

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC - CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT AND THE 2010 UNCITRAL RULES OF ARBITRATION**

**Between:**

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

**Claimants**

**- and -**

**THE REPUBLIC OF COSTA RICA**

**Respondent**

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**REJOINDER MEMORIAL**

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**Submitted on behalf of the Respondent by:**

**MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA**

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## **I. EXECUTIVE SUMMARY**

1. Claimants have presented a domestic dispute, perfectly capable of being resolved before the national courts of Costa Rica. However, Claimants have chosen to disregard the jurisdiction of these courts, thinking they could thereby avoid addressing their inability to make a case under Costa Rica's domestic law. This memorial demonstrates that under DR-CAFTA, as well as the domestic courts, Claimants' do not have a sustainable claim.
2. Respondent accepts that from the Claimants' perspective, there exists a dispute between Claimants and the authorities with whom they were working. Indeed, elements of that dispute have not yet been resolved. That dispute directly concerns the appropriate agencies and judicial and administrative bodies that are authorized to protect Costa Rica's environment, while also upholding and protecting any legitimate rights the Claimants may have in Costa Rica.
3. However, Costa Rican institutions have not been given the opportunity to conclude those proceedings, and Claimants have shown no interest in continuing them. Claimants are disgruntled by how the protection of the environment translates to their interests and development plans, and thus far, they are facing the prospect of having to significantly reassess their ambitions by accommodating the existence of wetlands.
4. Nevertheless, Claimants' mere discontent with an outcome (or series of outcomes) does not qualify as a sound (let alone permissible) basis to commence an international law claim against a sovereign state. And yet that is what this arbitration is – it is an appeal – one made out of time, and in ignorance of the laws and procedures of Costa Rica. It is an appeal not to the appropriate forum, but a tribunal that if seized of this dispute, would open the floodgates to every single upset investor to bypass legitimate domestic proceedings.
5. Claimants' procedural conduct is improper, but so too is their conduct in Costa Rica over several years. It is unacceptable to invest in a country that is internationally known for strong environmental legislation and policies, and then ignore the rules and law when they do not coincide with one's preferences. The rule of law does not excuse such behavior by an investor. Indeed, it is ironic that the Claimants protest that they have not received the appropriate protections owed under international law, when the same Claimants are the ones ignoring the due process they signed up to the moment they set foot in Costa Rica.

### **A. The Claimants' Story**

6. Claimants have gone to great lengths to narrate a story they feel underpins their claims. International arbitration often invites such narratives to cement a chronology or complex set

of facts. However, the Claimants' accounts are told at the expense and ignorance of objective and eminently provable facts. Not least, their arguments are replete with so many errors and factual oversights as to raise doubt as to whether Claimants truly understand their own predicament.

7. In Respondent's Counter-Memorial, we observed that there was no marrying of the facts and the law in Claimants' first Memorial. Claimants' Reply Memorial makes little progress in this regard. Accordingly, Respondent is left having to piece together a pleading that does little to coherently explain how the purportedly applicable standards of international law should be construed.

**B. Jurisdiction**

8. Claimants contend that Respondent's jurisdictional objection is concocted to avoid participating in the dispute for fear of having to address the alleged failures. This is not a constructive or accurate comment. In this case, Claimants' position on jurisdiction is deeply flawed. First, Mr Aven has relied exclusively on his Italian nationality at every step of his personal and professional engagement in Costa Rica – until it came to launch a DR-CAFTA claim. At that point he conveniently proclaims his American citizenship. DR-CAFTA's explicit provisions are designed to avoid precisely such a situation. As a result, this Tribunal has no jurisdiction to hear his claim.
9. Second, Claimants have comprehensively failed to prove they own all parcels of land that make up the Las Olas Project Site. Despite repeated requests, missing evidence has not been provided by Claimants in this arbitration. Moreover, Respondent has forensically analyzed the evidence submitted and identifies major breaks in the chain of ownership. Claimants' obligation to prove ownership is not a "nice to have," but a "must have." On this basis alone, the Tribunal's jurisdiction is compromised and it must reject corresponding claims in relation to 78 parcels that suffer from these deficiencies. As this Rejoinder sets out, the proportion of land that falls outside the Tribunal's jurisdiction is substantial.

