As a result, it is also unsurprising that the First KECE Report is riddled with unsubstantiated allegations of wetlands regarding multiple areas of the Las Olas site. These are discussed in detail below.

142. ***Mr Erwin's erroneous identification of Wetlands #6-8.*** In Appendix 7 of the First KECE Report, Mr Erwin identifies areas which he alleges are wetlands in the east and northeast portion of the Las Olas project site. As discussed by Dr Calvo and Dr Langstroth, these areas are not wetlands.

143. In paragraph 63 of their report,[129] Dr Calvo and Dr Langstroth explain that the alleged wetlands #6, 7, and 8 identified in Appendix 7 of the First KECE Report are "*not wetlands,*" but are "*natural drainage features, with moderate slopes, through which precipitation runoff drains to the north and east of the site.*" As their report makes clear, these drainage features show "*no indication that water remains ponded or soils remain saturated for a long enough time to allow the development of hydric soils or hydrophilic vegetation.*" Thus, as Dr Calvo and Dr Langstroth confirm, the vegetation in these areas are common in humid areas, but are not wetland species.

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125 *See* Barboza 2, at para 20.
126 *Id.* at para. 22.
127 *Id.* at para 24.
128 First KECE Report, at para 52.
129 *See* Calvo and Langstroth Report, at para 63.

144. Dr Calvo and Dr Langstroth's opinion is further confirmed by the site observations of Dr Baillie in regards to Mr Erwin's erroneous identification of wetland areas #6, 7, and 8. As Dr Baillie explains in paragraph 3 of his report, there is no support in the soil analysis for a finding of wetlands in the eastern part of the site:

> *[a]ll of the valleys in the eastern part of the site are narrow and have sloping floors. Their soils are predominantly red or brown and imperfectly drained. A few very small patches may be marginally hydric but these are not large enough to support wetlands. The topography appears to preclude wetland development.*[130]

145. Dr Baillie illustrates in his Figure 2 the drainage patterns described by Dr Calvo and Dr Langstroth, where the precipitation runoff from the northeast and east parts of the Las Olas site drains off the property into the distant Aserredero river systems.[131] Dr Baillie explains that the First KECE Report's "*depiction of extensive wetlands in the eastern part of the site . . . does not accord with the topographic map or my traverses and soil observations.*"

146. **Mr Erwin's erroneous identification of Wetland #1.** The First KECE Report also wrongly identifies what it calls "wetland #1" in the southwestern corner of the site as a wetland. As Dr Calvo and Dr Langstroth explain, Mr Erwin's photographs of wetland #1 suggest that he bases his assessment, in part, on the "*dominance of Mexican crowngrass*" which does not necessarily indicate that an area is a wetland.[132] As Dr Calvo and Dr Langstroth explain further, Mexican crowngrass is classified in the United States Department of Agriculture comprehensive list of species as "*facultative wet*," which indicates that the species "*usually occurs in wetlands, but may occur in non-wetlands.*"[133] Given that the classification is not definitive, it is all the more important that the two other criteria of wetlands be consulted.

147. In consulting the two other criteria of wetlands, hydric soils and hydric condition, Dr Calvo and Dr Langstroth determined that "*the southwest corner . . . does not show evidence of either hydric condition or hydric soils.*"[134] They explain further that the southwest corner shows "*no indication of ponding or saturation*" because although

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130 *See* Baillie Report, at para 3.
131 *See id* at Figure 2, p.16.
132 *See* Calvo and Langstroth Report, at paras. 33, 64.
133 *See id* at para. 36.
134 *See id* at para. 39.

there is an area of natural drainage in the southwest corner, "*the area is not concave enough to allow for ponding.*"[135]

148. Dr Baillie confirms Dr Calvo and Dr Langstroth's conclusion that there are no hydric soils in the southwest corner of the site, erroneously labelled as "wetland #1" in the First KECE Report. Dr Baillie explains that his "*soils work confirms the findings of INTA that there are currently no hydric soils in this valley. It also bears out INTA's conclusion that some general valley floor fill may predate Project works.*"[136]

149. **Mr Erwin's unsubstantiated allegations of wetland fill in his alleged wetland #1.** Furthermore, setting aside Mr Erwin's baseless conclusions regarding wetland fill in this southwestern area of the site,[137] Dr Baillie's primary data from his site visit "*bears out INTA's conclusion that any general valley floor fill may predate the site.*"[138]

150. The First KECE Report's erroneous conclusions regarding wetland fill may be attributable to its disregard for the possible impact of the public roads on the project Site, which Dr Baillie confirms is a significant part of the analysis. As Dr Baillie explains, "*there are many comments in the Report about the effects of culverts on stream hydrology and on wetlands . . . [but] the Report fails to clarify that most of the ecologically important culverts as far as the valleys are concerned are those installed by public authorities where their roads cross drainage lines.*"[139]

151. **Mr Erwin's unsubstantiated allegation regarding wetland #4.** In Appendix 7 of the First KECE Report, it is clear from even a cursory review that Mr Erwin's alleged "wetland #4" is located entirely outside the property boundary. This is noted by Dr Calvo and Dr Langstroth in their report.[140]

152. **Mr Erwin's exaggerated findings regarding wetlands in the western part of the Las Olas site.** In Appendix 7 of the First KECE Report, Mr Erwin identified three additional wetland areas #2, 3, and 5. Alleged wetlands #2 and 3 are located almost entirely on the "Easements and other lots" section of the Las Olas project site, whereas alleged wetland #5 is located in the Condominium Section.

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135 *See id* at para 64.
136 *See* Baillie Report, at para. 77.
137 *See* First KECE Report; *see also id* at paras. 189-190.
138 *Id.*
139 Baillie Report, para. 77.
140 *See* Calvo and Langstroth Report, at para. 65.

153. As Dr Calvo and Dr Langstroth explain, Mr Erwin "*grossly overestimates the extent of potential wetlands on the western portion of the site.*"[141] Dr Calvo and Dr Langstroth first explain that there are three depressional areas in the western part of the site near the outer borders of the Las Olas site that show marsh, but this area is much smaller than Mr Erwin's rough estimate based on topographic map lines (rather than site observations) because Appendix 7 fails to take into account the slopes surrounding the depressions and the corresponding precipitation runoff.[142]

154. Dr Baillie similarly finds that three "valleys" contain hydric soils, but these remain unaffected by development at the Las Olas site.[143] Dr Baillie explains further that "*the hydrological regimes of all of them are more or less affected by the roads, which were (to [Dr Baillie's] understanding) constructed by the public authorities, not the Investors*."

(e) The First KECE Report's lack of support for forestry conclusions.

155. The First KECE Report offers further unsubstantiated allegations regarding the existence of forests. It states that "*the majority of the Las Olas Ecosystem may be considered forested,*"[144] but acknowledges that "*in 2007-2008, at the time of the Environmental Viability Assessment for Las Olas, the property was identified as an abandoned agricultural area with scattered trees.*"[145] But then, Mr Erwin argues that the 2011 INGEOFOR Report's assertion that the Las Olas site was traditionally used as agricultural and grazing land (but was in need of maintenance) should be disregarded because of the presence of an "*early succession forest*."[146]

156. As Dr Calvo and Dr Langstroth explain in their report that the First KECE Report's findings regarding the Las Olas site's forestry features are suspect because Mr Erwin "*offers no support for [his] assertion.*"[147]

157. First, Mr Erwin's attempts to explain away the "no forest" findings in SETENA's Environmental Viabilities based on rapid growth due to the inability of the investors to perform maintenance on the land after 2012 is completely disingenuous. As Dr

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141 *See id.*
142 *See id* at para. 75; *see also id* at para. 65.
143 *See* Baillie Report, at para. 6.
144 *See* First KECE Report, at para. 187.
145 *See id* at para. 81-85.
146 *See id* at para. 181-82.
147 *See* Calvo and Langstroth Report at paras. 60, 66.

Calvo and Dr Langstroth explain, the annual precipitation is "*nearly double that of Florida*" and "*three times as high as in the District of Columbia*."[148] Because of these and other climate factors present at Las Olas, "*the site's natural tendency is to revert to a forested area if left untouched*."[149]

158. But, as Dr Calvo and Dr Langstroth explain, this overgrowth due to the lack of maintenance does not magically turn a land traditionally used for agriculture and grazing into a "*forest*" under Costa Rican law. Under Costa Rican law, the Forestry Law defines a forest ecosystem as "*…diverse plants and animal, major and minor, that interact: are born, grow, reproduce, and die, depend on each other throughout their life. After thousands of years, this composition [of species] has reached an equilibrium which, uninterrupted, will remain indefinitely and will sustain transformation very slowly.*"

159. Likewise, a forest is defined as an "*ecosystem native or auctoctonous, intervened or not, regenerated by natural succession or other forestry techniques, that occupies an area of two or more hectares, characterized by the presence of mature trees of different ages, species and of diverse sizes, with one or more canopy levels that cover more than seventy percent (70%) of the area and where there are more than sixty trees per hectare of fifteen or more centimeters of diameter at breast height (dbh)*".

160. The First KECE Report, according to Dr Calvo and Dr Langstroth, "*did not conduct a qualitative assessment of tree density and dbh, which is necessary to determine if an area meets the Costa Rican definition of forest.*"[150] Moreover, Dr Calvo and Dr Langstroth observed that the First KECE Report makes "*no specific reference to any methods [used by Mr Erwin] to assess whether forests are present on site.*" Thus, Mr Erwin's conclusion that the "*majority of the Las Olas Ecosystem <u>may</u> be considered forested*" is hyperbolic and lacks any support whatsoever. Mr Arce is equally critical of the First KECE Report's forestry conclusions. Not only does he find fault with Mr Erwin's methodology and classifications but he has prepared a photointerpretation based on satellite images of the project site over the 2002 to 2015 period which show clearly the absence of even a "*secondary forest*" at the material time.[151]

161. Furthermore, it is hypocritical for the Respondent simultaneously to argue without any basis that the Las Olas developers were not entitled to conduct routine

148 *Id* at para. 14.
149 *Id.* at para. 52.
150 *Id.*
151 C269, Minor Arce Solano's Photointerpretation of Las Olas Project site.

maintenance works on their own land – land which, at the time of the Environmental Viability issuance in 2008 was not forested (as acknowledged by even the First KECE Report),[152] and then base its forestry arguments on overgrowth on the site that took place after the Environmental Viability (some of which undoubtedly grew in after the Claimants' investment was expropriated). Such is the extent of the zeal that the First KECE Report contains for finding forests at the Las Olas site (where none exist), and the arbitrary and unpredictable regulatory environment that the Respondent maintains in violation of the DR-CAFTA.

(f) Other Critiques

162. **The First KECE Report's Lack of Primary Data and General Deficiencies.** The Methodology section of the First KECE Report indicates that, apart from the botanists, little data was collected.[153] The fieldwork for the non-botanist part of the team appears to have been limited to visual inspection, looking for culverts, and taking photographs, with GPS tracking waypoints. In the absence of primary data, the First KECE Report is largely an amalgamation of general descriptions of wetland and forest features in general, without actually substantiating that these features are present on the site. Furthermore, much of the rest of the First KECE Report is devoted to off-base comments on Mr Barboza's First Expert Report.

163. **The First KECE Report's failure to account for factors outside of the Investors' control.** Moreover, as mentioned previously, the First KECE Report also ignores the impact of the public roads on the project Site, which Dr Baillie confirms is a significant part of the analysis. As Dr Baillie explains, "*there are many comments in the Report about the effects of culverts on stream hydrology and on wetlands . . . [but] it fails to clarify that the most ecologically important culverts as far as the wetlands are concerned are those installed by the public authorities on their roads, rather than by the Project*."[154]

164. As further discussed below, by Mr Ortiz in his Opinion and by Mr Aven and Mr Damjanac in their Second Witness Statements, consideration of the Las Olas site's development and that of the surrounding areas prior to and unrelated to the Investors' arrival, including the existing public roads circumscribing the project area and drainage lines maintained by the town, are critical in debunking the Respondent's blanket accusations of environmental impact and illegality.

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152 First KECE Report, at para. 182.
153 *See* Baillie Report, at paras. 43-49.
154 *Id*., para. 80.

165. **The First KECE Report and Counter Memorial's misstatements about the Aserradero River.** A further critique of the First KECE Report and the Respondent's Counter Memorial as a whole is its imprecise and inaccurate description of the Aserradero River. The Counter Memorial states that the Las Olas project site "*forms part of a biologic and hydrologic system that comprises the Aserradero River System, located a few meters away from the project site,*"[155] but the Counter Memorial's general description is notable for its lack of specificity on what role the Aserradero River plays in the analysis of the Las Olas site itself.

166. The First KECE Report carries on this hyperbolic rhetoric based on its erroneous wetland and forestry findings, stating that "*ecosystems like Las Olas Ecosystem with its mosaic of upland forest and wetlands can provide an important contribution such as water, sediment and biodiversity to adjoining ecosystems such as the Rio Aserradero and its estuary*."

167. The flowery prose of Mr Erwin in his First KECE Report fails accurately or precisely to describe the Las Olas site's interaction with the Aserradero. As Dr Calvo and Dr Langstroth clarify, it is not disputed that the course of the Aserradero River runs to the east of the property boundary and outside of the site entirely, which the First KECE Report also acknowledges.[156] Indeed, the presence of the Aserradero to the east of the site influences the drainage features of precipitation runoff from the Las Olas site, as water will flow from the east of the site and exit towards the public road into the Aserradero River system.[157] These drainage features, which are a function of the topography of the site and the existence of the Aserradero to the east, *ensure that no wetlands could form in the eastern part of the site.*[158] The location of the Asseradero River system to the northeast of the Las Olas property is confirmed by Mr Mussio in his First Witness Statement.[159]

168. Therefore, because the topography of the Las Olas site and the Aserredero to the east actually *preclude* the formation of wetlands in the eastern part of the site, the First KECE Report's inclusion of the IUCN general description of the Aserradero wetlands,[160] and its later speculation of how the Investors' activities could *potentially*

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155 *See* Counter-Memorial, at para. 108.
156 *See* Calvo and Langstroth Report at para. 6; *see also* First KECE Report at Appendix 8 (blue dotted line indicates that the Aserradero River System exists outside of the Las Olas site).
157 *See* Calvo and Langstroth Report, at para. 20.
158 *See* Baillie Report, at para. 73; *see* Calvo and Langstroth Report, at paras. 20, 63.
159 Mussio 1, para. 65.
160 *See* First KECE Report, at para. 25.

have an effect on the Aserredero system[161] only serve to distract and confuse the reader into an unsupportable conclusion.

(2) The Las Olas Project Site in Reality

169. The Respondent's Counter Memorial and Mr Erwin's self-serving account of the Las Olas site is replete with environmental jargon and generalities regarding Costa Rica's ecological features, and is not rooted in the actual environmental conditions of the site. The truth is that the actual area that makes up the Las Olas site was once an animal grazing pasture, then a promising potential development site for the Investors with surrounding residential developments and tourist attractions, and now, after the Costa Rican Government halted development of the site, an area infiltrated by squatters and trespassers abusing the land.

(a) Background regarding the site

170. Importantly, as Dr Calvo, Dr Langstroth, and Dr Baillie confirm, the Las Olas site is not at all a pristine ecological area riddled with forests and wetlands. Rather, it is an area that has artifacts of prior development by the Municipality, is affected by existing developments that have largely developed and expanded (seemingly without obstruction) in the period since the Investors acquired their interest in Las Olas, and that has a history of agricultural use for grazing animals. Dr Calvo and Dr Langstroth explain that the "*site is bounded on all sides by roads, including Route 34, a main thoroughfare connecting towns along the Pacific coast in the Provincia of Puntarenas, on the north,*"[162] except for the area of the site that borders the ocean.

171. The immediate neighbors of the Las Olas site are existing residential developments (located to the east, west, and south of the Investors' property).[163] These substantial residential developments include Villas de Oceano Holiday residential development to the south and southeast boundary of the site.[164] The surrounding developments also appear to have largely developed and expanded during the same period of time that the Investors held their interests in the Las Olas site, as confirmed by aerial photography.[165]

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161 *See id* at para. 69.
162 Calvo and Langstroth Report, at para. 5.
163 *Id.*
164 *See* Baillie Report, at para. 19; *see also* aerial photographs in the First KECE Report, Appendix 4, for further view of residential developments surrounding site.
165 Compare Calvo and Langstroth Report, Figure 2 (aerial view of site and surrounding area in 2002) to Figures 3 and 4 (aerial view of the site and surrounding area, 2016).

172. Along the Pacific Coast near the Concession, there are also "*multiple tourist developments, such as hotels, resorts, and condominiums, which provide access to several kilometers of continuous beach.*"[166] These expansive residential and tourist developments typify the immediate area surrounding the Las Olas site.

173. To the north of Route 34 on the northern border of the site, there is a variety of land uses including cattle grazing and small scale agriculture.[167] As mentioned previously, the site itself was used for grazing before 2002, as also confirmed by aerial photography available through Google Earth,[168] as well as the testimony of numerous witnesses.[169]

174. In this neighborhood a bit further beyond the borders of the Las Olas site are a variety of other residential developments, including a nearly 500-unit residential development called "Project Malaga," a site developed by a company called Rock Constructions, as well as the "Jardines del Pacifco" and "Condominio Horizontal Residencia Costa del Sol" residential developments as described by Mr Damjanac in his Second Witness Statement.[170] Again, it appears that these developments have largely developed and expanded since 2002, as shown by aerial photography.[171]

(b) Evaluating the Historic and Present Conditions of the Site under Executive Decree No. 35803-MINAE and the Costa Rican Forestry Law

175. A striking feature of the Respondent's approach in its Counter Memorial and Mr Erwin's approach in the First KECE Report is the emphasis on *present* site conditions, as opposed to the historic site conditions at the time of the issuance of the SETENA Environmental Viability in 2008, and later, at the time of the TAA and the Municipality's arbitrary suspension of the development of the project. Indeed, the Respondent largely attempts to distance itself from the documentary record and the findings described in contemporaneous government reports.

176. The Respondent's choice to focus on the *present* conditions of the site becomes clear in the greater context of their post-hoc arguments in the Counter Memorial, in which the Respondent raises "*illegality*" arguments based solely on an "after-the-fact"

166 Calvo and Langstroth Report, at para. 7.
167 *Id* at para. 8.
168 *Id.* at para. 9; *see also id* at Figure 2.
169 Damjanac 1, para. 141; Arce 1, para 12 ; Bermudez 1, para. 37.
170 *See* Damjanac 2, paras. 59-67.
171 *See id.*

challenge of duly issued permits that may be challenged under Costa Rican law only through proper administrative challenges such as the "*lesividad*" process.[172]

177. The Respondent engages in this bizarre approach because from even a cursory review of these contemporaneous government documents, there are repeated findings of *no wetlands* and *no forests* up to and through 2011 at the Las Olas site, and the only reports of "*wetlands*" and "*forests*" are from SINAC – findings that have been rebutted in full by the First and Second Expert Reports of Mr Barboza – or by Ms Vargas (a government official who admits to having no competence to determine a wetland)[173] and/or Mr Bucelato.[174] By way of summary and as discussed in the Claimants' Memorial:[175]

(a) On January 20, 2006, SINAC issued confirmation that the Concession is not within a WPA;

(b) On March 17, 2006, SETENA issued an Environmental Viability for the Concession;

(c) On April 2, 2008, SINAC issued confirmation to SETENA that the Condominium Section is not within a WPA;[176]

(d) On June 2, 2008, SETENA issued an Environmental Viability for the Condominium Section after conducting a site visit and reviewing the Claimants' D1 application, which included an Environmental Impact Assessment;[177]

(e) In March 2009, the "*Esterillos Oeste community*" complained that the Las Olas site "*had always been wetlands*," accusing the Claimants of "*fill[ing] in lagoon*";[178]

(f) On April 26, 2009, Ms Vargas reported that, from inspections consisting of a "*limited . . . visual check from the property boundary*" on January 20, 2010 and May 21, 2010, that there was "*land in a low area that was characterized*

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172 *See* Ortiz Opinion, at para. 48.
173 *See* Vargas 1, at para. 12.
174 Or Mr Bucelato secondhand, through Ms Vargas's reports.
175 *See* Memorial, at para. 217.
176 Exhibit C36, SETENA Environmental Viability for the Concession, March 17, 2006.
177 Exhibit C48, SINAC Confirmation for Condominium Section of no WPA, April 2, 2008.
178 Exhibit R-23.

by soil that could be flooded and possibly saturated during the rainy season," and that the "*cutting and burning of trees had continued*";[179]

(g) On May 31, 2010, Ms Vargas issued three reports consisting of "*complaints by residents . . . about the existence of a wetland at the Las Olas project*," requesting inspection, and requesting information regarding the issuance of permits;[180]

(h) On July 16, 2010, SINAC issued a report based on Mr Manfredi and Mr Bogantes' July 8, 2010 inspection, confirming that there are no wetlands on the project site;[181]

(i) On August 7, 2010, the Director of Quality of Life of the Ombudsman sent a letter to the Mayor of Parrita reporting "*the existence of an allegation of wetlands impact and deforestation in the Las Olas project that had caused the flooding of the town*";[182]

(j) On August 19, 2010, SETENA issued a report reaffirming that there were no wetlands on the project site;[183]

(k) On August 27, 2010, Mr Bogantes of SINAC wrote to the Defensoria de los Habitantes, confirming that there is no damage to the environment and there are no wetlands on the project site;[184]

(l) On September 1, 2010, SETENA dismissed a complaint filed by Mr Bucelato regarding his accusations regarding existence of wetlands or other environmental violations on the site;[185]

(m) On November 30, 2010, (just two months after SETENA's September 1 Resolution rejecting Mr Bucelato's complaint and reconfirming the Environmental Viability for the Condominium Section) SINAC requested SETENA to suspend the Environmental Viability for the Condominium

179 Exhibit R-26; *see* Vargas 1 at para. 11.
180 *See* R-29, C-67, and R-30; *see* Vargas 1, at para. 14.
181 Exhibit C72, July 2010 SINAC Report, July 16, 2010.
182 Exhibit R-35; Vargas 1, at para. 16.
183 Exhibit C79, SETENA Report confirming no wetlands, August 19, 2010.
184 Exhibit C80, Letter from SINAC to Hazel Diaz Meléndez, August 27, 2010.
185 Exhibit C83, Resolución No. 2086-2010-SETENA, September 1, 2010.