**C. Applicable law**

10. Even on the assumption the Tribunal has jurisdiction (which is not admitted), the Tribunal should reject all claims. Before considering the claims on their respective merits, the most significant obstacle to Claimants' claims is their misinterpretation of Chapter 17 alongside Chapter 10 of DR-CAFTA.
11. Irrespective of what NAFTA provides, DR-CAFTA clearly seeks to protect the Parties' environments in a specific way. That protection unambiguously embraces the rigor of domestic environmental legislation which should not be compromised by Chapter 10

protections. Thus, such deference is fundamentally important to the Tribunal's assessment of the application of DR-CAFTA to this dispute. Accordingly, before even entertaining the standards contained in Chapter 10, the preliminary question facing the Tribunal is how Chapter 10 should apply, if at all, in the context of the environmental laws in effect.

12. Claimants assert that the environmental protection embodied in DR-CAFTA Chapter 10 (Article 10.11), which is the touchpoint of how the two chapters should be reconciled, is "hortatory." No other pleading of Claimants better illustrates their uninformed and unfounded attempt to marginalize environmental law. Environmental law (both national and international) is an entire body of law. It occupies more than an entire chapter of DR-CAFTA and constitutes the back-bone of Costa Rican economic enterprise. To consider the express prioritization of environmental protection by DR-CAFTA as merely "hortatory" does more to destroy Claimants' credibility than it does to build their case.
13. Integral to Claimants' lack of appreciation is the misunderstanding of the precautionary principle and how it derives from DR-CAFTA, customary international law and Costa Rican law. The same can also be said for the preventative principle and non-regression principle, both of which are essential to understanding how environmental protection is ensured as a practical matter.

**D. Claimants' claims are without merit**

14. While Claimants marginalize the relevance of Costa Rican environmental law, they cannot avoid the array of illegalities committed in connection with Las Olas. Illegality renders Claimants' claims inadmissible. In no circumstances did the Parties to DR-CAFTA agree that illegal investments would benefit from the protection of Chapter 10. Claimants mistakenly propose that illegality is a question for the Tribunal only in circumstances of a jurisdictional challenge, and only as a pre-establishment issue. This is wrong. No DR-CAFTA protection can extend to an investment which does not qualify as lawful. This is an inherent, implied and ongoing requirement throughout the life of the investment. The pre-establishment determination of legality is a snapshot at that point. That is not an issue in dispute in this arbitration. However, the Tribunal's inquiry as to whether a purported investment can benefit from treaty protection up to the moment in time when a dispute arises is inherently wedded to the question of admissibility. At the top of the list of issues that can determine admissibility is the legality of the investment itself.
15. As set out below, there are extensive grounds of illegality. In addition to evidencing how Claimants misconceived their obligations under Costa Rican law, the list of illegalities is a telling recital of how many counts exist to disqualify the claims on the basis of admissibility.

16. The illegalities are almost too extensive to list, but none is more representative of the Claimants' failings than the concealment of the Protti Report. This report identified the wetlands that are proven by Respondent's experts to continue in existence – something with which Claimants' experts also concur. The concealment of this report is central to understanding how the assessments by Costa Rican agencies that ensued were compromised. Thus, it is even more incredible that Claimants protest a discovery of wetlands at a later point when they knew from the outset they existed.
17. The illegalities include: Incomplete information was submitted to SETENA; reports other than the Protti Report also identified red flags in terms of the existence of wetlands; fragmentation of the environmental impact assessment was undertaken in violation of Costa Rican law; unlawful construction began on the property since March 2009; illegal works damaged the ecosystem in place at Las Olas; wetlands were drained and filled; "maintenance" work impacted the forests on the site; and Claimants continued to develop in violation of injunctions that were served against the Project Site. This is not an exhaustive list of the illegalities, which individually and collectively prevent Claimants from seeking the protection offered by DR-CAFTA.