Section on the basis that a group of residents complained of a SINAC March 27, 2008 preliminary study;[186]

(n) On January 11, 2011, after performing site visits in December 2010, SINAC alleged that the project site appeared to have a body of water that was consistent with wetland, but then requested, *inter alia*, that INTA sample the soils at the site to confirm soil composition; [187]

(o) On February 14, 2011, SINAC issued a notification requesting an injunction against further work on the project site;[188]

(p) On March 7, 2011, Mr Bucelato (with two others) appeared at the Municipality, requested the suspension of the Las Olas permits, and alleged the cutting of trees and the forging of a 2008 SINAC document (with reference to an ACOPAC report);[189]

(q) On March 18, 2011, SINAC issued two reports concluding that a wetland had been filled, and that a wetland was being affected by project works[190] (these findings have been roundly criticized by Mr Barboza in his expert report as deficient);[191]

(r) On April 13, 2011, SETENA issued a resolution regarding an injunction to halt any work on the Las Olas site,[192] which the Municipality later notified the Las Olas project in May 2011;

(s) On the same day, April 13, 2011, the TAA issued an injunction against the project on the basis of a complaint by Mr Bucelato;[193]

(t) On May 5, 2011, INTA issued a report on the project site as per SINAC's February 4, 2011 request, and concluded that the soil data did not support a finding of wetlands;[194]

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186 Exhibit C93, SINAC Letter to SETENA, November 30, 2010.
187 Exhibit C101, SINAC Inspection Report, January 3, 2011.
188 *See* Memorial, at para. 133; Exhibit C112, SINAC Notification, February 14, 2011.
189 *See* Vargas 1, at para. 27; *see* C101.
190 Exhibit C116, SINAC Inspection Report, March 16, 2011.
191 *See* Barboza 1 and 2.
192 Exhibit C20.
193 *See* Memorial at para. 155; C121.
194 Exhibit C124, INTA Report, May 5, 2011.

(u) On May 23, July 7, and November 7, 2011, SINAC issued reports reiterating findings of wetlands and forest damage;

(v) On August 23, 2011, SETENA issued a revised Environmental Viability for the Concession;

(w) On October 21, 2011, the Public Prosecutor charged Mr Aven with the crimes of (1) ordering the draining and drying of wetlands in violation of Article 98 of the Wildlife Conservation Law; and (2) invading a conservation area in violation of Article 58 of the Costa Rican Forestry Law; Mr Damjanac was charged with illegal exploitation of a forest in violation of Article 61 of the Costa Rican Forestry Law;[195]

(x) On November 15, 2011, SETENA reconfirmed the Environmental Viability for the Condominium Section (in Resolution No. 2850-2011);

(y) In December 2011, INGEOFOR, an environmental consultant, found that the Las Olas site did not contain a forest, but largely consisted of cattle pasture;[196]

(z) On June 19, 2012, the criminal judge determined that the criminal charges against Mr Aven should proceed to trial (despite a clear lack of evidence);[197]

(aa) On November 6, 2012, the Municipality issued Resolution No. SM-2012-802, notifying of the lifting the SETENA injunction of April 13, 2011,[198] (despite the fact that, as Mr Ortiz explains, a formal administrative proceeding was required to have been initiated within fifteen days of notification of the injunction under Costa Rican law);[199]

(bb) On January 16, 2013, the criminal trial was continued at the Prosecution's request at the eve of closing arguments, and due to the Prosecution's abuse of a procedural rule, the Government sought to re-try its criminal charges against Mr Aven.[200]

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195 C142.
196 C148.
197 *See* Memorial, at paras. 186-87.
198 R-132; Official Letter No. DeGA-359-2012.
199 *See* Ortiz 1, at para. 153. The fifteen-day time period required to initiate an administrative procedure also applies to the TAA and SINAC injunctions, but no administrative proceeding regarding a final determination ever occurred.
200 *See* Memorial, paras. 198-202.

178. Apart from the "Jekyll and Hyde" determinations of SINAC (discussed in further detail below) and the allegations of Ms Vargas (who self-admittedly has no competence to determine wetlands),[201] the contemporaneous governmental reports support the Claimants' recounting of the historical conditions of the site, and the lack of forests and wetlands at the site during the relevant time period.

179. Regarding the historical conditions of the site, there is some limited information that can be surmised by examining *present* conditions, though not the wholesale "post-hoc" examination that Mr Erwin constructs in the First KECE Report. For example, Dr Calvo and Dr Langstroth confirm in their report that there have been vegetation changes on the site since 2002, based on their review of aerial photography.[202] In an area such as the one in Las Olas' location in the humid tropics, after grazing stops, the tendency of the land will be towards rapid recruitment of new vegetation.[203]

180. Mr Damjanac explains that the Investors engaged in routine maintenance work in order to keep the land manageable. This includes clearing this overgrowth on the property, including large amounts of high grass locally known as "*Secate*" that grows constantly due to the high precipitation at the site location,[204] which is not protected by Costa Rican forestry laws. As explained above, the "*Secate*" and the successional tree cover that is present at the site do not constitute a "forest," as Dr Calvo and Dr Langstroth detail in their expert report.

181. Mr Arce, a forestry engineer with 31 years' experience, and Mr Bermudez, a licensed environmental regent, both of whom visited the Las Olas site at the material time (that is in 2009 and 2010), are clear in their findings of no forest at Las Olas. They both explain how they never saw anything on site that could be said to amount to a forest and Mr Arce explains by reference to applicable Costa Rican law, that the felling of certain trees does not require a permit. Mr Arce also explains how Ms Vargas's conclusions regarding the presence of a forest at Las Olas are unsubstantiated and therefore unreliable.[205]

182. Therefore, SINAC's accusations of destruction of a forest are plainly unfounded.

183. Likewise, as discussed above, the Las Olas site at present simply does not contain the eight wetlands that Mr Erwin and the Respondent allege. In particular, Dr Calvo and

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201 *See* Vargas 1, at para. 12.
202 *See* Calvo and Langstroth Report, at paras. 9-11,48.
203 *Id.* at 48.
204 *See* Damjanac 2, at para. 27.
205 Arce 2, paras. 13-19.

Dr Langstroth debunk Mr Erwin's assertions that the eastern portion and southwestern corner of the site contain possible wetlands.[206] Their findings are corroborated by Dr Baillie's soil findings.[207]

184. Dr Calvo and Dr Langstroth then describe three depressional areas which they consider as potential wetlands with seasonal ponding, and Dr Baillie concurs, noting three valleys with hydric soils in the western part of the site.[208] As Dr Baillie confirms, none of these areas are significantly affected by the Las Olas developers' works (if at all), and many effects may be attributable to the public roads or other works that predate the Investors' development of the site (which corresponds to the findings of the INTA Report).[209] After thorough analysis of soil samples, Dr Baillie confirms that the soils in the area surrounding the house on the western margin of the valley are "*not hydric*,"[210] and that "*overall, the field evidence is that the Project's development activities did little, if anything, to disrupt initially hydric soils.*"[211]

185. Accordingly, the Respondent's dogged emphasis on the allegations of "*neighbors*" of the destruction of a wetland, or SINAC's baseless accusations of filling a wetland, are entirely unsubstantiated – as INTA's May 2011 soil analysis and Dr Baillie's later soil findings confirm.

(c) The current state of the site's squatters and trespassers

186. Due to the Respondent's wrongful actions taken against Las Olas, at present it is subject to hordes of squatters who illegally trespass on the property. As Dr Calvo and Dr Langstroth explain in their report, "*squatters have placed simple barbed-wire fencing throughout much of the site. Primitive shelters are scattered throughout the site and at least three wooden houses have been built in the southcentral portion of the site. Plantain or banana and other crops are evident in many of the fenced areas.*"[212]

187. According to the Second Witness Statements of Mr Damjanac, Mr Ventura and Mr Aven, around 360 shacks (or similar structures) now exist on the property. Mr Damjanac explains that the squatters are not necessarily indigent individuals, and

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206 *See* Calvo and Langstroth Report, at para. 35.
207 *See* Baillie Report, at paras. 57-58.
208 *See* Calvo and Langstroth Report at para. 37; Baillie Report, at para. 6.
209 *See* Baillie Report, at paras. 5-6, 10, 57, 65, 76.
210 *See id* at para 11.
211 *See id* at para 12.
212 *See* Calvo and Langstroth Report, at para. 13.

many are individuals who trespass on the property at weekends for leisure activities.[213] Mr Damjanac and Mr Ventura explain that there are, in addition, approximately 19 individuals who live on the property without authorization permanently (although many more trespass onto the land in addition to these 19 individuals), and these squatters and trespassers are organized and dangerous.[214]

188. Mr Damjanac clarifies that "*these trespassers cause substantial damage to the property, including stealing water and electricity, creating waste and sewage, and destroying wildlife. They also engage in drug use and (possibly) drug trafficking, and have engaged in violent conduct*." Despite the substantial efforts that the Claimants have made in securing the property, the squatters and trespassers remain a substantial threat to Las Olas and the local community.

189. As Mr Ventura illustrates further, the Claimants have filed repeated complaints regarding trespassers on the property with the local authorities during the past year. Mr Ventura has filed requests with the Ministry of Security, the Municipality of Parrita, the local police and the Constitutional Court to get them to remove the squatters but so far nothing has been done to get rid of them. He has also delivered several letters to the authorities on behalf of Mr Aven, including two letters dated November 2, 2015 and December 9, 2015 informing the prosecutor, Mr Martinez, the President of Costa Rica, MINAE and the Ministry of Public Security of the problem with the squatters onsite[215] and a letter dated November 30, 2015 addressed to the Ministry of Public Security authorising entry onto the Las Olas site to clear the squatters and their illegal shacks.[216] Mr Ventura, in his Second Witness Statement, also recounts his communication to the Ministry of Security on at least one occasion in early November 2015 about the squatters and a telephone conversation with Ms Vargas on November 24, 2015, in which she informed him that the Municipality would attend the site to review the situation.[217] Although several visits have since taken place, still the squatters remain at Las Olas.

190. Despite receiving assurances that the authorities would help remove the squatters from the property, when the authorities do come to the property, they refuse to

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213 Damjanac 2, at para. 55.

214 *See id*; *see also* Ventura 2, paras. 11-19.

215 Exhibit C261 Letter from David Aven to Luis Martinez regarding squatters at Las Olas, November 2, 2015.

216 Exhibit C264 Letter from David Aven to Ministry of Public Security authorizing entry into Las Olas to evict squatters, November 30, 2015.

217 Ventura 2, para. 16.

remove these individuals from the Claimants' land, even as they threaten violence or attempt to cause harm to the Investors or the other residents of Esterillos Oeste.

191. On July 16, 2016, the Claimants finally received a notice from the Ministry of Security stating that they would act on the Claimants' complaints and remove the squatters from their property,[218] but no action has been taken as of yet.

(3) The Real Story of the Neighbors of Las Olas

192. The Respondent attempts to portray the Claimants as flouting Costa Rica's rules and regulations, and in particular its environmental protection regime. This "*misconduct*", the Respondent claims, must be contrasted with the Las Olas neighbors' concerns for the protected ecosystem that exists at Las Olas.

193. However, as is apparent from Ms Vargas and Ms Diaz's First Witness Statements, these "*neighbors*" really come down to one man, Mr Bucelato.[219] And as Mr Aven, Mr Damjanac and Mr Mussio explain their Witness Statements, Mr Bucelato had a vendetta against the project, because he had missed out on the opportunity to acquire and develop the land and was intent on causing maximum inconvenience and disruption to Mr Aven and the other Investors as a result.

194. According to Ms Diaz, Mr Bucelato filed his first complaint against Las Olas with the *Defensoria* on July 20, 2010.[220] What is apparent from this complaint is the extent to which Mr Bucelato claimed to have already rallied the other Costa Rican authorities to take up his complaint against Las Olas – the Municipality of Parrita, the TAA in San Jose and the Quepos and San Jose offices of MINAE. It is also apparent that the substance of the complaint at this point in time was the illegal construction on wetlands at Las Olas.

195. The second such complaint received by the Defensoria on November 23, 2010, related simply to the Allegedly Forged Document and requested an explanation from SINAC as to its provenance. Again, this complaint was signed by none other than Mr Bucelato.

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218 Exhibit C267, "Resolucion 510-16" regarding the removal of squatters from the site.

219 The only specific complaints Ms Vargas references in her First Witness Statement are those of Mr Bucelato and it was his complaint that formed the basis of her decision to proceed with her investigation.

220 R-40.

196. As for the complaints received by the Municipality of Parrita, Ms Vargas describes in her First Witness Statement a report of the community from March 2009, a complaint dated April 26, 2009, a complaint dated July 5, 2010 and makes a vague reference at paragraph 14 to "*new claims*" by neighbors of the Las Olas project. Yet, in support of all of these alleged instances, the only documentary evidence she has provided is the March 2009 complaint.[221]

197. In short, the Respondent provides no evidence to support its claim that "*in 2009 and early 2010, the neighbors of Esterillos Oeste issued numerous complaints with the Municipality claiming that Claimants had started works at the Project Site that were resulting in negative effects to the wetlands located within the property.*" The Respondent has only provided one such complaint, a rather hysterical document signed by a handful of apparent neighbors who have no authority to determine what constitutes a wetland, which provides no evidence for their accusations.[222]

198. Further, as a review of Mr Bucelato's criminal complaint and Mr Martinez's indictment reveal, the charges levelled at the project and against Mr Aven and Mr Damjanac personally were based in large (if not sole) part on Mr Bucelato's criminal complaint. Mr Bucelato appears to have been the driving force behind many of the steps taken by Costa Rican officials against the project – Ms Vargas admits in her Witness Statement that she knew him.[223]

199. In reality, the Claimants went above and beyond their duties as responsible developers in the Esterillos Oeste community. As the Respondent acknowledges in its Counter Memorial, the Municipality of Parrita, in which Esterillos Oeste is located, is one of the poorest in the country and social inequality as a result of the economic conditions remains a concern. This was something that the Claimants, as Investors, hoped to improve, by creating jobs and other opportunities for the local residents in the hope that money would flow into the community.[224] Mr Aven was also concerned to work with the Municipality to overcome any problems it had and it was in that spirit that he and the other Investors donated drainage equipment to the Municipality and helped with the construction of drainage channels to remedy the seasonal flooding that was known to take place.[225] Mr Aven and Mr Damjanac were

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221 R-23.
222 R-23.
223 Vargas 1, para. 95.
224 Aven 1, paras. 76-80; Damjanac 1, para. 46a.
225 Aven 1, para. 73; Damjanac 1, paras. 108-111; Damjanac 2, paras. 44-45.

not your typical profit-hungry investors – they lived locally and had strong ties to the community and a desire to see Esterillos Oeste prosper.

200. What is clear from Ms Diaz and Ms Vargas's version of events is that the complaints of a few overzealous neighbors were allowed to spiral out of control and take on a significance of which they were undeserving, given the lack of evidence of any wrongdoing these "*neighbors*" possessed, their lack of qualifications in environmental matters and the many opportunities the authorities had to bring an end to the matter, including by interviewing the Claimants about their alleged infractions, which they remarkably failed to do over the course of a more than four-year investigative process.

201. It is apparent from Ms Vargas and Ms Diaz's First Witness Statements that time and time again the authorities ignored critical evidence and the decisions taken by one another. For example, Ms Diaz confirms that SINAC was aware of the existence of the Allegedly Forged Document as early as October 1, 2008 but did nothing about it. Why then, would that same document later become the basis for multiple complaints and investigations, even after SETENA – the only authority capable of issuing or cancelling an Environmental Viability – had (in full knowledge of the existence of the Allegedly Forged Document) reconfirmed the Las Olas Condominium Section Environmental Viability?

202. As will be explained in more detail below, the Respondent relies on a distorted application of the preparatory acts principle under Costa Rican law to try and explain away the numerous, contradictory, and largely unsubstantiated findings of its own agencies, including INTA – the agency that (i) SINAC itself recognized as the only agency capable of making a determination on hydric soils, one of the essential requirements for a finding of wetlands and (ii) Prosecutor Martinez himself commissioned to produce a report on Las Olas as part of his criminal investigation, the findings of which he now attempts to downplay by claiming that "*[Dr Cubero] was not competent to determine whether or not a wetland existed.*"[226]

C. The Applicable Regulatory Regime

203. The Parties largely agree on the applicable regulatory regime for real estate developments in Costa Rica and the Claimants rely on the expert Opinion of Mr Ortiz on matters of Costa Rican law. Despite this, the Respondent omits crucial details

[226] Martinez 1, para. 104.

regarding the regulatory and administrative law of Costa Rica which are damning to its case.

(1) The Costa Rican Agencies involved in the permitting process

(a) Obtaining an Environmental Viability from SETENA

204. Regarding SETENA's issuance of Environmental Viability permits, both parties agree, for instance, that the first thing that a developer must do is to acquire the required Environmental Viability permit from SETENA, prior to applying for any construction permits.[227]

205. The parties largely agree on the process required to obtain an Environmental Viability from SETENA. They agree that, in order to obtain an Environmental Viability, a developer must complete a preliminary environmental assessment, and that for projects that have a high potential environmental impact, the developer must complete a form called a "D1."[228] This includes a determination from SINAC that the project area is not within a WPA.

206. Once the requisite information is submitted to SETENA, SETENA verifies the information and then determines the type of environmental impact assessment it requires the developer to complete.[229] The instrument required may be an Environmental Impact Study, an Environmental Management Plan, or a Sworn Declaration of Environmental Commitments.[230]

207. Both parties agree further that once SETENA issues the Environmental Viability, the developer can then apply for construction permits from the Municipality.[231]

208. Likewise, both the Claimants and the Respondent agree that SETENA is the governmental authority under Costa Rican law charged with monitoring compliance

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227 *See* Memorial, at para. 56 ("*As in the US, the very first thing that had to be done was to acquire the project's environmental viability permit…*"); *compare with* Counter Memorial at para. 130 ("*In order to obtain work permits from the Municipality, and develop the Project Site, Claimants had first to obtain an EV from SETENA*").

228 *See* Memorial, at paras. 57-58; Counter Memorial, at paras. 135-136.

229 *See* Memorial, at para. 60; Counter Memorial, at para. 137.

230 *See* Memorial, at para. 60; Counter Memorial, at para. 137.

231 *See* Memorial, at para. 62 ("*Once the Environmental Viability has been granted by SETENA, the developer can apply for the other permits required for the project…[including] construction permits from the Municipality*"); *compare with* Counter Memorial, at para. 167 ("*After the granting of the EV, Claimants had to apply in order to obtain construction permits for the Las Olas Project from the Municipality*").

by the permit holder with any conditions attached to the Environmental Viability.[232] As Mr Ortiz explains, as a general administrative law principle, all government bodies (including SETENA) are empowered and even obligated to review their own administrative acts and resolutions if there is a defect that may cause nullity.[233]

209. The Respondent fails to explain, however, that under Costa Rican law, there is a proscribed procedure for the injunction or suspension of a SETENA Environmental Viability.[234] Under Costa Rican public law, after a competent authority issues an injunction, such as the April 13, 2011 SETENA injunction, an administrative proceeding or judicial review must be initiated ***within 15 days*** following the notification of the injunction to the affected party, or be reversed.

210. Mr Ortiz concludes that SETENA's failure to initiate an administrative proceeding or judicial review within the required time period was a violation of Costa Rican public law.[235] Furthermore, the failure of SETENA to formally lift its injunction until November 2012 was unreasonable and a violation of the law, because the unreasonable delay illegally paralyzed the project and indirectly annulled or cancelled the Environmental Viability "*without respecting due process of law.*"[236]

(b) Obtaining Construction Permits from the Municipality

211. As it pertains to obtaining construction permits from the Municipality, the Municipality's powers are limited by sectoral laws that confer competencies to state entities such as SETENA and SINAC.[237] Therefore, although the Respondent fails to note this feature of the Costa Rican regulatory framework explicitly in its Counter Memorial, its own witness Ms. Vargas, explains in her First Witness Statement that it is undisputed that while the Municipality has power to regulate the use of land through the granting of construction permits, the Municipality is obligated to coordinate with SINAC, SETENA, and other agencies to ensure environmental

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232 *See* Memorial, at para. 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*"); *compare with* Counter Memorial, at para. 80 ("…*SETENA directs the applicant to undertake actions SETENA considers necessary to minimize the impact of such projects on the environment. Specifically, SETENA…verifies compliance with the environmental commitments*").

233 *See* Ortiz Opinion, at para. 43.

234 *Id.* at para. 51.

235 Ortiz Opinion, at para 51.

236 *Id* at para. 52.

237 *See* Memorial, at para. 73.

compliance.[238] Notably, Ms. Vargas explicitly acknowledges, and the Claimants agree, that the Municipality lacks competence to determine the existence of a wetland or forest.[239]

212. As Mr Ortiz explains in his expert Opinion, if the government had wanted to review or revoke a permit once it had been issued, the government was required to file an administrative action through a "*lesividad*" process. This "*lesividad*" process includes a declaration that the government act is "*harmful to the public interest*" and a request to the Attorney General's office to file a judicial review before the Administrative Court in order to seek its annulment.[240]

213. It is not disputed that the Costa Rican government has not initiated an administrative action to nullify the issuance of the construction permit for the Condominium or Easement sections. Furthermore, according to Mr Ortiz, "*until a final ruling is reached, the administrative act, resolution, or order that is being objected to maintains its validity and effectiveness, unless the Administrative Court issues an interim relief injunction to suspend its effects.*"[241]

214. This indicates the Costa Rican authorities' utter disregard for their own laws and procedures, and their willingness to deny necessary safeguards and procedures to the Claimants.

(c) SINAC's Role

215. Regarding the role of SINAC, both parties agree that SINAC's jurisdiction is conferred by the Biodiversity Law and the Wildlife Conservation Law.[242] As Mr Ortiz explains, SINAC is the body of MINAE charged with managing all issues of WPAs, among other things.[243] SINAC is responsible for establishing protected areas, classifying wetlands, and delineating the boundaries of wetlands. SINAC also responds to complaints and is able to investigate a property with the notification of the property owner.

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238 *See* Memorial, at para. 74; *accord* Witness Statement of Monica Vargas Quesada at para. 12 ("*In my capacity as Environmental Manager of the Municipality, I have no jurisdiction to determine the existence of a wetland or otherwise. This function corresponds to the National Program for Wetlands of the Central Pacific Conservation Area ("ACOPAC"), a department of [SINAC] of the MINAE*").

239 *See* Vargas 1, at para 11.

240 *See* Ortiz Opinion, at para. 46.

241 *See* Ortiz Opinion, at para. 48.

242 *See* Counter Memorial, at para. 74-75; *see* Ortiz Opinion, at para 1.

243 Ortiz Opinion, at para. 7.

216. Though the Respondent is not explicit in its Counter Memorial, it tacitly agrees that SINAC's role in the permitting process is more limited. According to the Respondent, SINAC: (1) confirms whether the project falls within a WPA;[244] (2) gives comments on Environmental Impact Statements;[245] (3) responds to requests from SETENA for review of Environmental Viabilities (where requested);[246] (4) issues permits for the removal of trees;[247] and (5) reviews complaints regarding possible environmental impacts to wetlands, forests, or wildlife.[248]

217. The parties also agree the SINAC is the authority in charge of registering WPAs as wetlands and forests created by Executive Decree, and also has the authority to delineate a wetland or forest.

218. SINAC may also investigate complaints. Importantly, however, while the Claimants and the Respondent agree about the ability of SINAC to investigate complaints, the Respondent neglects to explain that a landowner must be duly notified of the investigation process and be provided documentation relating to the investigation.[249]

219. In urgent circumstances, as explained by Mr Ortiz, SINAC may issue an interim relief injunction[250] but under Costa Rican law, SINAC is obligated to initiate an administrative proceeding to review all evidence within *15 days*, because otherwise, the interim relief injunction has the unlawful effect of "*annulling, cancelling or paralyzing a subjective right without respecting the due process of law*."[251]

(d) The Role of the Tribunal Ambiental Administrativo (TAA)

220. As Mr Ortiz explains in full in his expert Opinion, the TAA is a deconcentrated[252] body of the Ministry of Environment and Energy (MINAE) that investigates complaints regarding violations of environmental regulations.[253] The TAA may

[244] Counter Memorial, at para. 163.
[245] Counter Memorial, at para. 140.
[246] Counter Memorial, at para. 83.
[247] Counter Memorial, at para. 130.
[248] Counter Memorial, at para. 76; *see also* Ortiz Opinion, at para 12.
[249] Ortiz Opinion, at para. 17.
[250] Ortiz Opinion, at para. 32.
[251] *See* Ortiz Opinion, para. 30-33; *see, e.g.*, C247 Constitutional Chamber Res: 2009-03315; C250 Constitutional Chamber Res: 20100-15094; C251 Constitutional Chamber Res: 2010-015424; C258 Constitutional Chamber Res: 2014-019433.
[252] Mr Ortiz explains the important distinction between deconcentrated and decentralized bodies in his Opinion, at footnote 1 on page 9.
[253] Ortiz Opinion, at para. 5.

gather evidence as part of its investigation, and may also order an injunction within its discretion (as occurred in the case of Las Olas).[254]

221. The Respondent, however, again omits the crucial detail that under Costa Rican law, "*[TAA] injunctions cannot be indefinite*."[255] Rather, the TAA *must* initiate an administrative proceeding or judicial review within 15 days,[256] and summon the parties to an oral hearing in which all evidence must be examined.[257] Then, under Article 27 of the Procedure Regulations of the TAA, once the hearing has concluded, the administrative tribunal has thirty days to issue a final ruling (which may be extended another 30 days).[258] Otherwise, the injunction should be lifted.[259]

222. In the case of Las Olas, the TAA injunction has ***never*** been lifted, nor has TAA ever initiated an administrative proceeding to review the evidence at an oral hearing (much less initiate an administrative proceeding within 15 days of April 13, 2011, the date of the TAA injunction). Again, the Respondent's failure to abide by its own laws demonstrates its unqualified disregard for the Claimants' rights.

(2) The Claimants' compliance with the Costa Rican environmental permitting regime

223. The Respondent attempts to fashion something unique out of the obvious fact that a regulator initially relies upon the good faith submissions of the regulated in administering any enforcement regime, just like every other regulator in every other non-Communist country in the world. The reason for this ploy will become apparent below. For the time being however, the Claimants will demonstrate once more their compliance with all applicable local laws and procedures for obtaining the necessary environmental and construction permits.

224. As the Claimants explained in their Memorial, at all times, the Claimants appointed lawyers, architects, engineers, and other professionals to ensure the Claimants' compliance with Costa Rican law.[260] This point cannot be emphasized enough, especially in light of the Respondent's apparent belief that if you repeat an allegation

254 Ortiz Opinion, at para. 125.
255 Ortiz Opinion, at para. 127.
256 Ortiz Opinion, at para. 128.
257 Ortiz Opinion, at para. 124.
258 Ortiz Opinion, at para. 127-28.
259 Ortiz Opinion, at para. 128.
260 *See* Memorial, at para. 75.

over and over again (in this case, Claimants' compliance with the permitting regime), it becomes true:

(a) a "*complete disregard for the applicable environmental rules,*"[261]

(b) "*deliberately disregarded [Costa Rica's] framework for environmental protection,*"[262]

(c) Operated with "*misconduct and disregard for the rules,*"[263]

(d) "*[showed] . . . disregard . . . of Costa Rican law and of its authorities,*"[264]

(e) "*Claimants' continuing failure to grasp . . . concept[s] of Costa Rican law*."[265]

225. These allegations are all the more ironic given the Respondent's repeated attempts to undermine the findings of its own governmental agencies, its refusal to follow its own administrative procedure to challenge permits or agency determinations under proper processes, and its complete failure to afford the Claimants any semblance of due process.

226. To briefly summarize the Claimants' adherence to the required steps in the permitting process, the Claimants:

(a) Hired commissioned architects to develop the master site plan for the beach club on the Concession;[266]

(b) Hired DEPPAT, a Costa Rican environmental consultancy company, to assist in completing the Environmental Viability application for the Concession to SETENA. DEPPAT submitted the D1 application and accompanying documents, obtained confirmation from SINAC that the site was not within a WPA, and paid the environmental guarantee deposit;[267]

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261 Counter Memorial, at para. 197.
262 Counter Memorial, at para. 270.
263 Counter Memorial, at para. 316.
264 Counter Memorial, at para. 347.
265 Counter Memorial, at para. 280.
266 Memorial, at para. 76.
267 Memorial, at para. 78.

(c) Obtained an Environmental Viability for the Concession on March 17, 2006,[268] and applied to the Municipality for relevant construction permits for the Concession and beach club (through Mussio Madrigal), which permits were received in 2007;[269]

(d) Developed, through Mussio Madrigal, the master site plan used to apply for the Environmental Viability for the Condominium Section;[270]

(e) Obtained the relevant construction permits for two easements on the Easements Section in the first quarter of 2007;[271]

(f) Appointed Zurcher Architects to develop a design of the beach club;[272]

(g) Appointed Mussio Madrigral to obtain the Environmental Viability for the Condominium Section (issued June 2, 2008), which included:

(i) The submission of a D1 application to SETENA which included an Environmental Management Plan (on November 8, 2007) and all other studies and reports required by SETENA;

(ii) Field visits to the Las Olas site by SETENA's Institutional Management Department (January 10, 2008); and

(iii) Obtaining confirmation from SINAC to SETENA that the project site was not within a WPA (April 3, 2008);

(h) Notified SETENA on June 1, 2010 that works on the Condominium Section of the site had commenced;

(i) Acquired outstanding construction permits for the Easements (July 16, 2010);[273]

(j) Provided a deposit for the environmental guarantee prior to the start of construction (July 20, 2010);[274]

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268 Memorial, at para. 79.
269 Memorial, at paras. 83, 86.
270 Memorial, at para. 84.
271 *Id.* at 87.
272 Memorial, at para. 85.
273 Memorial at para.103.
274 Memorial, at paras. 88-98.

(k) Acquired construction permits for the remainder of the project (September 7, 2010);

(l) Reapplied for a new Environmental Viability for the Concession through architect Jose Andres Castro and environmental consultant Daniel Loria Sims, after making changes to the site plan (issued August 23, 2011, after the project had been halted by the Respondent's other agencies).[275]

D. The Respondent Convolutes the Basic Regulatory Framework to Make its Case

227. Despite the Parties' general agreement on the basic regulatory framework in which the Claimants operated when developing the Las Olas project, the Respondent convolutes the regulatory framework to make its case. Despite the Respondent's disingenuous assertion that it seeks to enforce its own law, at the heart of the Respondent's breaches of the DR-CAFTA is the Respondent's utter failure to apply its own laws and regulatory framework.

(1) The Respondent bizarrely fashions a novel "duty of good faith" application to support its baseless claim that the Claimants "buried" documents.

228. The Respondent attempts to fashion something unique out of the obvious fact that a regulator initially relies upon the good faith submissions of the regulated in administering any enforcement regime, just like every other regulator in the world.

229. According to the Claimants' expert on Costa Rican law, Mr Ortiz, the principle of good faith is a general principle in Costa Rican legislation that applies to every activity and act. This is codified through Sections 21 and 22 of the Costa Rican Civil Code.[276] This includes the moral obligation not to deceive, and to conduct business relationships (and any other relationship) with honesty.

230. The Claimants readily agree with the Respondent that the principle of good faith applies in the permitting process, but completely disagree about the application of the principle in this case. First, the principle applies equally to *both* a developer and to governmental authorities (including governmental agencies and officials). As discussed in the Claimants' Memorial and developed further below, the Respondent's

[275] Memorial, at paras. 101, 104.
[276] *See* Ortiz Opinion, para. 139.

actions towards the Claimants were in clear breach of this duty as well as the Respondent's obligations under the DR-CAFTA:

(a) The Respondent's agent, Mr Bogantes' solicitation of bribes was a breach of this duty;

(b) The Respondent's pretext in prosecuting Mr Aven and Mr Damjanac based on misinformation and second-hand accounts from Mr Bucelato and against the backdrop of inconsistent agency reports also breached this duty;

(c) The Respondent's decision to prosecute Mr Aven and Mr Damjanac when it did not have the required certainty in order to support the charges brought,[277] breached this duty;

(d) The Respondent's failure to disclose the ongoing investigations to the Claimants, when their outcome would ultimately be determinative of the Claimants' rights breached this duty;

(e) The Respondent's failure to respecte SETENA's duly issued Environmental Viabilities and repeated determinations breached this duty.

231. Second, the Claimants at all times acted in accordance with the principle of good faith. Mr Ortiz explains that the duty of good faith in regulatory matters is reflected in submitting accurate information within the Environment Viability application, and this is applicable both as a general principle and specifically as part of Section 20 of the Environmental Act and Section 81 of the General Provision for the Procedure of Environment Impact Assessment. The principle that a developer has to submit accurate information is hardly unique to the permitting scheme in Costa Rica.

232. Thus, as explained by Mr Ortiz, under Costa Rican law, the Claimants agree that the developer does have the obligation to submit complete and accurate information when obtaining an Environmental Viability, and that the failure to do so may give rise to an action by MINAE or SETENA to annul an Environment Viability previously issued through the "*lesividad*" process.

233. It is undisputed that no annulment proceeding has been initiated by the Respondent as it pertains to the Las Olas project. Therefore, the Respondent attempts to raise in its Counter Memorial a makeshift "*lesividad*" argument that the Claimants failed to

[277] Morera 2, paras. 12-17.

submit complete and accurate information. Putting aside for the moment that this is contrary to Costa Rican law, the Respondent's arguments are doomed for two reasons: (1) the Respondent completely ignores the role of SETENA in confirming and verifying the Claimants' Environmental Viability (which SETENA did (three times) in the case of the Condominium Section of Las Olas); and (2) the Claimants (in fact) submitted accurate and complete information.

(a) The Respondent's bad faith theory conveniently neglects any discussion of SETENA's obligation to verify and control of the Environmental Viability process

234. As explained by Mr Ortiz, the developer's obligations in Costa Rica (including its general and specific obligations to act in good faith) work in concert with SETENA's own obligations as part of the Environment Viability review process. Under Sections 18 and 84 of the Environmental Act, SETENA has the obligation to verify the information submitted by the developer, to analyze that information, and to control its accuracy.

235. This is not only described in the law itself, but by the Constitutional Chamber. According to Mr Ortiz, the Constitutional Chamber has clearly established the obligation of SETENA to duly review the information and to control its accuracy, and SETENA cannot decline the exercise of these powers and cannot delegate them to someone else. This obligation is confirmed by Mr Bermudez, an Environmental Regent with over 31 years' experience in dealing with the environmental permitting regime in Costa Rica, and Mr Mussio, the Las Olas project architect, who also has extensive experience of the Environmental Viability process.[278]

236. In this case, SETENA reviewed the information submitted by the Claimants, requested clarifications, and even made an inspection of the property before and after granting the Environment Viability permits at issue. Therefore, **SETENA validated the information and concluded that the project did not affect wetlands.**

237. The Respondent makes a bizarre and pathetic allegation that the Claimants failed to submit the required biological survey as part of their Environmental Viability application and that this means (although it is not explained how) that they "*duped*"

[278] Bermudez 2, para. 9; Mussio 1, para. 8.

SETENA[279] and obtained the Environmental Viability for the Condominium Section unlawfully.

238. However, as Mr Mussio explains in his First Witness Statement, this is just another baseless accusation, as a review of the Claimants' D1 Form makes clear, and ignores the fact that it was SETENA's responsibility to review and assess the information submitted and identify and request any missing documents. In fact, Mr Mussio points out that the required biological study was filed and that this can be seen from a review of the Environmental Management Plan that was submitted along with the D1, which includes at Section 4.2 "Biotic", all of the biological aspects that the Respondent now claims were not provided.[280]

(b) The Respondent's allegation that the Claimants "buried" information relies on only one document--the Protti Report—which it completely mischaracterizes

239. In another of its increasingly desperate attempts to derail the Claimants' legitimate claims, the Respondent accuses the Claimants of burying information in order to trick the Costa Rican authorities into issuing the requisite permits for their development. This particular allegation relies on only one document – the "Protti Report" – which the Respondent completely mischaracterizes.

240. In order to avoid the fact that SETENA had verified that the project did not affect wetlands, the Respondent has refashioned this broad duty of good faith to argue that the Claimants' failure to submit a single report – the 2008 "Protti Report" – amounted to a breach of that duty. This both misconstrues the duty of good faith, and completely misstates what the Protti Report actually says.

241. First, the Protti Report did not state, as the Respondent alleges, that any area within the project site was a protected wetland and it is therefore not evidence that "*since 2007 Claimants were aware of the existence of wetlands in the Project Site and the [sic] intentionally decided to keep this information from SETENA.*"[281]

242. Protti's report was based on general information, including existing geological and hydroecological maps and information from existing wells. Notably, the Protti Report did not meet the requirements of the Geology Protocol set forth in Executive Decree

[279] Counter Memorial, para. 298.
[280] Mussio 1, paras. 50-52.
[281] Counter Memorial, para. 161.

N. 32712-MINAE for submission with the Environmental Viability,[282] and it did not integrate geotechnical information as is required by the Executive Decree.[283] It is therefore unsurprising that the developer's agents included other reports in its submission to SETENA instead of the Protti Report.

243. The geotechnical information that the Claimants did submit as part of their Environmental Impact Assessment included a geotechnical survey made by Castro de La Torre (File 110-05) which included an analysis of the Concession area, as well as the Condominium Section of Las Olas. Castro de La Torre surveyed the southwest area of Las Olas and took soil samples. This report was composed during the same general time period that the Protti Report was written.

244. The Claimants also submitted a report from Hernández, who conducted geological, hydroecological, and geotechnical analyses. As stated in his report, he used general information from public databases but also conducted a Soil Survey drilling and sampling the soils to have accurate information of the local geology and characteristics of the soils, not just from general information of other sites as was done in Protti's report.[284]

245. As Mr Mussio explains in his First Witness Statement, his firm contracted a company, Tecnocontrol S.A., to carry out soil studies at the Las Olas site and it is likely that Tecnocontrol subcontracted Mr Protti, a geologist, to carry out such a study. Mr Mussio was not involved in the genesis of the Protti Report, however he notes that SETENA requires that the technical hydrogeology study be conducted by a hydrogeologist, which Mr Protti is not, and it is likely that this (and not some twisted attempt to conceal information from the authorities) was the reason for the decision

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[282] Annex 6 of the Executive Decree N. 32712-MINAE "***5. Consideraciones de escala del estudio de geología básica de la finca.*** *El estudio de geología básica de la finca tiene como objetivo la obtención de los datos básicos fundamentales, desde el punto de vista geológico del terreno del AP a desarrollar. En este sentido, el profesional responsable deberá promover la aplicación de una escala de trabajo que permita la realización de ese objetivo, conforme a lo establecido en el la Sección V de este Anexo 6. En la realización del estudio local, el profesional responsable podrá hacer una conceptualización del mismo respecto a otros datos de sitios aledaños al AP y de carácter más regional, siempre y cuando sean necesarios y de utilidad práctica para la finalidad establecida al estudio en cuestión.* ***Los datos locales de la finca deberán ser obtenidos directamente en el campo por el profesional responsable y no deberán ser extraídos únicamente de información previamente publicada por otros autores****. Los datos obtenidos pueden ser reforzados con la presentación de fotografías recientes obtenidas en el AP en estudio.*" (emphases not in original).

[283] Annex 6 of the Executive Decree N. 32712-MINAE: "*Unidades geológicas superficiales y del subsuelo superior descripción básica de las unidades y sus atributos litopetrofísicos fundamentales conforme a lo señalado en la Sección V de este Anexo 6,* ***integración con datos del estudio geotécnico***" (emphases not in original).

[284] *See* Exhibit C222 page 131 of SETENA's file for the Condominium Section (N. 1362-07).

by Geoambiente S.A.'s (the company Mussio Madrigal subcontracted to prepare the D1 application) decision to submit the Hernández report and not the Protti Report to SETENA with the D1.[285]

246. In preparing his First Witness Statement, Mr Mussio met with Geoambiente professionals to discuss the contents of the Protti Report and they confirmed his view that Mr Protti makes no determination as to the existence of wetlands on the project site. Mr Protti's conclusions relate to the drainage conditions on site and the site's potential for seasonal flooding and, according to Mr Mussio's review of the Protti Report with Geoambiente personnel, are based on the blockage of surface water run-off from the Las Olas site at an existing channel under the public road to the West of the site.

247. At bottom, the Las Olas developers submitted and completed more comprehensive surveys than the Protti Report – and SETENA verified these surveys, including by conducting a site visit. It is ironic that the Respondent now attacks the findings of its own agency, SETENA, in its Counter Memorial.

248. The Respondent must attack its own governmental agency because, as Mr Ortiz explains in his expert Opinion, the Environmental Viability is a valid act issued by the competent agency in Costa Rica, which other bodies of the Costa Rican Public Administration must respect and execute. Mr Julio Jurado, a witness for the Respondent, acknowledged and confirmed this fact in his witness statement, stating that "*the law clearly provides that both private and public institutions must comply with SETENA's resolution in relation to these environmental impact assessments*."[286]

249. It is curious that the Respondent accuses the Claimants of sending the Protti Report to SINAC only after SETENA issued its Environmental Viability on June 2, 2008. The only evidence the Respondent offers to support this claim is a statement that "*the survey rests in the files of SINAC for Las Olas Project*,"[287] with no explanation of how or when it supposedly got there or what the Claimants had to do with it. In the circumstances, this allegation should simply be ignored.

250. After alleging that Claimants had omitted to tell the entire story of their regulatory interaction with the authorities, the Respondent promised to identify the crucial, missing details. However, what it did instead, from paragraphs 129 to 255 of its

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[285] Mussio 1, para. 46-49.
[286] *See* Jurado 1, at para. 11.
[287] Counter Memorial, para. 161 and footnote 145.

Counter Memorial, was attempt to obstruct the simple facts of the case by unleashing a flood of misleading, insignificant or erroneous details.

251. The simple, and enduring, facts of this case are that SETENA was responsible for issuing an Environmental Viability designation to the Claimants and the Municipality was responsible for providing construction permits. In spite of all the bogus, extraneous and unproven allegations levelled against the Claimants' development of the Las Olas project – both by a jealous, would-be competitor and by certain unqualified, incompetent and/or overzealous bureaucrats only too willing to pile on – at the end of the day SETENA still maintained its finding in reconfirming the Environmental Viability for the Condominium Section in November 2011.

252. This finding, alone, demolishes the Respondent's defence, as it belies the fact that the Respondent itself – acting through SETENA – has already determined that there was no destruction of legally protected forest, that the Las Olas project would not affect wetlands, and there was no evidence that the original Environmental Viability finding had been procured by fraud or the omission of damaging evidence. If any of these allegations, upon which the entirety of the Respondent's defence hangs, were true, SETENA would not have reconfirmed the Environmental Viability in November 2011.

253. Indeed, the only reason the Respondent has been forced to contrive such a fatally flawed defence is that it is apparently incapable of maintaining the kind of transparent and predictable regulatory regime for foreign investment that it promised it would provide to US investors when it signed up to the DR-CAFTA. In Costa Rica it is apparent that obtaining the necessary permits and permissions through Costa Rica's regulatory regime may never be enough.[288]

(2) Mr Jurado's distinction between preliminary and final acts is incomplete and misleading

254. Mr Jurado, in his Witness Statement in support of the Respondent, stated that the Environmental Viability is a preliminary and preparatory administrative act, and on this basis, Mr Jurado concluded that there is no need to follow an administrative proceeding to annul the Environmental Viability (as in his view, it does not confer

[288] The Respondent similarly depends on a concept it calls the "*obligation of prudence.*" *See* Counter Memorial, at para. 131. As explained by Mr Ortiz, unlike the principle of good faith, Costa Rican legislation does not establish a principle or general obligation of "*prudence*." The Counter Memorial provides no explanation regarding the obligations inherent in this so-called "*obligation of prudence,*" nor does it explain the source of the obligation or its effects.

any subjective rights to the Claimants).[289] This oversimplification of Costa Rican law is misleading, and is *precisely* the opposite conclusion that Mr Jurado reached in an Attorney General's Office opinion on the issue.

255. Mr Ortiz explains that both Mr Jurado's Attorney General's Office opinion and the leading Constitutional Chamber case have stated that an "*administrative proceeding to declare the absolute, evident and manifest invalidity [of an EV] has to be followed, or else, if the invalidity does not have such characteristics, then a judicial review must be filed seeking its annulment at the Administrative Court.*"[290] Thus, Mr Jurado's argument that an Environmental Viability is not a binding act is contradicted by his own words.

256. Moreover, in this case, Mr Jurado's distinction between the classification of the Environmental Viability as preparatory or final act proves to be a hollow one, because he states that the "*final act*" to an EV is "*the construction permit that the Municipality would have to grant.*"[291] Since the Municipality issued construction permits to the Las Olas project, it is clear that Mr Jurado's purported distinction is meant only to further explain away and obscure the Respondent's erratic regulatory findings.

257. Accordingly, Mr Ortiz's analysis demonstrates that the Respondent's simplistic distinction between final and preparatory acts is a "straw man" argument. This is because the Respondent, without further explanation, has stated that agency reports are not final and binding acts, but are preparatory acts – and utterly fails to explain the relevant principles under Costa Rican law.

258. Even assuming *arguendo* that an Environmental Viability is not a final act (which is rejected), Mr Ortiz also makes clear that the Estoppel Rule and legitimate expectations principle under Costa Rican law (discussed in Section 4, below) provide that even acts that are not final acts "*cannot be disregarded by public servants and other administrative bodies.*"[292] Importantly, Mr Ortiz also emphasizes that Article 3 of the Law for the Protection of Citizens from the Excess of Requirements and Administrative Procedures provides that "*administrative bodies may not question nor*

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289 *See* Jurado 1, at paras 110-114.
290 *See* Ortiz Opinion, at para. 67.
291 *See* Jurado 1, at para 113.
292 *Id.* at para. 68.

review the permits and firm authorizations issued by other entities or bodies, except for the nullity regime."[293]

259. Accordingly, Mr Ortiz concludes that "*one cannot conclude that agency and/or other government bodies' reports, although preparatory acts, do not have any legal effects or are not binding, at least within the Public Administration.*"[294] More importantly, Mr Ortiz makes clear that, under the leading Constitutional Court case on the issue, in the case where a government agency repeatedly issues and confirms an Environmental Viability, the developer is entitled to rely on this series of governmental actions as part of Costa Rica's principle of legitimate expectations.[295]

260. Finally, Mr Jurado mentions that SINAC inspection reports and other government agency reports are preliminary acts and not final acts.[296] In no way does this distinction vitiate the applicability of the Estoppel Rule or legitimate expectations principle under Costa Rican law. Thus, if the Respondent adhered to the principles of its own law, it would be obliged to conclude – even on its own case – that the Claimants were entitled to rely upon SETENA and SINAC's multiple and repeated finding of "no wetlands" and "no forest," both in administrative proceedings and in the Respondent's abusive criminal charges against Mr Aven and Mr Damjanac.