**E. The Claimants**

18. The Claimants' professional standing and credibility before this Tribunal is seriously undermined in light of the findings Mr Hart identifies. Failed businesses, a history of undisclosed bankruptcies, breaches of trust and scandals all plague the Claimants. Moreover, their architect and a lead witness for Claimants, Mr Mussio, was involved in a separate project that collapsed spectacularly for a series of violations not dissimilar to those present in this arbitration.
19. This is particularly relevant to the Tribunal given the Claimants' veracity is brought squarely into scope by virtue of their unsubstantiated allegations against Costa Rican officials. Despite many years of possible evidence gathering, no evidence exists to support the claims of administrative misconduct.. Such allegations, both under international and English law (as the law of the seat of arbitration) cannot be upheld without clear and convincing evidence. No such evidence exists.
20. The facts that Claimants plainly misstate also diminish their credibility. A substantial part of this Reply Memorial is dedicated to identifying those errors. Too numerous to summarize here, we invite the Tribunal to consider the many occasions on which Claimants and their witnesses (and experts) err on the facts. In sum, the lack of credibility of the Claimants is a fair reflection of their claims.

**F. Claimants' claims are untenable**

21. Claimants assert two violations of the DR-CAFTA: expropriation and FET. Quite clearly, no purported investment has been expropriated. There has been no permanent or substantial deprivation – and the mere fact that Claimants treat the situation in a binary way of either having "all or nothing" does not permit the characterization of any compromise to their development plans to be an expropriation.
22. In relation to FET, Claimants focus their efforts on a violation of legitimate expectations. However, this is where Claimants tread on unstable ground. The reasonable, objective, legitimate expectations of any purported investor are assessed at the time they make their purported investment, and on the basis of their good faith. As international law unequivocally holds, the objective expectation incorporates wholesale, the laws and regulations of Costa Rica. Furthermore, it incorporates wholesale the full expectation that those laws and regulations will be upheld and enforced with the full force of law, by the relevant institutions, at the permissible time and in any lawful way.
23. Claimants' ignorance of Costa Rican law is also the reason why Respondent's Reply Memorial extends for so many pages. When the Tribunal enters into the detail of this dispute, it will become apparent precisely how far off Claimants were from a proper understanding of Costa Rican law.
24. As part of their FET claim, Claimants allege a violation of due process. Of relevance is the fact that DR-CAFTA frames the obligation of due process alongside the promise not to deny justice. In accordance with international law, no claim for denial of justice can be leveled in the absence of domestic proceedings having been exhausted. Furthermore, Mr Aven has simply absconded.
25. The justice that was administered by the Costa Rican criminal courts is shown to have been legitimate and entirely permissible. Judge Chinchilla confirms the conduct of Mr Martínez was at all times entirely acceptable. This includes the issuing of the Red Notice against Mr Aven which similarly was entirely acceptable.

**G. Conclusion**

26. Ultimately, this case must fail because of one simple fact. Both Claimants and Respondent have confirmed the existence of various wetlands on the Project Site. Thus, in strict accordance with international and domestic law, Costa Rican authorities have fulfilled their responsibility by protecting an area harboring wetlands and forests. Claimants have not been able to support a breach of the FET standard, nor have they proven that this is a case of expropriation. On the contrary, Respondent has acted diligently within the scope of

international and domestic law and in good faith, continuing its long tradition of strict observance of the rule of law and environmental protection.

27. Respondent respectfully requests the Tribunal to dismiss all claims and award Respondent its full costs for this specious claim.

28. The Respondent apologizes to the Tribunal for the length of this submission. The length is a frustration of the need necessary to respond to the various allegations of Claimants, including clarification of the facts that Claimants have repeatedly misstated.

## II. INTRODUCTION

29. In accordance with Annex A to Procedural Order No. 1 dated September 10, 2015, the Republic of Costa Rica ("**Costa Rica**" or "**Respondent**") respectfully submits this Rejoinder Memorial in support of its defense against the arbitral proceedings initiated by Mr David Richard Aven, Mr Samuel Donald Aven, Ms Carolyn Jean Park, Mr Eric Allan Park, Mr Jeffrey Scott Shioleno, Mr David Alan Janney, and Mr Roger Raguso ("**Claimants**") pursuant to Articles 10.16 and 10.28 of the Dominican Republic – Central America – United States Free Trade Agreement ("**DR-CAFTA**" or the "**Treaty**").

30. This Rejoinder Memorial is submitted in reply to Claimants' Reply Memorial dated August 5, 2016 ("**Claimants' Reply Memorial**").

31. In support of their defense, Respondent relies on the witness statements of:

- Ms Hazel Díaz;
- Ms Mónica Vargas;
- Mr Luis Martínez;
- Mr Julio Jurado.

32. Respondent also relies on the expert reports of:

- Mr Kevin Erwin of Kevin Erwin Consulting Ecologist, Inc. (the "**Second KECE Report**");
- Drs Johan Perret and B.K. Singh of Green Roots Consultants, Costa Rican-based soil scientists that undertook a soil survey on the Project Site and prepared a soils report in support of Respondent (the "**Green Roots Report**");

- Dr Rosaura Chinchilla Calderón, appeals Judge for the *Tribunal de Apelación de Sentencia Penal* of the Second Judicial Circuit of San Jose, who reviewed the conduct of the ongoing criminal proceedings against Mr Aven;
- Dr Timothy Hart of Credibility Consulting LLC (the "**Second Hart Report**").

33. Respondent also relies on the exhibits and legal authorities listed in the hyperlinked indexes attached hereto.

### III. PRELIMINARY LEGAL ISSUE FOR THE CONSIDERATION OF THE TRIBUNAL: THE SIGNIFICANCE OF ENVIRONMENTAL PROTECTION UNDER DR-CAFTA

34. Respondent considers that the legal framework surrounding the present case should be considered as a preliminary matter. It is fundamental to understand the law applicable to this dispute as well as framing the particularities that environmental issues bring to the case at hand. The key question is how Articles 10.2(1), 10.11, and Chapter 17 of DR-CAFTA should be interpreted together.
35. Respondent's position is consistent with international law. The Tribunal should not read Chapter 10 of DR-CAFTA in isolation from the rest of the Treaty – certainly international law does not permit this. In addition, it could not be read without taking into account international agreements and Costa Rican law as regards environmental protection.
36. In this regard, Dr Jurado in his second witness statement explains that:
- "It is important to underline that, this being an environmental issue, the analysis must also integrate the environmental law principles already discussed, such as the precautionary principle, the preventive principle, the principle of impartiality of environmental protection, the irreducibility of an ecosystem and the principle of non-regression."<sup>1</sup>
37. As we explain below, these principles are recognized by both Costa Rican law and international law. They act as important facilitative principles to reconciling Chapters 10 and 17 of DR-CAFTA.
38. Claimants suggest that "Costa Rica's rights or responsibilities...with respect to the implementation of international environmental law norms in its municipal legal order" are not relevant to the instant matter, blaming Respondent for weakening its environmental standards to attract investments.<sup>2</sup>
39. Claimants also consider Respondent's arguments on the applicable law to the present dispute as *"untenable."*<sup>3</sup> In this regard, they provide their own reading as to how should be interpreted, downplaying at the same time the implications of the precautionary principle and the principle of preventive action in the case at hand.
40. However, if Claimants' position were to be followed, it would entail a complete misapprehension of how DR-CAFTA was conceived to work. Such principles (as outlined below) were embraced by DR-CAFTA and any attempt by the Claimants to abandon them would be tantamount to abandoning the very substance of environmental protection that the DR-CAFTA Parties adhered to when negotiating and executing the treaty.

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<sup>1</sup> Second Witness Statement of Julio Jurado, para. 187.

<sup>2</sup> Claimants' Reply Memorial, para. 67.

<sup>3</sup> Id., Section II.C.