(3) In any event, the Respondent's Defence Ignores the Total Lack of Coordination between Governmental Agencies

261. Another clear deficiency in the Respondent's application of its regulatory framework is its failure to coordinate between the various governmental authorities and entities with environmental competence, as is required by Costa Rican law. Furthermore, the Contentious-Administrative Tribunal of Costa Rica reiterates this obligation on all entities of the Public Administration.[297] As previously discussed in the Claimants' Memorial,[298] the Respondent's government agencies utterly failed in meeting this obligation.

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293 *Id.*
294 *Id.* at para. 69.
295 *See* C248, Constitutional Court Res. No. 2010-010171.
296 *See, e.g.*, Jurado 1, at para. 118.
297 *See* C226, TAA Decision number 00079-2015, file number 09-002172-1027-CA.
298 *See* Memorial, at para. 74.

(4) The Respondent also completely disregards the "Estoppel Rule" and the Legitimate Expectations doctrine under Costa Rican law

262. This duty of coordination is related to the estoppel rule and the protection of legitimate expectations under Costa Rican law. As Mr Ortiz explains, an administrative body "*may not annul, revoke or suspend indefinitely an act or resolution that has previously been issued to grant rights to a third party. Either an administrative proceeding is carried out to declare the absolute, manifest and evident nullity, or a judicial review is filed.*" [299]

263. The estoppel rule is founded in the fundamental right under Costa Rican law of non-retroactivity of laws and administrative acts, and in the principle of legal certainty. This means that an administrative body cannot issue an act (such as a SETENA Environmental Viability) and then fail to recognize the act's validity.[300] Rather, the administrative body must follow established administrative procedure which adheres to Costa Rican principles of due process. [301] **It is plain that, by failing to initiate timely administrative procedures or judicial review of their injunctions as required by Costa Rican law (*i.e.* within 15 days of issuing said injunctions), SETENA, SINAC, and the TAA each violated Costa Rican law.** The Costa Rican government agencies' utter failure to afford the Claimants due process as required by its own law is damning, effectively expropriating the Claimants' investment.

264. Mr Ortiz also described the Respondent's Constitutional Court's Opinion[302] regarding the legitimate expectations principle under Costa Rican law, stating the principle is triggered where there is "*an act of the administrative body that recognizes or constitutes an individualized legal situation in whose stability the investor trusts,*" and that there is a "*duty on the Public Administration to compensate the frustration of legitimate expectations and the infringed rights.*"[303]

265. The Constitutional Court also clearly provides that the principle "*is also applicable when an administrative body issues and executes a series of acts and conducts that, although incorrect, generate a series of expectations in the private individual that believes to have a juridical situation that is in agreement with the legal system.*"

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299 *See* Ortiz Opinion, at para. 60.
300 *See* Ortiz Opinion, at para. 110.
301 *See id.*
302 *See* Constitutional Court Res. No. 2010-010171.
303 *See* Ortiz Opinion, para. 60

266. Mr Ortiz concludes that the Respondent breached these principles by:[304]

(a) "*grant[ing] the corresponding permits without any government body or public official raising any red flags;*"

(b) by the numerous "*contradictions among different government bodies and officials;*"

(c) by the issuance of injunctions without any "*administrative proceeding or judicial review before the competent jurisdictions . . . to seek the annulment, revocation, or cancellation of the permits"*;

(d) by issuing injunctions "*in a regular manner . . . without complying with the legal requirements,"* or keeping the injunctions "*in place for more time than is allowed by our legal system, thus converting them in a final act and/or punishment without following due process of the law*."

267. From this analysis, Mr Ortiz concludes that the consequences of the Respondent's failure to adhere to these principles are that "*the acts and resolutions issued to annul, revoke or suspend the EV and the construction permits are null and void.*" Furthermore, the government authorities that fail to respect these principles of Costa Rican law "*could be obligated to recognize the validity of the EV and construction permits as well as pay compensation to the affected party.*"[305]

268. The Respondent's failure to acknowledge these principles of Costa Rican law spells doom for its defence and further substantiates the Claimants' legal position on the Respondent's breaches of its DR-CAFTA treaty obligations.

(5) The Respondent's unsubstantiated allegations are a smokescreen – a convoluted mixture of question-begging, attacks on its own government agencies and conjecture based on unreliable sources.

269. The Respondent's allegation that the Claimants failed to report wetlands or forests and that this fact alone should defeat their claims is question-begging: before lodging such accusations, the Respondent is obliged to prove that a wetland or forest existed at Las Olas during the relevant time period, and the Respondent has not done so. The only permissible evidence that the Respondent can rely on are the contradictory reports of SINAC, INTA and the National Wetlands Program ("**NWP**") because the

[304] *See* Ortiz Opinion, at para. 62.
[305] *See id.* at para. 63.

allegations of Ms Vargas and others are unsubstantiated complaints made by individuals who (by their own admission) have no competence to make such declarations. These SINAC and other agency reports are plainly deficient in their analyses of wetlands – as Mr Barboza has already debunked.[306]

270. Despite Ms Vargas's admission that she "*has no jurisdiction to determine the existence of a wetland or otherwise*"[307] and that her observations are "*limited to a visual check from the property boundary*," [308] Ms Vargas nevertheless makes unsubstantiated allegations that the Las Olas site contains wetlands and forests, and that the Claimants began constructing or performing work without proper permits. Some examples of this include:

(a) Ms. Vargas's allegations in "*Official Letter DeGA-049-2009,*"[309] repeated in her First Witness Statement, that the developers at Las Olas were "*apparently filling a wetland area,*" and that "*wetlands are observed*" on the land; and

(b) Ms Vargas's claim that she revisited the site on January 10, 2010 and May 21, 2010 following more (baseless) claims by neighbors regarding the "*cutting and burning of trees . . .* [that] *took place during the weekends because public officials do not work those days*."[310]

271. The Respondent's Counter Memorial is replete with largely unsupported, extraneous or irrelevant allegations of illegality and impropriety on the Claimants' behalf.[311] The Claimants have addressed a number of these allegations (such as their alleged knowledge of the Protti Report and its so-called proof of the existence of wetlands) already in this Reply Memorial. In this section, the Claimants will rebut the remaining ones in turn.

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306 *See* Barboza 1 and 2.

307 *Id.* at para. 12.

308 Vargas 1, para. 11.

309 *See* R-26, "*Official Letter DeGA-049-2009*."

310 *See* Counter Memorial, para. 188; Vargas 1, para. 14. As Mr Damjanac and Mr Aven explain in their witness statements the Claimants were simply maintaining their property by cutting "*Secate*" and clearing overgrown foot trails in a cow pasture area. Mr Damjanac also noted the strange accusation that this only occurred on weekends, explaining that these activities occurred "*six days a week, every week*."

311 For example, at paragraph 156 of the Counter Memorial, the Respondent references the Claimants' alleged replacement of DEPPAT as Environmental Regent for the Concession "*for an alleged breach of environmental laws.*" Mr Bermudez of DEPPAT confirms in his Second Witness Statement that no such breach was committed and Mr Aven confirms in his that he has no recollection of any such infraction either.

272. First, the Respondent cites the Municipality's denial in July 2010 of the construction permit for the Condominium Section, on the grounds that a number of minor, technical documents were missing from the Claimants' application.[312] The Claimants did not handle the minutiae of the application process themselves and cannot therefore confirm whether there is any truth to this allegation. In any event, this particular allegation (whether true or not) has no bearing on the legality or qualifying status under the DR-CAFTA of the Claimants' investment (which it had by then already acquired). Further, the Respondent went on to grant the construction permits for the Condominium Section in September 2010, a fact which the Respondent itself concedes.[313]

273. What this particular allegation does is demonstrate the Respondent's authorities' ability to identify and call for missing documents before it grants the relevant approvals. This is precisely what SETENA has the ability to do and, in the case of the Claimants, did not do, because everything was in order with their D1 application – contrary to the Respondent's post-hoc allegation concerning an allegedly missing biological survey, as explained above.

274. At paragraphs 190 and 195 of the Counter Memorial (and paragraph 16 of Ms Vargas's First Witness Statement), the Respondent alleges that Mr Aven was given notice by the Department of Urban and Social Development of the Municipality on June 14, 2010 that "*Las Olas did not have the necessary permits for the execution of earthworks and private streets conducted at Las Olas.*" Mr Damjanac, who was working at the Las Olas site at this time, explains that the Claimants never received such notice, and in any case, were not engaged in the "*execution of earthworks and private streets,*" only raking and clearing debris. [314]

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312 Counter Memorial, para. 171.

313 At paragraphs 151 and 152 of the Counter Memorial, the Respondent references the fact that the First Environmental Viability for the Condominium Section of the Las Olas site was cancelled on March 23, 2011 because Mr Pacheco Palenco from SETENA inspected the site and "*reported that the works had not started and that the project will not be executed due to the existence of a new project "Hotel Colinas del Mar" to be undertaken in the same area of the project.*" Nothing turns on this, as the Claimants had, in the interim, applied for and obtained on June 2, 2008 a revised Environmental Viability for the Condominium Section, as the Respondent acknowledges at paragraph 166.

The Respondent also cites (Counter Memorial, at para. 149) DEPPAT's resignation as Environmental Regent for the Condominium Section on April 3, 2009 "*due to Claimants' failure to indicate a start date for the development.*" The Claimants do not see the relevance of this fact to the Respondents' defence since it relates to the first Environmental Viability, which was later superseded.

314 *Id.* at para. 34.

275. Further, despite the Claimants having a fully permitted project, in its post-hoc review of the Claimants' permits, the Respondent has alleged at paragraph 142 of its Counter Memorial that the Claimants "*left out*" of their Environmental Viability application the Easements Section of the Las Olas project site. This argument is specious.

276. As is evident from the Master Site Plan, the Easements Section of the site borders the public road that traverses on the western side of the site. As Mr Mussio explains in his First Witness Statement, under the applicable Costa Rican permitting regime, there is no requirement to obtain an Environmental Viability for the construction of easement infrastructure or the subdivision of lots. The Respondent doubtless should recognize this principle of Costa Rican law, as fully explained by Mr Ortiz in his expert Opinion. Mr Ortiz explains the exceptions to the Environmental Viability permitting regime, which allow for the creation of easements and subdivision of lots, without the need for an Environmental Viability permit. According to Mr Ortiz, Article 2 of the Executive Order Number 31849-MINAE-SALUD-MOPT-MAG-MEIG provides that a developer will need an Environmental Viability "*in order to make use of the fragmentation; that is an EV will be required prior to construction, but not simply in order to fragment the easement and create the easement lots.*" He goes on to explain that "*if a property owner wants to build a house in the lot that has been previously fragmented, then the Municipality would have to issue a municipal permit to build but no EV will be required.*"[315]

277. Mr Mussio further explains that his firm processed the permits for the construction of infrastructure (that is, the roadway and gutters) on easements 8 and 9, in order to facilitate the access to, and movement within, that section of the site. Importantly, the Claimants did <u>not</u> apply for permits for the construction of commercial or residential premises on the Easements Section of the site, which meant that it would remain the responsibility of every future owner of a lot in the Easements Section to apply for and obtain the requisite permits for construction from the authorities.[316]

278. In the circumstances, it was perfectly legitimate for the Claimants to have carved out the easements and subdivided the Easements Section into lots, without obtaining what would have been an unnecessary Environmental Viability. The fact that the Claimants applied for, and obtained, construction permits for the easements from the Municipality further demonstrates the ludicrous nature of the Respondent's argument. Had the Claimants been required to obtain an Environmental Viability for the

[315] Ortiz Opinion, para. 109.
[316] Mussio 1, paras. 53-54.

proposed construction work on the Easements Section, clearly the Municipality would not have granted the Claimants the relevant construction permits.

279. The Respondent also accuses the Claimants of unlawfully "fragmenting" the project site. This is another unjustified and baseless complaint. As Mr Ortiz explains in his Expert Opinion, it was perfectly permissible for the Claimants to do so.[317]

280. Further, as Mr Mussio and Mr Bermudez explain in their Witness Statements, based on their extensive experience of dealing with complex real estate developments in Costa Rica, it is common for developers to divide their projects into stages and apply for the relevant permits, as and when those stages are to be developed.[318] In any event, the Respondent was at all times aware of the Claimants' plans to develop the project per the Master Site Plan that was submitted with the Claimants' D1 form for the Environmental Viability for the Condominium Section and had the opportunity both at that stage, and when the Claimants applied to the Municipality for the construction permits to challenge the Claimants on this fragmentation. Unsurprisingly, they did not do so and the Respondent's disingenuous attempt to raise the issue now is just another try-on designed to obscure the Claimants' legitimate claims.

281. Even if the Claimants were required to obtain an Environmental Viability for the work they did on the Easements Section (which is denied), applying Mr Jurado's perverse theory of preliminary and final acts to this issue (which for the reasons the Claimants have already identified, they reject in its entirety), the issue of the construction permits is the final act by the Respondent on this issue and any desire by the Respondent to re-open this issue would require the appropriate "*lesividad*" procedure to be commenced, in accordance with Costa Rican administrative law. No such "*lesividad*" procedure has ever been invoked.

282. There is also no truth to the Respondent's allegation that SINAC and MINAE inspectors seemingly identified "*wetlands*" and placed the Claimants on notice of that fact on September 30, 2008 because Mr Mussio, who accompanied the inspectors on their site visit "*must have informed Claimants of the inspection and the investigations relating to the wetland – and even if he did not, his knowledge can be imputed to them.*"[319] Once more, the Respondent relies on conjecture to make its case. As Mr Mussio explains in his First Witness Statement, he did accompany the inspectors in

[317] Ortiz Opinion, para. 111.
[318] Mussio 1, para. 8 Bermudez 2, para. 9
[319] Counter Memorial, paras. 198-199.

question on their site visit but "*contrary to what Costa Rica now claims, [he] was not made aware of the fact that they were investigating the possible presence of wetlands.*" Specifically, Mr Mussio recalls being told that "*the purpose of the visit was to check and verify alleged anomalies due to a complaint*" and he "*was never informed of or consulted about any intention to determine whether there were wetlands on the project site or not*." Mr Mussio further notes that "*[t]he officials of the entities that carried out the inspection are not the required experts to determine with legal-technical criteria whether wetlands exist or not in any event.*"[320] Although Mr Mussio mentioned the inspectors' site visit to Mr Aven, he did not communicate (and could not have communicated) that the purpose of the visit was the investigation of possible wetlands.

283. In the context of the investigation proceedings conducted by the Defensoria, the Respondent claims that on August 7, 2010 the Defensoria "*gave notice of the complaint and requested information from all of the bodies involved with the protection of the environment in Parrita*."[321] It is not clear what is meant by this statement. The Claimants deny any suggestion that they were ever notified (by the Defensoria or any other arm of the Respondent) of the complaints made against the project.

284. The Respondent goes on to reference an August 18, 2010 letter from the Municipality to the Defensoria "*informing them of the situation of the Project*." The Respondent cherry picks from that letter, in an attempt to cast the Claimants' project in a bad light. In reality, all the Municipality's letter did was list (without passing judgment) the steps thus far taken (whether of its own accord or at the instigation of or by some other entity or person) in relation to the project. For example, the Respondent records the letter as noting that "*the term of the EV that Claimants had previously submitted to the Municipality had lapsed.*"[322] As outlined above, contrary to the Respondent's insinuation, there was nothing sinister about this lapse, which came about as a result of the passage of time and the redesign of the accommodation to account for the global recession.

285. The Respondent describes a SETENA inspection report of August 18, 2010 in which Mr Pacheco concluded that there were no "*bodies of water (lakes)*" on the site.[323] That report formed the basis for SETENA's resolution on September 1, 2010

[320] Mussio 1, paras. 57-59.
[321] Counter Memorial, para. 222.
[322] Counter Memorial, para. 223.
[323] C78

dismissing Mr Bucelato's complaint.[324] In its Counter Memorial, faced with this uncomfortable reality, the Respondent seeks to downplay the significance of SETENA's September 1, 2010 resolution which it claims was "*substantially undermined by the circumstances in which it was reached.*"[325] This line of argument does not withstand scrutiny:

(a) The Respondent cites SETENA's reliance on the Allegedly Forged Document and its findings in relation to Las Olas as contributing to the unreliability of SETENA's September 1, 2010 resolution. In reality, SETENA does no more than list that document among the many more important documents and steps taken in the approval process for the Claimants' proposed project (including the D1 form and physical site inspections).

(b) The Respondent argues that the wetland in question "*had been refilled and drained by Claimants during last years*" as if this fact (if true) was not known to SETENA at the time of its inspection. However, this alleged "*backfilling of wetlands and lakes*" was precisely what the SETENA inspection of August 18, 2010 had set out to investigate. SETENA's conclusion in its August 18, Report that "*there are no bodies of water (lakes) in the area around the project*" was reached in full knowledge of these backfilling of wetlands allegations.

(c) The Respondent offers no evidence to support its statement that the alleged wetlands had been drained and backfilled by the Claimants in any event. Its argument that this contributed to SETENA's "no wetlands" finding is therefore circular.

(d) The Respondent relies on the fact that SETENA is not competent to make any wetlands determination, in any event, to downplay the significance of SETENA's findings. This ignores the fact that the Defensoria referred the matter to SETENA for a determination and SETENA, the authority responsible for the Environmental Viability, determined that it was capable of responding to, and dismissing Mr Bucelato's complaint, without the involvement of SINAC. If SETENA were not competent to do, then it ought to have referred the matter to SINAC at the time.

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[324] C83.
[325] Counter Memorial, para. 224.

286. It is telling how the Respondent now seeks simultaneously to downplay the INTA Report [326] that SINAC (the environmental agency with authority to determine wetlands) commissioned to assist in the determination of wetlands as Las Olas, by studying the type of soils present at Las Olas, and play up the National Wetlands Program Report ("**NWP Report**") [327] whilst also completely ignoring their contradiction.[328] This is unsurprising since the INTA Report found no evidence of hydric soils (one of the three requirements for the classification of wetlands in accordance with applicable Costa Rican law)[329] at Las Olas in 2011 and therefore does not support a finding of wetlands at Las Olas.

287. In so doing, the Respondent:

(a) Ignores the fact that Mr Gamboa in the NWP Report does not study the soils and is not therefore in a position to make a final determination as to the existence or otherwise of wetlands;

(b) Relies on apparent findings in Mr Gamboa's NWP Report that have no bearing on the existence or otherwise of wetlands (e.g. that "*[t]here was machinery operating at the site and moving land and installing sewage systems over the draining channel in the wetland.*" This does not go towards proving the existence of a wetland; it presupposes its existence.)

(c) Describes INTA's Mr Cubero as "*not competent*" to draw conclusions regarding wetlands. The Claimants have never argued, nor do they need to show, that Dr Cubero is qualified to make determinations on wetlands. It is sufficient that Dr Cubero, who <u>is</u> competent to make soil classifications, concluded that there were no hydric soils at Las Olas;

(d) Argues that the "Official Methodology for the Classification of Land in the Country" used by Dr Cubero is not the relevant one for the determination of wetlands without explaining (i) what classification should have been employed; and (ii) why Dr Cubero, an experienced INTA professional, employed such methodology if it was not appropriate. In reality, the Claimants' expert, Dr Baillie, confirms that this is the correct

326 C124.
327 R-76.
328 Counter Memorial, para. 238 -241.
329 Ortiz Opinion, para. 95.

methodology.[330] The Claimants' expert, Mr Barboza, provides a thorough critique of the NWP and INTA Reports in his First and Second Expert Statements.

288. It is also telling that the Respondent offers absolutely no evidence of Ms Vargas's claim that she encountered Mr Sebastian Vargas, Mr Aven's attorney, at the Municipality on September 7, 2010 and raised concerns that a possible wetland existed and that trees were being unlawfully felled, and that she thought the project's Environmental Specialist should take up the matter.[331] As Mr Aven explains in his Second Witness Statement, he "*remember[s] being with Mr. Vargas on that day, as we were there specifically to pick up the construction permits, having been called by the Municipality a few days prior to do so. That was a memorable day for me since we were working towards acquiring those permits for years, hence my clear memory of it. Therefore I am certain when I say that her comment that she talked to us about wetlands and a forest is totally false.*"[332] Mr Aven recalls that day vividly as he and Mr Vargas were present at the Municipality picking up their construction permits – and he affirms that neither he nor Mr Vargas saw Ms Vargas that day.[333]

289. At paragraph 200 of its Counter Memorial, the Respondent self-servingly attempts to disconnect Mr Bogantes from his 2010 SINAC report which confirmed that Las Olas did not have wetlands,[334] by attributing it solely to Mr Manfredi. This cherry-picking of only the documents helpful to the Respondent is unavailing – as Mr Bogantes attempted to make this argument during Mr Aven's criminal trial, only to be taken to task by the Costa Rican Judge, as Mr Aven describes in his witness statement.[335]

290. Dealing next with the Respondent's false claims in relation to the action taken to enjoin the Claimants' legitimate project, the Claimants explained in their Memorial and accompanying witness evidence the deficiencies in the Respondent's so-called service of these official documents and does not propose to repeat them here.

291. Upon receipt of the MUNI shutdown notice in May 2011,[336] the Claimants immediately ceased all construction at the project site, contrary to what the

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330 Baillie Report, para. 72.
331 Counter Memorial, para. 197; Vargas 1, para. 85.
332 *See* Aven 2, at para 68.
333 *Id.*
334 *See* C72.
335 Aven 2, para. 104(b).
336 Not April 13, 2011, as alleged by the Respondent at paragraph 249 of the Counter Memorial. In this regard, the Claimants note that the Respondent relies on a receipted copy of the SINAC Notification signed by a Ms Angie Portillo Arreyo which was sent under cover of a letter dated

Respondent now alleges. As Mr Damjanac explains in his Second Witness Statement, the only works that continued beyond receipt of the shutdown notice were those maintenance works needed to ensure the site did not become overgrown or hazardous.[337]

292. Regardless of the Claimants' non-receipt of the SINAC injunction, as explained by the Claimants' Costa Rican law expert, Mr Ortiz, and as detailed in Section C above, the Respondent's various injunctions did not follow applicable procedures in breach of Costa Rican law.

E. Distorting the Facts as a Defensive Strategy: Untangling the Respondent's Web of Confusion

(1) There was nothing "illegal" about the Claimant's investment

293. The Respondent alleges that various aspects of the Claimants' conduct and their investment were unlawful, in a desperate attempt to persuade the Tribunal to deny them the protections of the DR-CAFTA. The Claimants have already addressed, in Section C above, the Respondent's contention that the Environmental Viability was unlawfully obtained by virtue of allegations of a failure to disclose the Protti Report, the deliberate fragmentation of the project site and the failure to submit the required biological survey with form D1. None of these allegations withstands the slightest scrutiny. In the paragraphs that follow, the Claimants will address each of the remaining bizarre, unfounded and post hoc allegations of unlawfulness in turn.