**A. The interaction of Chapter 10 DR-CAFTA with other Chapters of the Treaty under Article 10.2(1) DR-CAFTA**

41. Claimants contend that Respondent's argument on the relationship between international investment law and environmental law set forth in Article 10.2(1) of DR-CAFTA "*misconstrue[s] the express language of Article 10.2(1), which requires one to first find that an 'inconsistency' exists between Chapters, before concluding that the provision of another Chapter shall prevail 'to the extent of the inconsistency'.*"<sup>4</sup> Since "*Respondent did not delineate any examples of inconsistency upon which Chapter 17 would override investment protections,*"<sup>5</sup> Claimants consider that Respondent's allegation should be dismissed.
42. There is no such misconstrual of Article 10.2(1) of DR-CAFTA. On the contrary, Claimants' restrictive reading of Article 10.2(1) contradicts the *raison d'être* of the provision. Chapter 10 is not a stand-alone chapter, but rather is part of a broader trade agreement, which provides an express and deliberately agreed policy space in relation to the environment in Chapter 17. In this sense, Claimants' attempt to narrowly construe Article 10.2(1) entails a dramatically expanded interpretation of DR-CAFTA Chapter 10, which notably diminishes, if not annuls, the competing policy of Costa Rica to protect the environment. Therefore, to allow Chapter 17 to be rendered redundant would ignore the intent of the Contracting Parties to DR-CAFTA.
43. In addition, Claimants' restrictive reading contradicts the DR-CAFTA as a whole. DR-CAFTA contains other references (in addition to Articles 10.11 and 17.2) relevant for the relationship between international investment law and international environmental law. As an illustration of how the environmental policy space was intended to be protected, its Preamble expressly mentions that:
- "[...] IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters;
- PROTECT and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories [...]."<sup>6</sup>
44. It seems pretty obvious that Claimants insistence on a partial reading of Chapter 10 of DR-CAFTA—as if each of the Chapters were separate compartments—is grounded on the

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<sup>4</sup> Id., para. 53.

<sup>5</sup> Id., para. 56.

<sup>6</sup> **RLA-116**, Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Preamble. See also: **RLA-6**, Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Chapter Ten, Article 10.11; and **RLA-117**, Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Chapter Seventeen, Article 17.2.

concern that any interpretation in the light of environmental law is fatal to their claims, which it is.

45. Claimants also argue that Respondent did not delineate any examples of inconsistency upon which Chapter 17 would override investment protections.<sup>7</sup> However, the inconsistency exists between Chapter 10 and Chapter 17—and it was properly raised by Respondent in its Counter-Memorial— in the sense that Costa Rica's alleged decision to "shut down" the Las Olas Project (to use Claimants' misleading characterization) grounded on environmental issues could not be considered a compensable investment measure.<sup>8</sup>
46. To support their argument, Claimants allege that Article 10.2(1) mirrors NAFTA Article 1112, arguing that in cases where such Article had to be applied, it was concluded 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,*"<sup>9</sup> and that, "*an overlap is not necessarily an [in]consistency.*"<sup>10</sup>
47. First, such position expressly contradicts Article 17.2(2) of DR-CAFTA, which provides that each party shall ensure that it does not waive or otherwise derogate from its domestic environmental laws in a manner that reduces the protections provided therein in order to encourage the establishment, acquisition, expansion, or retention of an investment. Thus, the promotion of investments should not weaken or reduce protections afforded under domestic environmental law.
48. In fact, Costa Rica balanced the two interests towards Claimants: it has adopted measures in order to protect wetlands and forests, while at the same time it has respected property rights of investors by allowing them to develop their investment if they complied with certain requirements—to reduce the impact of Las Olas Ecosystem— on wetlands and forests. All Claimants had to do was observe and respect Costa Rica's environmental laws and procedures and by now they could be enjoying the fruits of a development sympathetic to the sensitive environmental conditions that clearly exist.
49. Claimants add to its position that if the Tribunal were to apply the precautionary principle and the preventative principle as general principles of international law—which, as already stated, is not Respondent's contention—, "*it would still be inappropriate to rely on them*

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<sup>7</sup> Claimants' Reply Memorial, para. 56.

<sup>8</sup> Respondent's Counter-Memorial, para. 459.

<sup>9</sup> Claimants' Reply Memorial, para. 54.

<sup>10</sup> Ibid.

because neither can be rightly construed as 'protecting the economic rights and interests of aliens'" as provided in Annex 10-B.<sup>11</sup>