294. First, the Respondent accuses the Claimants of obtaining the construction permit for the Condominium Section unlawfully on September 7, 2010 by reference to events that transpired several days later. Specifically, the Respondent alleges that after granting the construction permit, the Municipality identified two missing alignment certificates and noted that the required appointment of a responsible professional from the Federate College of Engineers and Architects of Costa Rica for the construction had not been made. On the basis of these alleged omissions, the Respondent argues that the "*Claimants obtained the construction permit for the Condominium unlawfully.*"[338] This conclusion ignores the fact that the Municipality alone was responsible for granting the construction permits on September 7, 2010 and

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May 19, 2011. The Claimants have no connection with this person, nor have they knowingly met her.

337 Damjanac 2, paras.27-30.

338 Counter Memorial, para. 179.

that it alone is accountable for the decision to do so, apparently in the absence of documents of such critical importance that their absence renders the construction permits "*unlawful.*"

295. The Respondent's Counter Memorial is conspicuously devoid of any evidence that it challenged the Claimants on these alleged omissions at the time or that it considered the permits to be unlawful as a result. In the circumstances, even if there were some truth to these allegations (which is denied), the Claimants were entitled to rely on the construction permits in believing themselves entitled to proceed with the construction. This particular allegation, like so many others, should be seen for what it is – a blatant attempt to deny the Claimants the protections to which their investment is entitled under the DR-CAFTA.

296. In relation to the Concession, the Respondent makes three surprising allegations. The first is that "*[t]hrough the more than fourteen years that Claimants held the Concession, Claimants never paid any tax to the Municipality*" and that this amounts to a breach by the Claimants of the terms of the Concession Agreement. This is simply not true, as Mr Aven explains in his Second Witness Statement and as evidenced by the receipts obtained from the Municipality's own files which are and have always been at the Respondent's disposal.[339]

297. The second is that the Claimants failed to initiate development of the works on the Concession within the mandatory timeframe. However, the authorities were at all times aware of this, since, as the Respondent admits, they proceeded to grant construction permits to the Claimants for the Concession in 2007 and on August 29, 2008.[340] In the circumstances, having waived this breach of the Concession Agreement's terms, the Respondent cannot now rely on that fact as a basis to deny the Claimants their DR-CAFTA protections. In any event, the Respondent has not explained how breach of a term of the Concession Agreement renders their "investment" unlawful, as explained in Section II above.

298. Third, the Respondent alleges that the Claimants failed to submit declarations on the value of the constructions to be perfrmed on the Concession to the Municipality, in

[339] Aven 2, paras. 38-40; Exhibit C269, "PAGOS REALIZADOS POR: LA CANICULA SOCIEDAD ANONIMA," retrieved July 19, 2016.
[340] Counter Memorial, para. 168.

breach of Clause 13 of the Concession Agreement. Again, this is simply not true, as even a cursory review of the construction permits confirms.[341]

299. The Respondent goes on to allege that the Claimants had commenced construction at the project site before the construction permits were issued (on July 16, 2010 and September 7, 2010 for the Easements and the Condominium Section respectively). The basis for this allegation is an unsubstantiated March 2009 complaint from the neighbors of Las Olas and Ms Vargas's 2009 and early 2010 inspections from outside the project site. As Mr Aven, Mr Mussio and Mr Bermudez explain in their witness statements, no work was undertaken prior to issue of the applicable construction permits. This is reflected in the project's Environmental Regent, Mr Bermudez's, bi-monthly reports, which do not record any work being undertaken prior to issue of the relevant construction permits.[342]

300. In its Counter Memorial, the Respondent further alleges that the Municipality notified the Claimants of the complaints that works were being performed without the requisite construction permits on June 14, 2010.[343] No such letter was ever received by the Claimants.

301. Curiously, the Respondent also claims that "*on the same day*" (i.e. June 14, 2010), the Claimants notified SETENA of the start of works. DEPPAT's notification to SETENA on the Claimants' behalf is actually dated June 1, 2010, not June 14, 2010.[344] As Mr Damjanac and Mr Aven explain in their Second Witness Statements, this notification was required to be given to SETENA as a condition of the Environmental Viability and bore no relation to works for which construction permits were required and simply indicated that work had commenced at the project site in readiness for the issue of the construction permits which, by then, the Claimants hoped would soon be forthcoming.

(2) Counting on the Spectre of an Allegedly Forged Document

302. The Respondent goes to great lengths to tie Mr Aven (whether personally or, latterly, through his "agent," Mr Madrigal) to the Allegedly Forged Document. At the time of the authorities' investigations in 2011, Mr Aven believed that Mr Bucelato was responsible for its creation, if it was indeed a forgery. During the course of this

341 Each construction permit contains on its face a declaration of the value of each such construction.
342 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.
343 Counter Memorial, paras. 190-191.
344 R-31.

arbitration, however, evidence uncovered by the Claimants suggested that Mr Bogantes was the first to "discover" the Allegedly Forged Document and record its existence.[345] In view of the timing of this discovery not long after Mr Bogantes's rebuffed bribe solicitation, the Claimants' reasonable conclusion was that he had something to do with its provenance. As the Claimants explained in their Memorial, they believed that either he or "*an unknown co-conspirator*" was responsible for planting the Allegedly Forged Document in the records for Las Olas.[346]

303. Critically, however, the Claimants never saw the Allegedly Forged Document as being of any great significance to their dispute with the Respondent. As they explained in their Memorial, this was because SETENA confirmed, in November 2011, that it had not relied on the Allegedly Forged Document in issuing the Environmental Viability for the Condominium site and elected to re-confirm the Environmental Viability in spite of its existence.[347]

304. Nonetheless, the Claimants had always been troubled by a number of unanswered questions surrounding the Allegedly Forged Document. For example, how was it that the neighbors of Las Olas, who made a complaint about its existence to the Municipality in 2010[348] and demanded an investigation into its provenance in 2011,[349] came to know of its existence? The Respondent has never offered any explanation for this, nor does it appear to have asked that question of the neighbors' themselves.[350]

305. In its Counter Memorial, the Respondent asserts, without any evidence to support its allegation that, "*[t]his document was later on proved to be a forgery*" and that it "*was forged and presented in support of Claimants' applications at a critical time in the timeline*."[351] These unsubstantiated statements are made in spite of Mr Martinez's admission in his First Witness Statement that all of the evidence he gathered during his investigation pointed to Mr Madrigal as the author of the document.[352]

306. Unbelievably, the Respondent goes on to state, again without a shred of evidence to support its allegation, that "*[t]he Forged Document was relied upon by several authorities in studies and reports that either examined the site's conditions or attested*

345 Exhibit C80, Letter from Christian Bogantes of SINAC to Hazel Diaz Melendez, August 27, 2010.
346 Memorial, para. 413(III).
347 Exhibit C144, SETENA November 2011 Resolution, November 15, 2011.
348 R59
349 Vargas 1, para. 27
350 Counter Memorial, para. 208
351 Counter Memorial, para. 164.
352 Martinez 1, para. 34.

to the inexistence of environmental risks." What studies and reports? As stated above, the opposite is true, as SETENA confirmed when it re-validated the Environmental Viability for the Condominium Section in November 2011. The Respondent's unsubstantiated and contradicted statement only serves to underline the significance of the Respondent's failure to provide any witness evidence from the officials at SETENA tasked with issuing Las Olas with the Environmental Viability, to confirm what documents were relied on and how their decisions were reached.

307. As support for its claim that Mr Aven had something to do with the document's creation (whilst at the same time maintaining that all the evidence points to Mr Madrigal), the Respondent alleges that Mr Aven submitted the Allegedly Forged Document to the Municipality in August 2010 and that he relied on it during his criminal trial.[353] Mr Aven addresses both these points in his Second Witness Statement.

308. First, as regards Mr Aven's alleged reliance on the Allegedly Forged Document at his criminal trial, as Mr Aven explains in his Second Witness Statement, although he did refer to the Allegedly Forged Document at trial, he did so in order to illustrate the contradictions in Mr Martinez's prosecution tactics: one minute Mr Martinez told Mr Aven that he would not pursue the forged document charge since he knew Mr Aven had nothing to do with it, the next minute Mr Martinez charged him with forgery. If the Respondent had only been forthcoming about what it already knew about the Allegedly Forged Document, these arguments would not have been necessary.

309. At the time, although Mr Aven had strong suspicions that Mr Bucelato might have had something to do with it, he also thought it possible that the document was genuine, as he told Mr Martinez during his statement in May 2011. The reason for this belief was Mr Bogantes's letter of August 27, 2011 in which he noted the existence of the document in SINAC's records. Mr Aven's point was a simple one – why would the very agency that would supposedly have created it be referencing its existence as one of many documents in their records for the project, if they deemed it to be a forgery?

310. Whatever the provenance of the document, the fact of Mr Aven's reference to it at his criminal trial does not mean he had anything to do with its creation.

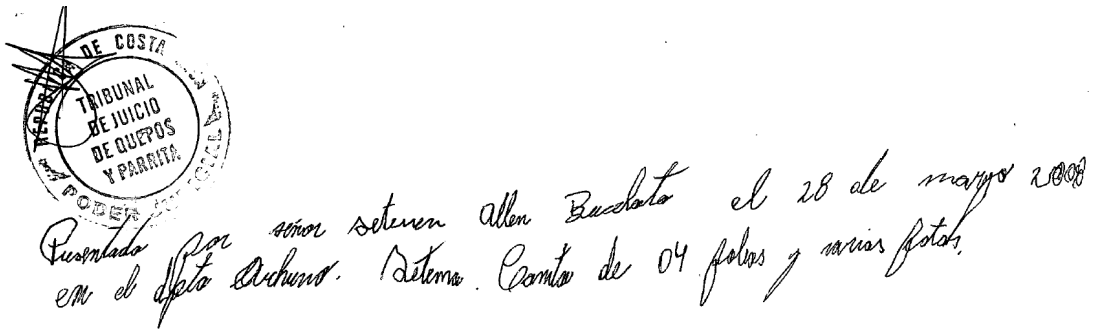
[353] Counter Memorial, paras. 210 and 218.

311. Second, although at the time of his First Witness Statement in this arbitration, Mr Aven believed that he had not seen the Allegedly Forged Document before his Costa Rican attorney obtained a copy of SETENA's file for Las Olas in early 2011, on reading Mr Mussio's First Witness Statement and the Respondent's claim in its Counter Memorial that he handed the Allegedly Forged Document in to the authorities in the summer of 2010, Mr Aven thinks it is possible that he saw the Allegedly Forged Document prior to the spring of 2011, without appreciating its significance. As he explains in his Second Witness Statement, there were many, many documents relating to Las Olas (the vast majority of which were in Spanish) and it is possible that Mr Aven was presented with a copy at some point and simply handed it to Mr Mussio or someone else, without appreciating its significance.

312. On reading the Counter Memorial, the Claimants learned that the Costa Rican authorities were alerted to the possibility that the document was a forgery in October 2008.[354] The Claimants are at a loss to understand why, if a document was suspected to be forged in 2008, it took until the start of 2011 for SETENA to consult the Claimants on it? The Claimants submit that this is just another example of the Respondent's lack of transparency in their dealings with them and its utter disregard for proper procedures. For example, the Claimants have only just learned of the existence of a Department of Audit and Environmental Monitoring recommendation in relation to this issue .[355]

313. The most startling thing about the Allegedly Forged Document, however, is this: on the reverse of the document, a copy of which the Claimants obtained in 2016 from the SETENA file that Mr Martinez seized on February 8, 2011[356] and which is currently being held by the Court hearing the criminal claim against Mr Damjanac, is the following – a handwritten note confirming that the provenance of the Allegedly Forged Document is none other than Mr Bucelato, who hand delivered the document to SETENA's archive department on March 28, 2008, just one day after it was allegedly created:

[354] Counter Memorial, para. 209.
[355] Counter Memorial, para. 217.
[356] Martinez 1, para. 19.



314. A simple review of this document by the authorities in 2008 would have revealed as much. It would therefore appear that either no such review was undertaken by SETENA, SINAC, the Audit and Environmental Monitoring Department, the Prosecutor's office, the TAA or the Criminal Court or that all of these agencies willfully chose to pursue Mr Aven for the offense of forgery and to use the document as a basis to shut down the Las Olas project, in spite of clear evidence that this was a ploy by Mr Bucelato to destroy the Las Olas project. Certainly, in the case of Mr Martinez, who seized the original SETENA file in February 2011, this is a case of willful disregard of evidence that put Mr Bucelato squarely in the frame for the forgery offense which Mr Martinez even now seems insistent on pinning on Mr Aven or his "*agent*," Mr Madrigal.

315. To the Claimants' knowledge, the Respondent has never interviewed Mr Bucelato about the reasons why he was in possession of a letter purporting to be from SINAC to SETENA about Las Olas dated only one day earlier or why he presented it to SETENA's archive department.

(3) The Prosecutor Did Not Fulfill His Duties in a Manner Consistent with International Law

316. In its Counter Memorial, the Respondent mischaracterizes the arbitrary criminal investigation and trial of Mr Aven, attempting to recast a grossly unfair process as one that was somehow "*objective*" and "*reasonable*."[357] The Respondent's attempt utterly fails in light of the overwhelming evidence demonstrating that Mr Aven complied with Costa Rican law. The very fact that multiple Costa Rican environmental agencies had already determined that the Las Olas project was compliant with environmental regulations before the commencement of Mr Martinez's investigation should have been devastating to any allegations that Mr Aven actually *intended to commit a crime*.

[357] Counter Memorial, para. 538.

317. Nonetheless, this did not deter Mr Martinez from singling out Mr Aven and accusing him of being a criminal. Nor was he deterred by the findings of the INTA report, which Mr Martinez himself commissioned, as he considered a soil analysis to be an important step for the purposes of Mr Aven's criminal case. Yet somehow such analysis became far less important once Mr Martinez realized that the conclusions were completely at odds with the criminal charges. He continued to move forward though, taking the lead in a criminal trial that was replete with disastrous and contradictory trial testimony that was, candidly, embarrassing for the prosecution's case.

318. By the end of the trial it was virtually impossible to conceive of any outcome other than an unqualified dismissal of all charges. However, the prosecution had other plans, deciding to exploit an obscure mechanism of criminal procedure that would allow an entirely new trial, as if the previous one never existed. It was shortly after this that Mr Aven received numerous death threats and suffered an assassination attempt that left his vehicle riddled with bullet holes. Under the circumstances he had little choice other than to leave Costa Rica out of justifiable concerns for his safety. Nonetheless, the Respondent insists that Mr Aven should have stayed in Costa Rica, despite the attempted murder, and continued to subject himself to a second round of highly prejudicial and corrupt criminal proceedings, all for the purposes of "*exhausting local remedies.*"[358] As discussed above, it was clear at this point that any such "*local remedies*" were non-existent, as the Costa Rican criminal system had failed Mr Aven in every respect.

(a) Prosecution of Mr Aven's Case

319. Before discussing the specific errors committed by the prosecution during the criminal investigation and trial, it is important to understand that the issues in Mr Aven's case were not the proper subject of a criminal proceeding. Instead, they should have been resolved through the contentious administrative or civil courts. As discussed in the Second Witness Statement of Nestor Morera, criminal proceedings deal with certainties in concepts and definitions.[359] Mr Martinez was aware that different environmental agencies were using different criteria to arrive at different conclusions as to the existence of wetlands or a forest on the Las Olas project site. Such inconsistencies should have been resolved through technical analysis conducted at the administrative level rather than through a criminal prosecution.

[358] Counter Memorial, paras. 568-572.
[359] Morera 2, para. 13.

320. As a prosecutor, Mr Martinez has a duty to decline to prosecute certain cases that are outside the scope of his competence.[360] This is consistent with the Principle of Objectiveness as set forth in Article 63 of the Criminal Procedure Code.[361] Mr Martinez ignored this principle by attempting to resolve complex environmental regulatory issues in a criminal court. In doing so, he claims that he was acting in a manner consistent with the "*precautionary principle also known as* dubo pro-natura."[362] This is incorrect.

321. The precautionary principle provides that serious environmental threats and health hazards should be anticipated and prevented before the harm takes place. It did not necessitate or even permit the filing of criminal charges against Mr Aven. Instead, the precautionary principle must be viewed in context, and in connection with other applicable principles. This includes the principle of "*ultima ratio*," under which criminal prosecution should be the last remedy pursued, and should be reserved for situations in which other remedies are inadequate.[363] In Mr Aven's case, it would be absurd to claim that the only way to prevent serious environmental harm would be to treat him as a criminal.

322. It is not the job of a criminal prosecutor to resolve the conflicts caused by inconsistent environmental agency determinations. In attempting to assume this role, Mr Martinez grossly overstepped his competence and engaged in a highly prejudicial proceeding that unfairly targeted Mr Aven. As discussed below, the deficiencies in the criminal case were obvious from the moment Mr. Bucelato filed his criminal complaint, and any reasonable prosecutor should have recognized this.

(b) Criminal Investigation

323. The Claimants have extensively discussed the severity of the Respondent's conduct leading up to and during the criminal trial of Mr Aven in the Memorial, and will not endeavor to do so again on Reply. Instead, the Claimants will specifically rebut the unsupported allegations made by the Respondent in the Counter Memorial and by Mr Martinez in his witness statement.

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360 Morera 2, para. 15.
361 *Ibid.*
362 Martinez 1, para. 79 ; Morera 2, para. 9.
363 Morera 2, para. 9.

324. The Claimants would also remind the Tribunal that under Costa Rican law, criminal liability requires proving the element of intent.[364] This fact in and of itself exposes the ludicrous nature of the criminal case against Mr Aven. Mr Martinez prosecuted a case in which he was required to prove that Mr Aven *intended* to drain and fill a wetland and destroy a forest. The impossible nature of this position is exemplified by the documents that were available to Mr Martinez throughout the investigation and trial, including but not limited to the following:

(a) SETENA Environmental Viability for the Concession, issued March 17, 2006;[365]

(b) SINAC confirmation of April 2, 2008 to SETENA stating that the Condominium Section is not within a wetlands protected area;[366]

(c) SETENA Environmental Viability for the Condominium Section, issued June 2, 2008;[367]

(d) SINAC Report of July 16, 2010 confirming that there are no wetlands on the project site;[368]

(e) SETENA Report of August 19, 2010 confirming that there are no wetlands on the project site;[369]

(f) INTA Report of May 5, 2011, concluding that the soil on the project site is not characteristic of wetlands;[370]

(g) INGEOFOR Report of December 2011 confirming that the area under review is not a forest as defined by the relevant Costa Rican regulations.[371]

325. The list provided above is a non-exhaustive list of government reports and permits demonstrating that the Las Olas site was compliant with wetlands and forestry regulations. Each of these reports was available for Mr Martinez to review prior to the criminal trial. In fact, with the exception of the INGEOFOR report, Mr Martinez had access to every one of the above-mentioned documents prior to filing the criminal

364 Morera 1, para. 32.
365 Exhibit C36, SETENA Environmental Viability for the Concession, March 17, 2006.
366 Exhibit C48, SINAC Confirmation for Condominium Section of no WPA, April 2, 2008.
367 Exhibit C52, Environmental Viability for the Condominium Section, June 2, 2008.
368 Exhibit C72, July 2010 SINAC Report, July 16, 2010.
369 Exhibit C79, SETENA Report confirming no wetlands, August 19, 2010.
370 Exhibit C124, INTA Report, May 5, 2011.
371 Exhibit C148, INGEOFOR Forestry Report, December 2011.

charges against Mr Aven. Of course, there are other reports that contained inconsistent findings, and the Claimants dispute the accuracy of those reports for reasons stated throughout this pleading and in the expert reports. The fact remains that there was disagreement among environmental agency officials as to whether a wetland and/or a forest even existed on the project site. It is therefore incomprehensible that a criminal prosecutor could conclude that Mr Aven, a developer without an environmental background, *intended* to drain and fill a wetland and *intended* to damage a forest, when numerous agency officials had already determined that neither of these characteristics even existed on the project site.

326. It is even more incredible that Mr Martinez actually *commissioned* one of the reports that he now refuses to recognize. As Mr Martinez admits in paragraph 21 of his First Witness Statement,[372] he asked INTA to take soil samples as part of his investigation. Luis Picado Cubillo, who filed one of the two criminal complaints against Mr Aven, also considered that soil samples were a "*necessary*" step to take after the commencement of the criminal investigation.[373] As the Claimants have discussed extensively, the INTA report confirmed that the soil on the Las Olas site was not characteristic of wetlands. This was a confirmation that should have severely called into question whether Mr. Aven was guilty of criminal wrongdoing, and it was also a confirmation that came months before Mr Martinez decided to file criminal charges against Mr Aven.

327. Mr Martinez has attempted to downplay the significance of the INTA report by stating that INTA "*does not have any jurisdiction regarding the issue of wetlands*."[374] It is disingenuous for Mr Martinez to distance himself from a report that he commissioned on the basis that the reporting agency lacks jurisdiction to make a determination. The fact remains that it was Mr Martinez who believed that the INTA analysis was relevant to his investigation. INTA's analysis then seriously called into doubt whether Mr Aven could be guilty of a wetlands-related crime. A reasonable prosecutor would have decided to abandon a criminal investigation after receiving such findings. Instead, Mr Martinez's reaction was to criticize the agency's qualifications and to disregard the report. As discussed below, he then decided to rely on the trial testimony of a series of witnesses who admitted that they had no background in the study of wetlands and could not even provide the definition of a "wetland" under Costa Rican law. Mr Martinez apparently trusted the opinions of

372 Martínez 1, para. 21.
373 R-66, Criminal Complaint filed by SINAC (ACOPAC-CP-015-11-DEN), January 28, 2011 , p. 4.
374 Martínez 1, para. 78.

Mr. Bucelato, a retired musician, more than a national agricultural research institute with specific expertise in wetlands soils.

328. Mr Martinez's persistence in moving forward with the criminal investigation despite the overwhelming evidence against his case seriously calls into question his true intentions in singling out Mr Aven and the Las Olas project. Mr Martinez attempts to reconcile this in paragraph 38 of his First Witness Statement, stating, "*If that were true, then it is incomprehensible why I decided to drop the charges against Mr Aven on the basis of the use of a forged document, which is a very serious crime with penalties of up to 6 years in prison*."[375]

329. In making this incredible statement, Mr Martinez is essentially stating that a decision to drop baseless charges due to a lack of evidence is somehow definitive proof that he has no bias toward Mr Aven. He is also completely disregarding the significance of the fact that he ever levied a forgery accusation against Mr Aven in the first place. By his own admission, Mr Martinez had no evidence that Mr Aven committed the crime of forgery. His eventual decision to drop the charges does not somehow cancel out his prior reckless conduct, and it does nothing to resolve the serious concerns with his continued pursuit of the wetlands and forestry charges.

(c) Trial

330. It is clear from the documentary evidence that was available to Mr Martinez during his investigation that there was no basis to charge Mr Aven with a crime. Nonetheless, Mr Martinez adopted a strategy of disregarding the evidence that did not support his case and instead relied on inconsistent or otherwise irrelevant testimony. Such a strategy backfired, and resulted in a criminal trial in which the prosecution's case crumbled due to a lack of credible evidence. Despite the failures of the prosecution's case, Mr Martinez has criticized Mr Aven in his witness statement for refusing to agree to a settlement of the criminal case.[376] To be clear, the reason that Mr Aven refused Mr Martinez's "*settlement*" offer is that it would have required Mr Aven to admit to wrongdoing. Mr Aven was very clearly not guilty of the crimes with which he was charged, and as a matter of principle, any settlement agreement requiring a guilty plea was unacceptable.

331. The Respondent has also stated that if Mr Aven had accepted Mr Martinez's "*settlement*" offer, "*there was a possibility of developing the project on the rest of the*

[375] Martínez 1, para. 38.
[376] Martínez 1, paras. 86-92.

property not affected by wetlands and a forest."[377] This is completely false. Mr Aven's reputation was severely damaged at this point as a result of the Respondent's arbitrary and unfair treatment. Additionally, his confidence in the Costa Rican regulatory regime was justifiably undermined due to the corruption of its public officials and the repeated discriminatory measures taken against the Las Olas project. Moreover, as described by Mr. Morera, the prosecution's settlement offer would have impeded Mr Aven's development of the project site.[378] Indeed, the terms of the so-called "*restoration*" plan were such that Mr Aven would not be able to develop the property in any meaningful way. As a result, the "*settlement*" offer described by the Respondent would have resulted in an admission of guilt and a complete abandonment of the Claimants' vision for Las Olas. This was unjustified and unacceptable, and as a result, Mr Aven went forward with the criminal trial.

332. The Claimants have described the prosecution's meltdown at trial in detail in the Memorial[379] and will not do so again on Reply. However, the Claimants would emphasize the following additional points to rebut the Respondent's characterization of the trial testimony, which can be verified through the trial transcript and video.

(a) Carlos Alberto Mora was a fact witness called by the prosecution who had lived in Esterillos Oeste since he was a young child. He was not qualified to determine the existence of a wetland or a forest under Costa Rican law. Nonetheless, his descriptions of the property were inconsistent with the case advanced by the prosecution. In describing the Las Olas property, he stated that, "*As long as I have known the property, it has been a cattle farm . . .*" He further stated that, "*If you ask me if [the Las Olas project site] was a forested area, I would tell you that it isn't.*"[380]

(b) Mr. Bucelato was a fact witness called by the prosecution, and a self-described retired musician who lived in Esterillos Oeste.[381] He was not qualified to determine the existence of a wetland or a forest under Costa Rican law. His testimony, which was described in detail in the Claimants' Memorial, was replete with ridiculous assertions. When asked to state the basis for believing that the project site contained a wetland, Mr Bucelato replied that he "*personally would go in there and get my snakes, my*

377 Counter Memorial, para. 254.
378 Morera 2, para. 24.
379 Memorial, paras. 179-201.
380 Criminal Trial Transcript, p. 29.
381 Criminal Trial Transcript, p. 46.

amphibians, and my turtles. I collect those things."[382] In other words, he admitted to trespassing on the project site to "*collect*" animals that somehow proved the existence of a wetland. Mr Bucelato also made other wildly unsupported claims regarding the alleged "*ecosystem*" of the site, stating that it included panthers, flamingoes, toucans, and margays.[383] A person only needs to spend a few minutes on the property, which is largely a cattle pasture, to understand the ludicrous nature of his testimony.

(c) Ms. Vargas testified as an employee of the Municipality of Parrita in the environmental department. She was not qualified to determine the existence of a wetland or a forest under Costa Rican law. In fact, she admitted during her testimony that her "*site visits*" largely consisted of observing the project site from the street. When asked what she was able to observe, she stated, "*As I mentioned to you – what they were indicating to me was more inside the site, so from there no, nothing was visible, shall we say, from the street side you couldn't see anything.*"[384] She was able to offer nothing other than second-hand knowledge and hearsay regarding the site conditions. When asked if she was able to observe any of the alleged wetlands on the site, she replied, "*No.*"[385] When asked whether she could corroborate whether anyone on the site was cutting down trees, she replied, "*No.*"[386]

(d) Francisco Vicente Iglesias testified as a fact witness for the prosecution, and worked as an operator of heavy machinery on the project site. He was not qualified to determine the existence of a wetland or a forest under Costa Rican law. Instead, he discussed his role as Mr Aven's employee.[387]

(e) Jose Rolando Manfredi testified as an employee of MINAE who conducted two separate visits to the project site. After the first visit, he issued a report in which he categorically stated, "*it is concluded that no wetlands are found in the property*."[388] In his testimony, Mr Manfredi explained, "*Many times one finds a certain type of wetlands which are not permanent, they are temporary. Then that is why it is advisable to make two or three or more*

[382] Criminal Trial Transcript, p. 45.
[383] Criminal Trial Transcript, p. 43-44.
[384] Criminal Trial Transcript, p. 60.
[385] Criminal Trial Transcript, p. 61.
[386] Criminal Trial Transcript, p. 61.
[387] Criminal Trial Transcript, p. 73-78.
[388] C72, July 2010 SINAC Report, July 16, 2010.

inspections to check whether there is a possible wetland." [389] He then erroneously claimed that "*I think that to characterize a wetland you do not need, that is, experience in the aspect of training on that. But yes, uhm, to go around the wetland, is not a thing that is so complicated.*"[390] Mr Manfredi's testimony was extremely harmful to the prosecution's case. The entire case was based on the premise that a wetland existed on the project site – a premise directly contradicted by Mr Manfredi's report.

(f) Christian Bogantes testified for the prosecution as a Forestry Engineer working for MINAE. He was not qualified to determine the existence of a wetland under Costa Rican law, and admitted in regard to wetlands that "*this is not really my specialty.*"[391] Although he attended the July 2010 site visit with Mr Manfredi, Mr Bogantes claimed that the sole purpose for his attendance was to drive the car, as Mr Manfredi did not know how to drive.[392] Mr Bogantes also testified that he observed the cutting of certain trees on the project site, although any assertions regarding the alleged protected status of those trees were rebutted through the testimony and report of Minor Arce Solano.[393]

(g) Melvin Gonzalez Benavides testified for the prosecution as a maintenance worker for Mr Aven and Mr Damjanac. He was not qualified to determine the existence of a wetland or a forest under Costa Rican law. Instead, he testified to certain clearing works performed on the underbrush of the property.[394] It was after Mr Gonzalez's testimony that the prosecution requested the admission of eight additional witnesses – a request that was denied.[395]

(h) Jorge Isaac Barrantes Villa testified for the prosecution as an employee of the Organismo de Investigacion Judicial. He was not qualified to determine the existence of a wetland or a forest under Costa Rican law. Instead, he testified to having accompanied Christian Bogantes on a site visit in which Mr Bogantes claimed to have observed the cutting of trees. When Mr Villa was asked why he had stated that the trees that he observed constituted a

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389 Criminal Trial Transcript, p. 87-88.
390 Criminal Trial Transcript, p. 91.
391 Criminal Trial Transcript, p. 104.
392 Criminal Trial Transcript, p. 121.
393 Criminal Trial Transcript, p. 125-27; C82, Minor Arce's Forestry Report, September 2010.
394 Criminal Trial Transcript, p. 129-32.
395 Criminal Trial Transcript, p. 133-39.

"*secondary forest*," he stated, "*That was what Christian Bogantes indicated to me, who is specialist in these areas.*"[396]

(i) Dionel Burgos González testified for the prosecution on behalf of SINAC. In his Witness Statement, Mr Martinez has described Mr Burgos's testimony as "*very important*."[397] The reality is that Mr Burgos visited the project site and attempted to make conclusions as to the existence of wetlands based on factors such as the existence of small lagoons and visual observation of birds and animals. He did not conduct any sort of technical analysis, nor was he qualified to do so. Mr Burgos was not educated in the criteria used for wetlands classifications.[398]

(j) Jorge Gamboa Elizondo testified for the prosecution as Coordinator of the Programa Nacional de Humedales and the author of theNWP Report, or "PNH Report" on Wetlands as referred to by the Respondent. Again, the importance of his testimony is overstated in the Counter Memorial. Mr Gamboa did not have sufficient experience to cover all aspects relevant to the determination of the existence of wetlands. Specifically, he lacked experience in the study of soils.[399] This is the precise reason that Mr Martinez ordered the INTA report in addition to the PNH report, as INTA is an agency that specializes in soil studies. The INTA report concluded that the soil on the Las Olas site was not characteristic of wetlands soils. This conclusion was at odds with the PNH Report, which should have raised serious doubts as to (i) whether Mr Aven could possibly have the requisite knowledge of the existence of a wetland on the project site, much less the *intention* to fill or drain a wetland; and (ii) whether a wetland in fact existed on site. Nonetheless, Mr Martinez chose to disregard INTA's findings and criticize INTA's qualifications to opine on wetlands, despite the fact that he was the one who actually commissioned the INTA report.

333. The Claimants do not offer the descriptions above for the purposes of rearguing the merits of Mr Aven's criminal case. In fact, it is the Respondent that sought a second chance to prosecute Mr Aven by exploiting the ten-day rule under Article 336 of the

396 Criminal Trial Transcript, p. 172.
397 Martínez 1, para. 114.
398 Morera 2, para. 21.
399 Morera 2, paras. 22-23.

Criminal Procedure Code.[400] Instead, the purpose of describing the deficiencies in the prosecution's case is to demonstrate that Mr Martinez grossly overstepped his competence as prosecutor, and in doing so treated Mr Aven in a patently unfair and prejudicial manner.

334. The prosecution's case was based on the premise that a protected wetland and a protected forest existed on the Las Olas project site. Without these classifications, the prosecution's case would fail. However, at the time of Mr Aven's criminal trial, the issue of whether the project site contained wetlands and a forest was disputed in numerous reports issued by multiple environmental agencies containing inconsistent findings. Mr Martinez sought to resolve this issue by criminally prosecuting a real estate developer. In doing so, he offered a series of fact witnesses that had little to no qualifications in answering the technical questions that were still disputed by environmental agency officials. This demonstrates a blatant disregard for the basic principle of objectiveness, and it is also yet another example of a disturbing trend of animosity and prejudice toward Mr Aven that underlies his entire case before this Tribunal.

[400] Mr. Martinez erroneously claims that his reason for refusing to extend the ten-day period under Article 336, in accordance with the agreement proposed by Mr. Morera, was that the case would be nullified on appeal. As described by Mr. Morera, this is incorrect and based on Costa Rican cases that have been superseded by more recent decisions upholding agreements to extend the ten-day period.

IV. APPLICATION OF RESTATED LAW TO THE FACTS OF THE CASE

A. All Claimants Have Standing to Pursue All Claims

(1) The Claimants have demonstrated evidence of ownership of their Investment

335. The Respondent accuses the Claimants of failing to produce all documents and records evidencing the various transactions and subdivisions of land that make up the Las Olas project site. However, in so doing, the Respondent fails to specify what documents and information it would expect to see, that it has not yet seen, or to explain whether and how the Respondent considers these alleged gaps in the evidence to affect the Claimants' ownership of Las Olas. The reality is that the Respondent has stopped short of pleading any real challenge or specific objections to the Claimants' ownership of the Enterprises as there is no basis for such an argument. This side-show is yet another attempt at obfuscation and misdirection by the Respondent.

336. The Claimants have explained how the land for the Las Olas project was acquired.[401] This has been supplemented by various exhibits and explanations in factual witness statements.[402]

337. At paragraph 120 of the Counter Memorial, the Respondent contends that no documents have been submitted by the Claimants to prove that Ms Paula Murillo purchased a 51% interest in La Canicula. The Agreement dated March 8, 2005 demonstrates that Ms Murillo was assigned 51% of the shares in La Canicula and that Ms Murillo agreed to assign all future profits generated by the La Canicula development to the Claimants.[403] In accordance with Costa Rican law, the Claimants ensured that at all times, a Costa Rican national held the requisite 51% of the shares in La Canicula.

338. The Respondent appears to be confused as to the manner in which the various properties making up Las Olas were acquired. For clarity, the Claimants set this out in the paragraphs that follow.[404]

339. On February 6, 2002 the Claimants acquired the following three parcels:

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401 *See* Memorial, paras. 31–40.
402 *See* Aven 1, paras. 14-26.
403 C242, Agreement between Paula Murillo and David Aven.
404 *See also* Aven 2, paras. 24 – 32.

(a) Property No. 6-12678-000 (in the name of Pacific Condo Park);

(b) Property No. 6-91765-000 (in the name of La Canicula); and

(c) Property No. 6-001004-Z-000 (which included the land making up the Concession and was in the name of La Canicula). This acquisition was contingent upon the granting of the Concession to develop the beach in the Maritime Terrestrial Zone of Puntarenas, as explained at paragraph 34 of the Memorial.[405]

340. The Concession was granted on March 5, 2002 and a Concession Agreement was entered into on March 6, 2002.[406]

341. As explained in the Memorial, on April 1, 2002, Mr Aven entered into an Agreement for the Purchase-Sale, Endorsement and Transfer of Shares with Carlos Alberto Monge Rojas and Pacific Condo Park pursuant to which he acquired (1) the totality of the shares of La Canicula from its sole shareholder, Mr Monge and (2) 16% of the shares in Inversiones Cotsco from Pacific Condo Park (the other 84% being owned by La Canicula) (the "**SPA**").[407]

342. On April 4, 2002, title in Pacific Condo Park was transferred to Inversiones Cotsco pursuant to the SPA.[408]

343. On May 22, 2002 three further parcels, Properties No. 124625-000, 124626-000, and 124627-000, were purchased from Chicas Poderosas S.A. by Inversiones Cotsco.[409]

344. Together all six of these parcels (one of which comprises the Concession) made up the property that is now known as Las Olas.

345. On October 4, 2004 the percentage interests in the project were set out in a letter from Mr Aven to the other Claimants.[410] The Claimants also signed registration documents for Inversiones Cotsco C&T, S.A. and Cerros de Esterillos del Oeste, S.A. setting out their shares in these companies.[411]

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405 C27.
406 C236, Concession Agreement, March 6, 2002.
407 C8.
408 *Ibid.*
409 The public records demonstrating the ownership of these parcels by Chicas Ponderosas S.A. can be found at C280 and C281.
410 C241, Letter from David Aven to other Investors, October 4, 2004.
411 C277.

346. From February 2008, Property No P-142646 was segregated into nine different properties. Those properties are numbered: (i) from 156479-000 through 156486-000; ii) 156483-000; and iii) 156483-000, as shown by the Public Records that can be found in Exhibits C274, C275 and C276.[412]

347. As the Claimants have already explained in the Memorial,[413] on September 29, 2009, Trio International segregated property No. P-142646 into 288 different lots. The Respondent asserts that the Claimants have not provided proof of the existence of the lots that comprise properties 156481 – 000, 156482 – 000, 156484 – 000, 156485 – 000, 156486 – 000 and 156487 – 000. The existence of these properties is shown by the public records that can be found in Exhibits C274 and C276.[414]

(2) David Aven is a National of the United States of America

348. As explained above and confirmed by the ILC Draft Articles, the dominant and effective (or "predominant") nationality standard found in the customary international law on diplomatic protection is not applicable in cases such as Mr Aven's, where the would-be "*investor of a Party*" possesses the nationality of a third State, in addition to the nationality of a DR-CAFTA Party *cum* claimant State – but ***not*** the nationality of the host State.

349. Nonetheless, even if the Tribunal applies the factors set forth in the *Nottebohm* decision in addressing the Respondent's jurisdictional objection, there is no question that Mr Aven's dominant and effective nationality is American, not Italian. The Respondent has asserted a baseless and conclusory argument regarding Mr Aven's Italian nationality, which was followed by an unsuccessful fishing expedition during the document production phase for information that simply does not exist. The Respondent's jurisdictional objection must fail.

350. The *Nottebohm* test considers a party's connection with the population of a particular State, including the party's attachment to that state's traditions as well as the party's interests, activities, and family ties. In the case of Mr Aven and as confirmed by his Second Witness Statement,[415] he was born in the United States, he lives in the United States, he owns properties in the United States, he has business interests in the United States, and he has close family ties to the United States. By contrast, the only reason

412 C274 ; C275 ; C276.
413 *See* Memorial, at para 40.
414 C274; C276.
415 Aven 2, paras 14-23.

he acquired Italian citizenship is that his grandfather was Italian. Mr. Aven has no contact with or knowledge of any family members in Italy, he owns no property in Italy, he has no direct business interests in Italy, and it has been a decade since Mr Aven so much as stepped foot in Italy.

351. In the Counter Memorial, the Respondent argues that Mr Aven "*held himself out*" as an Italian citizen in dealings with the Costa Rican government and he should therefore be considered an Italian citizen for the purposes of his DR-CAFTA claim. As a preliminary matter, Mr Aven has "*held himself out*" as both a US and an Italian citizen in Costa Rica,[416] a fact that the Respondent conveniently neglects to mention. In any event, the Respondent's argument fails for the simpler reason that the *Nottebohm* test has nothing to do with how a claimant "*holds himself out*." As mentioned, the relevant considerations are the connections or ties that the claimant has to the particular State at issue. Mr Aven has virtually no ties whatsoever to Italy, and the Respondent has done nothing to refute this. It is absurd for the Respondent to claim that Mr Aven must forgo DR-CAFTA protection based solely on the fact that he called himself an Italian on a handful of papers in Costa Rica.

B. Article 10.5

(1) Frustration of Legitimate, Investment-Backed Expectations

352. The Claimants' argumentation on how their legitimate, investment-backed expectations were frustrated by the contradictory conduct of various Costa Rican officials can be found at paragraphs 322 to 334 of the Memorial. In response, Costa Rica has attempted to portray the Claimants as incautious and greedy developers out to make a quick buck by pulling the wool over the eyes of credulous officials.

353. It was perhaps as predictable as it is lamentable that the Respondent would base its answer on such hoary stereotypes: pitting its rapacious gringo developer against underdog officials who strive only for environmental justice. The evidence on the record belies a diametrically different truth.

354. This is not the story of foreign investors so impetuous and/or avaricious in their quest for profit maximisation that they would skirt or subvert any rules, especially those intended to protect the environment. Rather, as the record unambiguously indicates,

[416] Exhibits C256, Motion filed with Court in Aguirre & Parrita; C246, Construction Contract with ASADA for Water System, February 19, 2009; C279 Appeal filed with ACOPAC indicating U.S. nationality.

this is the story of a small group of individual investors who fell in love with the Esterillos Oeste region and its people, so much so that they were prepared to commit their own capital to investing in its further development. Given how they were drawn to the region by its natural beauty, their development plans were obviously geared to ensuring that it would be preserved. This was not a matter of mere environmental altruism either. The investors were well aware that if they developed their investment in a manner consistent with the highest standards of environmental sustainability, the finished product would attract their target clientele: eco-aware, upper middle class North Americans.[417]

355. The Claimants were also experienced enough as real estate investors to know that the best way to realise the full potential of their shared investment was to retain highly qualified local professionals to ensure that, as they developed and later operated their investment, they would remain in full compliance with the host State's legal and administrative requirements.

356. The Claimants' approach to development was based on the most uncomplicated of premises: investors who are willing and able to hire qualified local professionals to ensure their compliance with applicable local rules can expect to enjoy the rights that such compliance entails, confident in the belief that the host State is committed to maintaining the transparent and predictable regulatory environment in which such rights can be enjoyed. There is, of course, another name for the premise that guided the Investors. It is a legitimate expectation, vouchsafed by the international law minimum standard, that a foreign investor, who is prepared to take the necessary steps to comply with applicable municipal legal rules and administrative processes, is entitled to reasonably rely on the rights that such compliance is promised to produce.

357. The protection of such expectations, under the customary international law minimum standard of treatment, is informed by a combination of two general principles of international law: good faith and the rule of law. Recalling how a host State is obligated to maintain and abide by the rule of law, the foreign investor who satisfies the host State's requirements for the development of his investment reasonably expects to enjoy the fruits of such compliance. For example, and as in the instant case, the investors expect to enjoy the rights that their good faith participation in a permitting process is supposed to generate, confident in the legal certainty that the host State's promotion of the rule of law is supposed to provide.

[417] *See* Aven 1 and 2; *See* also Damjanac 1 and 2.

358. Indeed, although it may be trite it nonetheless remains true that the entirety of international investment law, both by custom or convention, can be distilled to the host State's promise of adherence to the principles of good faith and the rule of law. The very reason for the evolution of norms protecting the interests of foreign investors over the past two centuries has been to counterbalance the fundamental disadvantages that have been historically experienced by aliens attempting to transact commerce in a foreign business and legal environment.

359. The native investor typically enjoys significant informational advantages, vis-à-vis the foreign investor, benefiting both from her innate understanding of the 'unwritten rules' and customs of local bureaucrats and politicians, and her awareness of the unseen interests and alliances that can animate the conduct of various local factions. Lacking such local knowledge, the foreign investor must instead rely on the host State's good faith maintenance of the applicable regulatory regime, in a manner consistent with its official description.

360. While more prudent foreign investors hope to bridge this potential knowledge gap by attempting to retain local professionals who can assist them in achieving good faith compliance, the instant case demonstrates how such prudence may prove ultimately insufficient as a means of protection. The unfortunate reality is that the modern administrative State can be so complex and unwieldy that, even in a relatively stable political environment, opportunities may arise through which motivated local officials or third parties could take advantage of local knowledge to frustrate a foreign investor's legitimate expectations. This phenomenon is undoubtedly one of the reasons why the Parties made multiple promises, in the DR-CAFTA, to uphold transparency, predictability and legal certainty in both establishing and maintaining measures that could potentially impact upon cross-border trade and/or investment. And this is also why it is incumbent upon host State officials to exercise delegated governmental authority in a manner that avoids frustrating the legitimate, investment-backed expectations of foreign investors (and, in so doing, to uphold the general international law principles of good faith and the rule of law).

361. For example, again as in the instant case, both parties have diligently identified the key elements of Costa Rica's permitting regime for real estate development. By means of their good faith participation in satisfying the requirements of this regime, the Claimants obtained certain rights – the enjoyment of which should have resulted

in their realisation of the full potential of their investment. Customary international law protects the expectation that such enjoyment will not be impaired by the acts or omissions of other Costa Rican officials. It is not a matter of whether such impairment *could* be plausibly justified under Costa Rican law; it is about whether such conduct can be reconciled with the Claimants' reasonable and legitimate expectation that if SETENA officials certified the environmental viability of their project, it should have been allowed to proceed.

362. The reasonableness of the Claimants' expectation was only enhanced by their demonstrated willingness to retain local professionals with the requisite expertise and experience to help them achieve and maintain compliance throughout the permitting and construction phases. Comprehensive engagement with SETENA officials satisfied them that the Claimants' project deserved a designation of environmental viability. Construction permits were obtained on the same basis, the Claimants having cultivated cordial, professional relationships with the municipal officials who were directly responsible for issuing them. As the evidentiary record demonstrates, the investors acted with great prudence, expending significant resources to propose a development plan that completely satisfied the Costa Rican officials responsible for issuing the permits and approvals required for them to proceed.

363. Because the Respondent cannot disprove the reasonableness of the Claimants' expectations, it turns instead to a scurrilous attack on the good faith means by which their development rights were obtained. Between paragraphs 487 and 497 of the Counter-Memorial, the Respondent goes so far as to claim that the Claimants obtained their environmental viability permit illegally. Incredibly, the Respondent's allegation is founded upon nothing more than the manifest mischaracterisation of both the requirements of its permitting regime and the so-called 2007 Protti Report. It also requires overlooking the simple fact that the SETENA officials who actually granted, and subsequently re-affirmed, certification of environmental viability, never changed their minds.