50. Annex 10-B refers to the understanding of customary international law as regards the minimum standard of treatment, which is different to Respondent's contention on the law applicable to the dispute. The mandate of Article 17.2(2) of DR-CAFTA that the promotion of investments should not weaken or reduce protections afforded under domestic environmental law is still applicable in relation to Annex 10-B.
51. Second, the effect of Article 1112 of NAFTA cannot be replicated to the same extent to DR-CAFTA. In fact, the latter addresses environmental issues in a more developed manner than NAFTA. Indeed, it has been sustained that:
- "The main difference between NAFTA and CAFTA relates to how labor and environmental issues are handled. As noted above, in NAFTA they were appended through the two side agreements negotiated subsequent to the main economic agreement. CAFTA negotiators, on the other hand, handled all three pillars in the same talks; therefore, CAFTA covers labor and the environment in chapters 16 and 17, respectively. **Thus it is inclusive of the sustainable development paradigm.**"<sup>12</sup> (emphasis added)
52. Third, Article 10.2(1) could not be assessed *in abstracto*, as Claimants do in their Reply Memorial when referring to NAFTA jurisprudence in relation to Article 1112 without taking into account which were the "competing" chapters. Indeed, most of the cases, which Claimants raise were not related to environmental issues,<sup>13</sup> and when environmental issues were touched on, it was done so obliquely.<sup>14</sup>
53. Claimants also resort to Article 59(1)(b) of the VCLT on the concept of incompatibility, concluding that, "there is no reason to suppose that holding the Respondent to account of the breaches of Articles 10.5 and 10.7 would, in any way, be inconsistent with the provisions of Chapter 17."<sup>15</sup> Notably, Claimants do not remind the Tribunal that Article 59 concerns the "Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty." This has no bearing on the present situation – and the mere

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<sup>11</sup> Id., para. 65.

<sup>12</sup> **RLA-95**, John R. McIntyre and Vera Ivanaj, Multinational enterprises and sustainable development; a review of strategy process research. in McIntyre and others (eds), *Multinational Enterprises and the Challenge of Sustainable Development* (Edward Elgar Publishing Limited 2009) 9.

<sup>13</sup> CLA-140, *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; CLA-138, *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, para. 62. See also CLA-137, *Pope & Talbot v. Canada*, UNCITRAL, Decision on Preliminary Motion by Government of Canada, 26 January 2000, paras. 26, 33.

<sup>14</sup> CLA-135, *Ethyl Corporation v. Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, para. 63; CLA-43, *S.D. Myers v. Canada*, UNCITRAL/NAFTA Tribunals, First Partial Award, 13 November 2000, para. 297.

<sup>15</sup> Claimants' Reply Memorial, para. 57.

search for the word "incompatibility" that is then supposed to have application in this case is primitive to say the least.

54. We are not in a situation here where there is a proposed termination of the DR-CAFTA, and therefore the standards of incompatibility are irrelevant. Here we are concerned with the reconciliation of two chapters within the same treaty. Article 59 of the VCLT therefore is utterly inapplicable. In fact, Claimants' attempt to rely on Article 59 instead evidences their profound misconception of what DR-CAFTA contemplates. The Contracting Parties to DR-CAFTA clearly contemplated a situation whereby other standards of protection would be compromised by Chapter 10 standards of protection.

55. Finally, Claimants allege that they:

"[R]ecognize 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."<sup>16</sup>

56. This statement was made in the context of requiring the Tribunal to consider the obligations that Costa Rica undertook in Article 17.3 of DR-CAFTA in order to analyze how the principle of due process ought to be construed in the circumstances of the instant case. Claimants' position clearly reinforces Respondent's argument that the Treaty should be read as a whole.

57. Although Article 10.2(1) of DR-CAFTA is clear enough in the sense that it articulates the Parties' intention to apply other Chapters over Chapter 10 when there is a disconnection among their provisions, it should be also read together with Article 10.11 of DR-CAFTA and the international principles of environmental law directly applicable through DR-CAFTA.

**B. The precise interpretation of Article 10.11 DR-CAFTA**

58. For the purpose of evading any "environmental concern" that could affect their claims, Claimants allege that, "Article 10.11 indicates that, even when 'environmental concerns' 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."<sup>17</sup> Such statement entails an interpretation completely the opposite of what the Article intends to provide. Claimants essentially propose that Chapter 10 trumps everything – something that Chapter 10 most definitively does not provide.

59. Article 10.11 of DR-CAFTA provides:

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<sup>16</sup> Id., para. 71, fn. 29.

<sup>17</sup> Id., para. 60.