364. The Respondent's case on the Claimants' construction permits is even weaker, as it cannot substantiate its *post facto* claim of the supposedly unlawful manner in which they were allegedly obtained. It is thus left to make other claims, again *post facto*, that other alleged defects should have prevented such permits from being issued, but again without more than the fiat claim that this is how things were really supposed to have been done.

365. In the end, the Respondent offers nothing more than a handful of dubious, *post facto* claims that certificates and permits should not have been granted in the first place. Otherwise it has only the incredible proposition to offer that, in Costa Rica, there are many ways in which rights granted to a foreign investor under the country's official real estate development permitting process could be effectively vitiated – by the decision of bureaucrats with no direct involvement in, or responsibility for, running that process. Better yet, the Respondent further insists that these officials are under no legal duty to notify the foreign investor of their activities, much less afford them any opportunity to comment before a precipitous decision has been taken.

(2) Abuse of Rights

366. In their Memorial, the Claimants identified three examples of treatment that constitutes an abuse of rights under customary international law: Ovideo's bribe solicitation; Bogantes' two bribe solicitations; and the Respondent's misuse of the INTERPOL notification system to persecute Claimant David Aven for having had the temerity to persist in pursuing the instant arbitration. The Respondent has apparently decided to abstain from providing any answer as regards two of the three claims, given that the Counter-Memorial only mentions Mr. Bogantes.

367. As regards Mr. Bogantes, the Respondent has little more to say than that it believes the Claimants have not proved their case. It says that the Claimants must provide direct, clear and convincing evidence. It also alleges the Claimants intentionally omitted mentioning how the Tribunal in *EDF* v. *Romania* "*rejected the allegation of corruption since the evidence was not 'clear and convincing' as there were weaknesses and inconsistencies in the relevant witness testimony and criminal investigations had failed to prove bribery.*"

368. The folly of the Respondent's argumentation as regards the bribery solicitations is evinced in the simple fact that, the "*relevant witness testimony*" in the instant case – found in the statements of Messer's Aven and Damjanac – is neither weak nor inconsistent. If the Respondent were serious about disputing the fact that the investors suffered three bribery solicitations – from persons who possessed the ability to derail or destroy their investment development project – they would produce Messer's Ovideo and Bogantes as witnesses, making both men available for cross examination before the Tribunal in December. Much in the same vein, it also lies for the Respondent to produce, as witnesses in the instant proceeding, the person or persons

responsible for having wrongfully placed Mr Aven's name on an INTERPOL Red Notice list.

369. It was also an odd choice for the Respondent to have taken note of the fact that, in the *EDF* case, the tribunal was able to review the results of a criminal investigation undertaken in respect of the claimant's corruption allegations against certain host State officials. Given how, in the instant case, the uncontroverted record indicates that the Respondent was unwilling to conduct a good faith investigation of the bribery charges filed against Mr. Bogantes, it is in no position to rely on an analogy to the *EDF* case for succour.

370. Finally, the Claimants note how the Respondent did not dispute their contention that the obligations it undertook concerning corruption, in DR-CAFTA Article 18.8, should inform the Tribunal's analysis of the Claimants' allegations – including the Respondent's failure to investigate, much less prosecute, the bribe solicitations visited upon them. For example, the Claimants argued that the Tribunal's construction and application of Article 10.5 should be informed by paragraphs (2) and (4) of Article 18.8, by which Costa Rica undertook to "*maintain appropriate penalties and procedures to enforce the criminal measures that it adopts or maintains [to prevent corruption],*" and to "*maintain appropriate measures to protect persons who, in good faith, report acts of bribery or corruption.*"[418] In this regard, the Respondent's failure properly to investigate, or punish, credible complaints by a foreign investor about corruption should also be regarded as a failure to provide the "*protection and security*" that customary international law requires it to provide to all aliens, and which has been explicitly included in the language of Article 10.5.[419]

(3) Due Process

371. In as much as the Respondent's utter failure to undertake a good faith, criminal investigation of the bribes solicited from the Claimants by its own officials constitutes a failure to accord protection and security under Article 10.5, it equally represents an egregious failure to accord due process to the Claimants as well. This would be true even in absence of Mr Bogantes' having been allowed to appear as a prosecution witness in Mr Aven's erstwhile criminal trial. Given the allegations made against him, and the personal jeopardy faced by Mr Aven, it was simply beyond the pale for the Respondent to have relied on Bogantes' testimony in Mr Aven's trial, much less

[418] Memorial, paras. 309-312.
[419] Memorial, paras. 268-269.

to have refused to treat the charges against him with the seriousness they deserved. To add insult to injury, when it dismissed Mr Aven's complaint against Mr Bogantes, the responsible officials did not even notify him of their decision.

372. As regards the other instances in which the duty to provide foreign investors with due notice, much less an opportunity to comment, the Respondent's primary answer appears to be that notice was not required under Costa Rican law.[420]

373. Examples of Costa Rica's failure to provide notice, along with the corresponding failure to provide any meaningful opportunity for comment on issues of grave importance to the future of the investment enterprise, can be found at paragraphs 213 to 215 and 344 to 365 of the Memorial. These failures extended to:

(i) The decision to wrongfully have David Aven's name placed on Interpol's Red Notice list, and potentially the decision to permit INTERPOL to delete it after the Claimants' counsel filed an official complaint with the international agency;

(ii) The multiple investigations conducted and/or instigated by Ms Vargas;

(iii) The multiple investigations conducted and/or instigated by Ms Diaz;

(iv) The hastily-prepared wetlands investigation conducted by MINAE/SINAC officials, which apparently included four secret site visits in December, 2010, with a damming report issued on the first day back from Christmas vacation (Memorial, paragraph 352);

(v) The Bogantes/Manfredi investigations conducted in July 2010 and July 2011, copies of which would only be presented to the Claimants, simultaneously, by Mr. Bogantes once the fate of their project was effectively *fait accompli*;

(vi) The investigations undertaken by the TAA, first at the request of Ms Vargas and at later at the request of Ms Diaz; and

[420] It is stupefying to discover that, at this point in the development of public international law, it would actually be necessary to state the proposition that compliance with municipal norms is no answer to allegations of non-compliance with international norms, but please see, e.g. Malcolm M. Shaw, International Law, 5th ed. (Cambridge, Cambridge University Press, 2003) at 125-126.

(vii) The belated 2011 MINAE/SINAC "forgery" investigations which, notwithstanding the Respondent's desperate attempt to rely upon them in the instant proceeding, nevertheless failed to convince SETENA officials to change their minds about the environmental sustainability of development at the Las Olas site.

374. To be fair, as regards at least one of the above examples, the Respondent was prepared to advance an additional argument, which can be found at paragraph 394 of the Counter Memorial. In answer to the charge that it failed to provide the Claimants with any notice of the 2010 Bogantes/Manfredi investigation (which, in contrast to the similarly secretive 2011 Bogantes/Manfredi investigation, found that no wetlands existed), the Respondent says that it does not matter anyway. The basis for this stunning proposition is that, since it now says the Claimants had been draining wetlands in 2009, they could not have "relied" upon the report concluded in 2010.

375. That the Respondent could advance such a bizarre rationale in defence of a claim that its conduct breaches international minimum standards of due process suggests that it is either unable or unwilling to recognise the gravity of the charge, or what constitutes the governing law of a DR-CAFTA Chapter 10 dispute. The very fact that the same two officials could have concluded two investigations of the same land, a year apart, and have come to the opposite conclusion on the second try, is bad enough. That neither investigation was notified to the foreign investors is much worse, and that the second investigation just so happens to have been conducted after one of the officials' two attempts to solicit bribes from those same investors had been rebuffed, raises the due process breach beyond all doubt.

376. Why does the Respondent assert that the Claimants could not have "relied" upon the 2010 report, in light of the contrary findings contained in the 2011 report? Surely it must understand that the Tribunal's role is to determine whether the reports were prepared in a manner that violated the Claimants' due process rights. Whether the substance of the 2011 report affords the SINAC Secretary-General with what he believes to be a valid rationale for downplaying or discounting the significance of the 2010 report is obviously of little significance to somebody tasked with determining whether customary international law due process protections were afforded to the Claimants in their preparation. The very fact that the 2011 report provides a convenient rationale for overlooking the 2010 report – at least in so far as the host State's witness is concerned – can only be regarded as confirmation of irrefutably

tangible, indeed irreversible, harm caused to the Claimants as a consequence of Costa Rica's failure to accord due process to them in the reports' preparation.

377. The manifestly unfair manner in which the conflicting Bogantes/Manfredi investigations were conducted in 2010 and 2011 is just one example of how Costa Rica failed to comply with its Article 10.5 due process obligations. Taken together, the litany of failures, on the part of various Costa Rican officials, to provide the Claimants with notice of various types of investigatory process – any of which could (and most of which did) lead to a catastrophic result for the investment – represent an undeniable breach of any reasonable measure of due process.

378. This may be why the Respondent appears to have poured so much of its rhetorical effort into suggesting that the only way the Claimants can win their case is if they can prove both that Bogantes solicited bribes from them ***and*** that each of Bucelato, Martínez, Vargas, and Diaz entered in cahoots with him after he was rejected. To be sure, the Claimants never made such a claim, nor does it represent an evidentiary bar that they would ever have reason to reach. The bottom line for the due process claim is that Costa Rica cannot hide behind the fact that it has apparently established a legal and administrative order so fraught with contradictory authority that the overzealous actions of certain few of its officials could have the effect – even if perfectly legal as a matter of municipal law – of depriving foreign investors of the fundamental rights of due process owed to them under international law.

(4) Arbitrariness in the Exercise of Public Authority in Criminal Proceedings

379. The Respondent does not answer the Claimants' case on how the manner in which Mr Martinez conducted his criminal prosecution of Mr Aven fell below the customary international law minimum standard reflected in the prohibition against arbitrariness. It attempts to convert the Claimants' case into a denial of justice claim instead. The Claimants' argumentation on how the manner in which Mr Martinez conducted himself is a manner so arbitrary that it breached the customary international law minimum standard of treatment can be found at paragraphs 369 to 380 of the Memorial. They stand by those submissions.[421]

[421] Even if one were to rely upon the outdated 1926 U.S.-Mexico Claims Commission case, *L.H.F. Neer and Pauline Neer* v. *United Mexican States*, for guidance on this point, the Claimant would still succeed. Although it is easily distinguishable from the instant matter, in that it reflects an archaic notion of international governance, and that it arose out of a protection and security claim

C. Article 10.7

(1) Covered "Investment"

380. At paragraphs 615 to 620, the Respondent argues that the Claimants have failed to identify an investment capable of protection under Article 10.7. It accomplishes this feat by parsing the claim as being based upon the taking of a construction permit, reasoning that "*[s]ince Claimant's construction permit did not grant them a right to be immune from the application of mandatory environmental law, they cannot claim that by enforcing the law Costa Rica expropriated a 'vested right.*"[422]

381. The Respondent's argumentation is based upon its second gross mischaracterization of the Claimant's case. This time, rather than arguing that the Claimants' Article 10.7 case was based upon their alleged "*right to the value of their investment,*"[423] the Respondent says that the Claimants' case is based upon the indirect expropriation of their construction permits. The Respondent founds its ploy on what it claims to be the Claimants' own words, contained in a carefully redacted quotation from paragraph 409 of the Memorial. Unsurprisingly, however, the unredacted version tells a different story:

> *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*

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concerning the alleged failure of local police officers to investigate the murder of the claimant's husband, even the *Neer* Majority recognized:

> *It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which—under the name of "denial of justice"—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities.*

The Majority additionally posited:

> *… that the treatment of an alien, in order to constitute an international delinquency, should amount to **[1]** an outrage, **[2]** to bad faith, **[3]** to willful neglect of duty, **or** **[4]** to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. [Numerals and emphasis added]*

As for the instant case, it should be apparent that Martinez's treatment of Mr Aven, up to an including his taking advantage of a procedural rule that is supposed to protect defendants, not prolong their jeopardy, in order to save himself from an embarrassing loss, constitutes and "outrage" to the modern legal mind. This represents the first of four potential grounds of liability under the *Neer* methodology quoted immediately above.

422 Counter Memorial, para. 620.

423 Memorial, para. 409, citing Respondent's Notice of Intent to Defend.

> *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?*

382. Obviously it is not the Claimants' position that their "*investment*" constituted solely of "*construction permits*." Rather, they possessed property rights in land, the use of which was enhanced by the grant of various certifications and permissions. The Claimants' case is that they possessed a very valuable commercial parcel of land on the Pacific Coast of Costa Rica which, through conduct inconsistent with the customary international law minimum standard recalled in Article 10.5, certain Costa Rican officials rendered virtually inutile. The difference between the use to which the Claimants' land should have been put, but for the interference of these officials, and its current use is so substantial that such interference should be properly regarded as an indirect taking of the investment. Whereas the land that comprised the Las Olas project was originally approved for use in a comprehensive, commercial real estate development, which would have included condominiums, a boutique hotel and associated financial, recreational and entertainment services, thanks to the interference of officials such as Mr Martinez, Ms Diaz, Ms Vargas, and, above all, Mr Bogantes, its highest and best use today is likely either as pastureland or, given the Respondent's current disposition of acquiescence, as an impromptu campground for squatters.

383. It is particularly telling that, in attempting to separate the Claimants' underlying property rights in land from the construction permits that were duly granted for its development, the Respondent was careful to avoid identifying the SETENA certification of environmental viability as an "investment" that had been subject to interference so substantial that it constituted an indirect expropriation. This is likely because the Respondent would prefer not to recall how – as a practical matter of Costa Rican law and administrative practice –SETENA certification of environmental viability constitutes a *sine qua non* point of embarkation for its real estate permitting process. One simply cannot obtain a construction permit from any municipal government officials in Costa Rica without first having obtained confirmation from SETENA officials of the environmental viability of one's proposals for development.

384. Obviously the Respondent does not expect its latest mischaracterisation of the Claimants' Article 10.7 case to be accepted by the Tribunal, which is why it elected to focus instead on the construction permits the Claimants have been prevented from

utilizing in relation to their property rights in land. It wants to avoid reminding the Tribunal of the crucial fact that SETENA officials not only gave their contemporaneous blessing to the Las Olas Project as proposed, but also remained unmoved in this conviction by the machinations of the likes of Mr Bogantes and Mr Martinez, as well as all of the other interventions initially inspired by the persistent Mr Bucelato.

385. The bottom line is that, but for these interventions, which culminated in injunctions that remain firmly in place today, the Claimants would have been able to proceed with the development of their investment as originally proposed and approved. At the very least, as soon as SETENA officials had satisfied themselves, in November of 2011, that the reasons supporting their original certification of environmental viability remained valid, the TAA's administrative injunction should have been removed and the criminal case against Messer's Aven and Damjanac should have been dropped, thereby removing any remaining prohibition against development. Instead, owing both to obvious flaws in the Respondent's diverse array of delegations of regulatory authority and the arbitrariness of Mr Martinez's procedural chicanery, these impediments have remained in force to the present day.

386. Five years later, the prospects for development of the Claimants' land, which now appears to be infested with illegal squatters whose trespass seems to have been at least tacitly condoned by the Respondent, are beyond dim. The Respondent's stubborn assertion, that the Claimants cannot have been expropriated because they continue to retain title in it, is belied by this practical reality. No reasonable commercial investor would, for a moment, think seriously about acquiring land afflicted by such a troubled procedural and political history. This is why the Respondent's unlawful interference with the Claimants' use and enjoyment of their land rises to a level so substantial as to constitute an expropriation under international law.

(2) The "Police Powers" Defence

387. The Respondent has taken the position, at paragraph 628 of the Counter Memorial, that the customary international law doctrine of police powers has been encapsulated in sub-paragraph 4(b) of Annex 10-C. It logically follows that, as the Claimants have already demonstrated that this provision does not constitute the "exception" to paying compensation for indirect expropriation that the Respondent hopes it could be, the

Respondent's invocation of the "police powers" doctrine has been determinatively addressed.

388. The better view of "police powers" doctrine is that it is actually already encapsulated in the text of Article 10.7 itself, which recalls that expropriatory conduct should only be exercised in a non-discriminatory manner, for a [valid] public purpose, and in a manner consistent with applicable minimum standards of treatment under customary international law.

389. In the instant case, the Claimants do not argue that the conduct of characters such as Ms Vargas or Ms Diaz was undertaken without a valid public purpose, or that it was even discriminatory. Their case against these two officials is that their conduct was inconsistent with the standards encapsulated in Article 10.5, and that it was not accompanied by the payment of prompt, adequate and effective compensation. As regards Mr Martinez, although his investigation of Mr Aven could be regarded as consistent with a valid public purpose, the arbitrary manner in which he would subsequently pursue the case against Mr Aven brought him outside the bounds of valid public purpose and was additionally *per se* discriminatory because it had the effect of singling out Mr Aven for procedurally unjust scrutiny.

390. Of course the conduct of Mr Bogantes cannot be regarded as either non-discriminatory or undertaken for a valid public purpose, because it was manifestly undertaken for personal gain – i.e. the payment of a bribe. Mr Bogantes stopped exercising the authority delegated to him for a public purpose from the moment that he decided to use that power to effectively run a regulatory protection racket, in which he offered to accept personal payments from investors in exchange for a willingness to abstain from utilizing the various means at his disposal to interfere with the very development for which they had already obtained official approval from the proper authorities. There is obviously no room for the police powers doctrine in so sorry a scenario.

D. Damages Arising from the Respondent's Violations of the DR-CAFTA

(1) Quantification of the Claimants' Losses

391. The Respondent has submitted an Expert Report from Mr Timothy Hart [424] ("**Hart 1**") which responds to Dr Abdala's First Expert Report ("**Abdala 1**"). The points made by Mr Hart are summarized and adopted wholesale by the Respondent in the Counter-Memorial.

392. However, as Dr Abdala explains in his Rebuttal Expert Report ("**Abdala 2**") filed with this Reply Memorial, there are significant flaws in Dr Hart's criticisms of Abdala 1.

(a) The methodology used by Dr Abdala is entirely appropriate

393. Mr Hart's primary criticism of Abdala 1 is that it allegedly uses an income approach based on a discounted cash flow ("**DCF**"). Mr Hart and the Respondent argue that a DCF is too speculative and inappropriate for a pre-operational project.[425]

394. As carefully explained in the Memorial, however, Dr Abdala's valuation cannot properly be described as being "*based on*" a DCF model, or being "*an income approach*". A DCF analysis, assessing potential future income, is indeed one element of Dr Abdala's valuation, but it is not the only element. The DCF analysis only represents, in Dr Abdala's valuation, the highest value which a hypothetical willing buyer could have expected to have extracted from the land and project if such a willing buyer had been assessing the market value of the project.

395. This end of the scale is balanced at the other end by the hypothetical willing buyer's "worst case scenario" – a failure of the project and the bare sale of the land a day after she purchased it.

396. Neither of these scenarios, in this case, represents the market value of the project as would have been assessed by a hypothetical willing buyer at the relevant point in time, but the market value clearly lies somewhere between these two extremes. Dr Abdala's valuation involves valuing the two extremes (i.e. the business failing and the

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[424] The Respondent refers to its Quantum Expert as "Dr Hart" but it is not clear from where the appellation "Dr" has been taken – neither Mr Hart's Expert Report nor his Curriculum Vitae discloses any doctorate-level qualification.

[425] Counter Memorial, paras. 667 and 668; Hart 1, paras. 105 and 106.

business succeeding), and then calculating where on the scale between them the true value is by assessing the probability of each of the extremes occurring.

397. In this sense, therefore, Dr Abdala does not propose a DCF analysis any more than he proposes a bare land appraisal approach. In reality, he proposes a mixed approach to valuation which more accurately reflects the true market value of the investment at the relevant time.

398. The Respondent's citation of cases in which a "*lost profits*" or DCF approach was rejected are therefore of little probative value in this case, because that is not the calculation Dr Abdala puts forward.[426]

399. Dr Abdala's methodology is supported by valuation literature, including by Professor Damoradan, Titman, Sheridan and Martin, Koller et al and Pratt *et al*.[427]

400. Dr Abdala's approach is particularly appropriate, however, since it is the same approach adopted by potential buyers in real life.[428] No prospective hypothetical buyer would expect to purchase an investment such as this one for the bare value of the land and no hypothetical seller would expect to receive the full value of a fully successful investment. The hypothetical buyer would therefore perform the same calculation as Dr Abdala and weigh the likelihood of success against the likelihood of failure.

401. Mr Hart's criticism that this means that "*even if the project were a failure, a third party would still pay for 68% of the cash flows that were never achieved*"[429] is entirely misplaced. The hypothetical buyer is, by definition, purchasing the investment before she knows whether it will succeed or not. If the project fails, she will have overpaid; if the investment succeeds, she will have underpaid. As Dr Abdala notes "*neither the buyer nor the seller know with 100% probability whether the project will be successfully completed or not, and therefore such buyer and seller would have to make their best estimates on what is the probability for each scenario, based on the information available*."[430]

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426 Counter Memorial, paras. 670 – 674.
427 Abdala 2, paras. 13 to 25.
428 Abdala 2, paras. 22 – 27.
429 Hart 1, para. 162.
430 Abdala 2, para. 21.

402. Support can be found in the *Unglaube v Costa Rica*[431] case for the use by Dr Abdala of an income-based analysis to identify the highest and best use of the land. In that case, the tribunal found that the income approach was useful to determine the highest and best use of land, even if "[…]*the affected property is not a 'going business concern' but, instead a plot of ocean front beach property*."[432]

403. Similar to the Las Olas project, in *Unglaube* the relevant asset in dispute was at a pre-operational stage, and the compensation awarded was based on the claimant's expert's income approach that contemplated the "*highest and best use of the property*", dividing it into five single units.[433] The award discloses no explicit adjustment by the tribunal for the pre-operational nature of the asset.

(b) Mr Hart's cost basis of valuation is inappropriate

404. Having misunderstood the nature of Dr Abdala's valuation, Mr Hart argues that the only appropriate measure of damages is the funds spent on the project. However, as Dr Abdala notes, this "*is not an accepted method to derive market value, as it fails to recognise the value at which the asset can be transacted, which seldom will be equal to the funds already spent on it.*"[434] In other words, it is not a measure of the fair market value of the asset.

405. The approach advocated by Mr Hart also suffers from bearing no real relation to the way in which an investment such as the Claimants' would actually be assessed by a hypothetical willing buyer and seller. This is clear from a simple analogy to purchasing residential real estate: the market value of a house has almost nothing to do with the costs of its construction.

406. In any event, Hart 1 misrepresents the "cost approach methodology" it espouses. He characterises his approach as an "asset-based cost approach", but as Dr Abdala notes "*his proposed methodology, based on historically incurred cash costs spent by the investor, does not equate to the value of the asset under an cost-based or asset-based approach, it is not a generally accepted valuation methodology in financial literature, nor does it fit the definition of the cost approach provided by Mr. Hart himself*."[435]

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431 CLA105.
432 CLA105, para.308.
433 *Ibid*.
434 Abdala 2, para. 7.
435 Abdala 2, para. 106.

407. Dr Abdala explains that the cost approach in financial literature looks at the replacement cost of an asset, rather than the cash costs spent, as Mr Hart mischaracterises it.[436] The replacement cost value is the value of recreating the target asset. This may or may not be representative of fair market value, as assets can always produce more (or less) than the replacement cost. But in any event, if Mr Hart views, as he does, the "cost approach" as being a derivation of an "asset-based approach", then this would require him to rely on the appraisal value of the land, such as that performed relatively contemporaneously by Mr Calderon, not the cash costs spent.

408. As Dr Abdala notes, Mr Hart makes no attempt to provide any "*support as to why* [his] *methodology could be applied to determine the fair market valuation of the Las Project and how such methodology would comply with a full compensation principle, from a damage valuation perspective.*"[437]

(c) A valuation as at today is the only true compensation for the Claimants

409. The Respondent rejects the Claimants' alternative valuation date of the date of a final award in this case, arguing that "*Dr Hart explains that in damages calculations the valuation date to determine what the investment was worth is the day of the 'alleged bad act'.*"[438]

410. The First Hart Report notes that "*in accounting and finance, the determination of a proper valuation date is based on economic events.*"[439] Mr Hart goes on to say that he "*believes*" the November 2015 valuation put forward by Dr Abdala is "*irrelevant*" and so he does not address it.[440]

411. The question of the appropriate date on which to value the loss to the Claimants is quite clearly a legal question, not a question of accounting and finance. Mr Hart's opinion on this point is therefore irrelevant. The Respondent has failed to put forward any rebuttal to the Claimants' explanation of why, legally, the date of the award is the appropriate valuation date, and has failed to put forward, through Mr Hart, any critique of Dr Abdala's valuation as at that date.

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436 Abdala 2, paras. 107 – 110.
437 Abdala 2, para. 110.
438 Counter Memorial, para. 677.
439 Hart 1, para. 100.
440 Hart 1, para. 104.

412. Dr Abdala now updates this valuation to July 2016,[441] as envisaged by Abdala 1.[442]

(d) Dr Abdala's assumptions are reasonable and conservative

413. Mr Hart makes a number of criticisms of the assumptions underlying Dr Abdala's valuation, most of which either misrepresent Dr Abdala's position or are, in fact, wrong. In Abdala 2, Dr Abdala addresses in detail each of the issues raised by Mr Hart, but the Claimants will consider some of the more egregious examples here.

414. Before doing so, it is worth noting that Mr Hart's approach is not to engage in the substance of Dr Abdala's valuation and to provide his own valuation (where he argues that Dr Abdala is wrong). He has therefore provided the Tribunal with no assistance in valuing the Claimants' losses. Rather, he resorts to criticizing Dr Abdala's assumptions or approaches to discrete issues without providing any opinion, or valuation, of his own on those points.

415. First, Mr Hart states that "*Claimants consider Los Sueños a comparable development to Las Olas.*"[443] He then argues that this is not the case. In fact, nowhere in Abdala 1 does Dr Abdala claim that Los Sueños is comparable to Las Olas in the sense that the market price of Las Olas properties is the same as that of Los Sueños properties.

416. Dr Abdala clearly notes that Los Sueños was comparable to the 2004 version of the Claimants' development (which was originally targeting at a higher standard), not the 2010 version,[444] and he does not base any values in his model on the value of Los Sueños properties. The value of lots is calculated using data from Remax (which do not include any Los Sueños lots – see Appendix B, table 12) and the El Místico development. House prices are calculated using data from Remax (of which only one of 128 properties is a Los Sueños property – see Appendix B, table 14) and data from the El Místico and Málaga Residences developments. The value of condominiums is calculated using Remax data (of which only two of 68 properties are Los Sueños properties – see Appendix B, table 16) and data from the El Místico development. Finally, rental prices are calculated using data from Remax, which do not include any Los Sueños properties – see Appendix B, table 18).

417. Second, Mr Hart criticises Dr Abdala for relying on a 2010 business plan prepared by the Claimants on the basis that the business plan for the development had changed

441 Abdala 2, Section III.
442 Abdala 1, footnote 62.
443 Hart 1, para. 86.
444 Abdala 1, para. 40.

over time.[445] A Dr Abdala notes, given the changes in the global economy between 2004 and December 2010 it is reasonable that the business plan for a real estate development would change. Indeed, it would be highly reckless for it *not* to change, given the global financial crisis of 2008.[446]

418. Third, Mr Hart criticises Dr Abdala for assuming prices which are higher than the prices of actual sales of lots and higher than the prices assumed in the December 2010 Business Plan. However, as Dr Abdala explains, he did not rely on the figures contained within the December 2010 Business Plan but instead performed a completely new, independent, market-based analysis of the assumptions underlying the model, using market data.[447] He only used the December 2010 Business Plan to obtain a description of the constituent elements to the investment. The task of the experts is to assess the fair market value of the investment – i.e. a third party valuation, not the value obtainable had the Claimants continued to run the investment. If a hypothetical willing buyer had purchased the investment, she would not reasonably have sold properties at significantly below the market price.

419. Fourth, Mr Hart accuses Dr Abdala of having failed to take into account infrastructure costs.[448] However, far from failing to take these costs into account, Dr Abdala increased his assumption as to infrastructure costs from those that appear in the December 2010 Business Plan to account for the budget prepared by the engineer Manuel Calvo Navarro. The infrastructure costs are set out and included in the "CAPEX" worksheet of CLEX-003.[449]

420. Fifth, Mr Hart criticises the profit margin calculated by Dr Abdala on the sale of the hotel.[450] However, Dr Abdala has sense-checked that valuation by calculating the implicit value per room and comparing that to other hotel sales in the wider region.[451]

421. Sixth, Mr Hart criticises Dr Abdala's calculation of the probability of success, calling it "*speculative and unsupportable.*"[452] However, the only reasons given by Mr Hart for the assertion that Dr Abdala's probability of success is "*speculative and unsupportable*" are that (i) the source data is based on the US not Costa Rica; and (ii) the time period used is not comparable to the pre-operational time period of the Las

445 Hart 1, para. 182.
446 Abdala 2, paras. 28-29.
447 Abdala 2, para. 35.
448 Hart 1, para. 115.
449 Abdala 2, paras. 51 – 52.
450 Hart 1, para. 136.
451 Abdala 2, paras. 64, 65 and table II.
452 Hart 1, para. 149.

Olas project.[453] As Dr Abdala explains, the only appropriate data to use is US data and, in fact, the limited Costa Rican data available actually shows that his assumption is too conservative.[454] He also explains that the six year survival rate is, in fact, very consistent over time.[455] Finally, Dr Abdala considers a number of close-by developments to assist in assessing the likelihood of success.[456]

422. Dr Abdala has updated a number of assumptions in Abdala 2, following the receipt of new information. In particular, he has adjusted his valuation as follows:

(a) Changed the 10% discount on listing prices to 7.8%;

(b) Increased the average size of the lots to 649m^2;

(c) Used new timeshare data from a report specific to Costa Rica; and

(d) Corrected some minor computational errors.

423. These adjustments demonstrate Dr Abdala's careful and conservative approach to the valuation of the Claimants' losses, and his independent approach. They result in a slightly lower damages calculation of US$ 69.1 million as at May 2011, as compared to US$ 74 million originally.[457] If assessed at July 2016, as compared to November 2015, the damages to the Claimants amount to US$ 92 million.[458].

(2) Moral Damages

424. The Respondent argues that an award of moral damages requires there to have been exceptional circumstances of substantive gravity.[459] It then quotes the tribunal in *Lemire v Ukraine*, which considered that:

(a) As a general rule, moral damages are not available, but they can be awarded in exceptional cases;

(b) The State's actions should imply physical threat, illegal detention or other analogous situations in which the ill treatment contravenes the norms according to which civilised nations are expected to act;

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453 Hart 1, para. 150.
454 Abdala 2, paras. 96 and 97.
455 Abdala 2, para. 98 and Figure III.
456 Abdala 2, paras. 99 – 102.
457 Abdala 2, Table I.
458 Abdala 2, Table VIII.
459 Counter-Memorial, para. 704.

(c) The State's actions should have caused, amongst other things, a deterioration of health, stress, anxiety or other mental suffering, or loss of reputation or credit; and

(d) Both cause and effect are grave or substantial.

425. The Respondent goes on to note that the claimant in the *Lemire* case was not awarded moral damages. If the criteria set out by the *Lemire* Tribunal are applied to Mr Aven's case (and the Claimants deny that this is appropriate), it is clear that Mr Aven meets them. It is also wholly disingenuous for the Respondent to attempt to draw a parallel between the tribunal's dismissal of the moral damages claim in *Lemire* and the situation in which Mr Aven finds himself.

426. Mr Lemire sought moral damages said to have been caused by "*the irregular awarding of frequencies, the excessive inspections and the attempt to charge abusive renewal fees.*" [460] The Tribunal noted that Mr Lemire may well have been "*despondent*" at the rejection of his applications, but that this was nothing more than an "*incidental difficulty*".[461] This is, it must be said, an unsurprising result. A degree of frustration at the behaviour of State agencies could hardly give rise to moral damages.

427. Mr Aven's position is entirely different. He has been charged with a serious criminal offence in circumstances where the appropriate action was to challenge the granting of the permits he obtained from the relevant Government agencies. Moreover, it is clear that the prosecutor, in pursuing these charges, knew that he had no evidence of any intention on Mr Aven's part to commit any crime in the first place. Having pursued his case nonetheless, when all his witnesses had given evidence which was unhelpful to his case, the prosecutor took advantage of a rule of procedure designed to protect defendants (and which Mr Aven did not wish to exercise) to bring about a complete re-trial, thereby giving himself a second attempt at the case and subjecting Mr Aven to unnecessary further uncertainty and stress. Finally, the Government's response to Mr Aven's inability to attend the re-trial due to surgery in the US was to put his name on the INTERPOL Red List.

428. Even if the previous acts could be explained away merely as poor decision-making by the prosecutor, the pursuit of Mr Aven through INTERPOL elevated the attack on Mr Aven to a much higher level. As described in the Memorial (and in respect of which

[460] CLA102, para.334.
[461] CLA102, para. 337.

the Respondent did not make any comment in the Counter-Memorial), being placed on the INTERPOL Red List is a very significant issue for the individual concerned. INTERPOL is almost exclusively used for criminals who pose a threat to others or are implicated in very serious crimes. Of course, crimes against the environment are a serious matter, but they do not rise to the level of murder, drug trafficking, international fraud and the like.

429. As a result of the seriousness of the INTERPOL Red List, it is carefully watched by the operators of other databases and it is virtually impossible to erase the record that an individual was on that list even if they are only on it for a very short period of time. The listing itself is therefore a serious matter, and it is not the case that every individual wanted to stand trial should be put on the Red List. Taking the act of listing an individual must be a reasonable and proportionate response to the circumstances at hand. It clearly was not reasonable or proportionate in Mr Aven's case.

430. The listing itself has caused substantial effects on Mr Aven's mental health, as described more fully in his First and Second Witness Statements[462] but, in addition to that, it has already had (and will continue to have) a grave effect on his business life. Mr Aven and Mr Valecourt describe in detail the very significant opportunity to partner with Google (estimated by Google itself to result in at least 20 million downloads of an application costing $19.99, of which Mr Aven would receive 10%) which was lost purely as a result of Mr Aven's listing with INTERPOL. Crucially, this occurred after Mr Aven's name had been removed from the INTERPOL website, such is the seriousness of the effects of a decision to list him in the first place.

431. It can therefore be seen that Mr Aven clearly meets the criteria set out in *Lemire*. Not all breaches of the DR-CAFTA will engage the question of moral damages (the general rule being that breaches of an investment treaty are unlikely to do so, as recognised by the *Lemire* tribunal). The "*exceptional circumstances*" referred to in *Lemire* are clearly any circumstances which are such as to take the case outside the confines of the general rule. Mr Aven's treatment by the Costa Rican authorities, arising out of his ownership of the investment in Costa Rica, undoubtedly takes the case outside the general rule.

432. It is also clear that Costa Rica's actions contravene the norms according to which civilised nations are expected to act. Costa Rica's actions in aggressively pursuing Mr

[462] Aven 1, paras. 266-273; Aven 2, para. 147.

Aven by listing him on the INTERPOL Red List rise to the same level implications of physical threats (of course, Mr Aven has suffered from these as well – witness the drive-by shooting of him and Mr Shioleno). Being listed on INTERPOL's Red List prevented Mr Aven from travelling, conducting his other business interests (including in Costa Rica) and, as he describes, has severely affected his mental and physical health. He has also, as demonstrated by the Google deal, suffered a permanent blow to his reputation and standing in business circles, which is tainted by the historic listing by INTERPOL.

433. This last fact goes far beyond the "*negative impact on his entrepreneurial image*" claimed in the *Lemire* case, in which the tribunal accepted that the acts complained of by Mr Lemire were capable of engaging the question of moral damages. Ultimately, the tribunal in that case decided that the injury inflicted by the loss of image was not substantial enough. If the fact–pattern of the *Lemire* case was close to giving rise to a claim for moral damages (as the tribunal's wording of paragraph 339 appears to suggest), the significantly worse fact-pattern of this case clearly points towards an award of moral damages.

434. The Respondent also points to the decision in *Europe Cement Investment & Trade S.A. v Republic of Turkey*,[463] in which the Respondent asserts that the tribunal "*found that while the illegal conduct involved fraud and abuse of process the claim for moral damages should be rejected as there were no 'exceptional circumstances such as physical duress are present in this case to justify moral damages.'*"[464]

435. The circumstances of *Europe Cement* were entirely different to this claim. In that case, it was the Respondent State which brought a claim for moral damages for damage to its reputation and international standing arising from the claimant bringing a baseless arbitration claim founded on fabricated documents.[465] This is a far cry from the situation faced by Mr Aven here. In dismissing the respondent's claim for moral damages, the tribunal noted that any potential reputational damage suffered by the State would be remedied by the award in its favour and an award of costs. It also noted that it did not consider that "*exceptional circumstances <u>such as</u> physical duress*" (emphasis added) were present.[466]

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463 RLA-27.
464 Counter Memorial, para. 707.
465 RLA-27, para. 177.
466 RLA-27, para. 181.

436. These comments are inapplicable to Mr Aven's case. First, an Award in favour of the Claimants would not remedy the moral damage caused by Costa Rica's actions towards Mr Aven. Second, the *European Cement* tribunal did not express any limitation as to the "*exceptional circumstances*" which might justify an award of moral damages, it merely gave one example. The tribunal's comments do not, therefore, elucidate any further what is meant by "*exceptional circumstances*", and are therefore of limited relevance to this Tribunal's determination of Mr Aven's case.

437. Finally, the Respondent quotes the decision of the tribunal in *Arif v Moldova*,[467] which decided that the relevant facts in that case did not reach a level of gravity which would allow a conclusion that moral damages should be awarded. However, again, the facts in *Arif* were very different from the facts applicable to Mr Aven. The tribunal in *Arif* found that Mr Arif's assertions of harassment and threats had not been proved to have occurred, and that the actions of the Government merely provoked stress and anxiety in Mr Arif. In particular, the tribunal decided that Mr Arif had not suffered any loss of reputation, noting that the claimant was able to continue operating in Moldova and that his business relationships remained intact.[468] Again, these facts are completely different from the facts of Mr Aven's case.

438. In conclusion, the Respondent fails in its attempt to equate this case with prior arbitral decisions in which moral damages claims were rejected. The reality is that the actions of the Costa Rican Government were serious, and have had serious consequences for Mr Aven's mental health and his reputation, as shown by his inability now to enter into business relationships because of the historic Red Notice.

439. The Respondent argues that Mr Aven has "*provided absolutely no independent proof of suffering such alleged damage and/or harm.*" However, this assertion ignores the evidence submitted with the Memorial, including the letter from Mr Ohryn Valecourt regarding his communications with Google on Mr Aven's behalf[469] and the appraisal of another property Mr Aven owned in Costa Rica and was forced to sell at a discount.[470] Moreover, with this Reply Memorial is filed a witness statement from Mr Valecourt confirming the damage caused to Mr Aven by Costa Rica's actions[471]

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467 RLA-28.

468 See RLA-28 paras. 608 and 614.

469 Exhibit C171. Note that this letter was incorrectly said to be dated 11 January 2015 in the Index of Exhibits to the Memorial and in footnote 100 to Mr Aven's witness statement. The letter is actually dated 1 November 2015, the error being a confusion over US and U.K dating conventions. The document is re-exhibited to this Reply Memorial, still as Exhibit C171, but with the date corrected.

470 Exhibit C137.

471 See Valecourt 1.

and a copy of the agreement by which he was to earn a 10% commission on the abortive project.[472]

440. In addition, it is perfectly clear that Mr Aven has suffered significant mental health issues as a result of the situation in which the Costa Rican Government put him. A psychiatrist's report into Mr Aven's health testifies to this.[473]

441. The tribunal in *Pezold v Zimbabwe*[474] noted that in respect of an individual's moral damages claim "*it seems difficult to think of evidence more appropriate than his own account of his experiences.*"[475] Here, the damage complained of by Mr Aven is twofold. First, the reputational and business harm caused to him by Costa Rica's actions, as evidenced by the Google deal. Second, the significant toll this situation has had on Mr Aven's mental health. There is only so much that a doctor's note can say about an individual's reaction, mentally, to traumatic events. By far the most appropriate evidence, as the *Pezold* tribunal concluded, must come from the individual concerned.

442. In light of the above, Mr Aven's claim for US$ 5,000,000 in respect of these moral damages is entirely appropriate. Based on projections accepted by Google, this opportunity alone was worth at least US$ 40,000,000 overall to Mr Aven. In the circumstances, Mr Aven should be awarded the full amount of his claim.

(3) Interest

443. As the Claimants explained in the Memorial, if damages are awarded as at May 2011, then the Claimants must also be awarded interest on those damages from that date until the date of the award (and thereafter until payment). Dr Abdala has modified his interest calculation slightly, to take into account both the expected increase in the value of the land and the opportunity cost of doing business.[476]

444. As a result, Dr Abdala now calculates the applicable interest rate as being 6.8%.[477] At that rate, the total interest from May 2011 to July 2016 is US$ 28.1 million.[478]

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472 Exhibit C260, Commission Agreement for David Aven, August 15, 2015.
473 Exhibit C271, Letter from psychiatrist Dr Cosma, August 1, 2016.
474 RLA-52, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015.
475 *Id*. para. 919.
476 Abdala 2, para. 147.b.
477 Abdala 2, Table IX.
478 Abdala 2, Table X.

445. The Claimants now therefore request an award of both pre-award and post-award interest at the rate of 6.8% (as adjusted as the arbitration progresses).

V. THE RESPONDENT'S SO-CALLED COUNTERCLAIM

446. Starting at paragraph 647, the Respondent purports to submit a "*counterclaim*" against the Claimants. The DR-CAFTA does not contemplate counterclaims. If it did, Article 10.26 would specify the means and limitations under which an award could be granted in favour of a respondent. Instead, the Tribunal's authority is expressly confined to rendering a final award "*against a respondent*" in paragraph (1). That a claimant-investor cannot also be construed as a "*respondent*" is evinced in the language of paragraph (8), which provides, in relevant part:

> *If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 20.6 (Request for an Arbitral Panel).*

447. Dispute settlement under Chapter 20 of the DR-CAFTA is exclusively limited to disputes involving Parties to the Agreement. It is thus impossible for a "*respondent*," as the term is used in Article 10.26, to be anything other than a host State. Thus, even if one were to decide that some sort of qualified right for DR-CAFTA Parties to pursue counterclaims existed, the Tribunal would be bereft of the necessary authority to award the contrived restitution the Respondent illegitimately demands. Obviously if the Parties were prepared to go to the trouble of explicitly delimiting a tribunal's authority to render awards in the case of an investor's claim, they would have done the same had a right to pursue counterclaims also existed.

448. Finally, the Claimants take note of the Respondent's attempt to found a right of counterclaim on the basis of an implicit application of the old *expressio unius est exclusio alterius exclusio unis* rule of interpretation to DR-CAFTA Article 10.20(7),[479] which seems to contemplate the existence of some sort of counterclaim. In fact, the provision's counterclaim reference is general in application, intended to cover any potential rights of counterclaim, set-off, or the like under municipal law or indeed any other potential fora. This type of clause has been included in every US Model BIT since the beginning of the program in the early 1980s. It was known as a "*collateral source rule clause*," and was intended to ensure that "*any recovery from a third party [would] not [be] applied to reduce the liability of the wrongdoer*." This provision, "*[i]n other words, permits an investor to continue to pursue a claim notwithstanding the receipt of compensation through insurance.*"[480] It does not

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[479] Counter Memorial, para. 660

[480] Exhibit CLA150, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009) at 583

contemplate, nor was it ever intended to contemplate, the pursuit of counterclaims other than those concerning indemnified investment losses by host State parties to an investment treaty based upon the US Model.

449. Even if this Tribunal were to disagree with the Claimants on the question of admissibility of any counterclaim, the Respondent has failed to show (beyond mere assertion by Mr Erwin in his Expert Report) that the Claimants have caused damage to the environment at Las Olas, resulting in loss to the Respondent. The Respondent has made no attempt to explain how any of the allegedly detrimental activities described by Mr Erwin in his Expert Report and repeated by the Respondent at paragraphs 647 and 648 of its Counter Memorial can be attributed to the Claimants' actions, nor has it evidenced the alleged environmental harm as a result. Yet again, the Respondent makes sweeping allegations about the "*filling and draining of wetlands*" which has allegedly "*directly destroyed habitat for fish and wildlife species thus reducing the biological diversity of the Las Olas ecosystem.*"[481] No evidence of any of this destruction or of the prior existence of a "*habitat for fish and wildlife species*" has been supplied. Instead, the Respondent simply states that "*[t]his is damage that Claimants caused, and that Claimants can, and ought to repair.*"[482]

450. In the circumstances, the Respondent's counterclaim is not grounded in law or in fact and should be dismissed in its entirety.

[481] Counter Memorial, para. 158.
[482] Counter Memorial, para. 656.

VI. CONCLUSION AND REQUEST FOR RELIEF

451. The Claimants had high hopes for the Las Olas project. They saw an opportunity for developing something that would be of economic benefit for them and for the Esterillos Oeste community. Had it not been for the slew of unjustified and unsubstantiated allegations made and attacks launched by elements within Costa Rica's State apparatus, and certain individuals, Las Olas would today be providing vacation 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.

452. 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 and, more recently, by levelling unjustified allegations of criminality and bad faith at the Claimants. Even if those allegations were true, the Respondent cannot escape the reality that its own agency in charge of issuing and administering Environmental Viability permits, SETENA, reconfirmed the Las Olas project's right to proceed with the proposed development in 2011. Despite several opportunities to challenge the Claimants about their alleged omissions and to inspect the site first hand, SETENA nonetheless confirmed that the Las Olas project could proceed.

453. 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. In all of the circumstances therefore, the Claimants claims are as follows.

The Claimants respectfully seek an Award for the following:

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

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

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

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

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

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

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

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

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

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

Respectfully Submitted on this 5th day of August 2016



George Burn Louise Woods Alexander Slade
Vinson & Elkins R.L.L.P.

Todd Weiler, SJD