"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.**"<sup>18</sup> (emphasis added)

60. This provision is clear in the steps that a party may take to ensure that investment an is sensitive to the environment.<sup>19</sup> It is not, as Claimants suggest, that the Contracting Parties must conduct themselves consistently with the commitments made under Chapter 10 even when there are environmental concerns. Claimants' position represents a complete misunderstanding of the standard contained in Article 10.11. Such an error (or contrived re-writing of DR-CAFTA Chapter 10) is a telling flaw in a central pillar of this case. Respectfully, we would invite the Tribunal to take particular note of this significant misreading of the DR-CAFTA since it explains how fragile the foundations of Claimants' case are.
61. Claimants also contend that DR-CAFTA Parties, under this provision:
- "[A]dopted 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."<sup>20</sup>
62. Claimant could not misstate the intent of DR-CAFTA Parties any greater. Article 10.11 prioritises to measures taken "otherwise consistent" with Chapter 10, with the purpose of protecting environmental issues over all other provisions in the chapter.
63. Both Articles 10.2 and 10.11 of the DR-CAFTA serve the same purpose: they express the Parties' intention to give primacy to other Chapters of the DR-CAFTA over Chapter 10, and more expressly, to Chapter 17. This is a perfectly standard qualification that does not require the contortion Claimants propose in order to understand it's relevant to this case.
64. As stated in Respondent's Counter-Memorial, it is necessary to review Chapter 17 to understand the goal of DR-CAFTA in terms of policy making in the environmental sphere.<sup>21</sup> Strikingly, Claimants did not advance any argument regarding the relevance of Articles 17.1, 17.2 and 17.3 to the case at hand. Thus, Respondent stands by paragraphs 443-444 and 446-459 of its Counter Memorial, where it affirmed that Article 17 identifies the need of the enforcement of domestic environmental laws.

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<sup>18</sup> RLA-6, Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Chapter Ten, Article 10.11.

<sup>19</sup> **RLA-86**, Christina L Beharry and Melinda E. Kuritzky, "Going Green: Managing the Environment Through International Investment Arbitration" (2015) 30(3) American University International Law Review 383, 383-430, 391 fn. 31.

<sup>20</sup> Claimants' Reply Memorial, para. 60.

<sup>21</sup> Respondent's Counter-Memorial, paras 437, 442-443.

**C. The precautionary principle is directly applicable under DR-CAFTA**

65. Claimants suggest that:

"Respondent goes on to cite a handful of international instruments, almost all clearly of no more than declaratory effect [...]."<sup>22</sup>

"Respondent fails to explain either how the Tribunal should go about incorporating these alleged principles [precautionary principle and the principle of preventive action, among other principles] in the interpretative analysis."<sup>23</sup>

66. Claimants' statements are misleading. The applicability of environmental principles to the case at hand —being the precautionary principle, one of the prominent standards of international environmental law<sup>24</sup>— is not a consequence of any of Respondent's legal construction of what should be the legal framework of the dispute, but a result of the text of the DR-CAFTA itself.

67. As stated in Respondent's Counter-Memorial,<sup>25</sup> Article 10.22(1) of the DR-CAFTA provides in pertinent part: "*the tribunal shall decide the issues in dispute in accordance with [DR-CAFTA] and applicable rules of international law.*"<sup>26</sup> The consequence of such provision is that environmental rules and principles provided both in domestic and international law become applicable:

"[S]ome room is left for the potential application of environmental norms stemming from both domestic and international law. As noted by two commentators with respect to the potential application of human rights law: 'human rights [and by analogy environmental] provisions are applicable to the extent to which they are included in the parties' choice of law.'"<sup>27</sup>

68. Claimants contend, "Respondent intended to have the Tribunal construe these so-called principles as having achieved the status of general principles...but neither of these two so-called principles has attained the status of general principles."<sup>28</sup> Respondent has never alleged that these principles were "general principles of law." Instead, it is Respondent's contention that these principles stem from international law and Costa Rican law, which under Article 10.22 DR-CAFTA constitutes the law that the Tribunal should apply to decide the dispute.<sup>29</sup>

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<sup>22</sup> Claimants' Reply Memorial, para. 62.

<sup>23</sup> Ibid.

<sup>24</sup> **RLA-106**, Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2013) 122.

<sup>25</sup> Respondent's Counter-Memorial, paras. 434-436.

<sup>26</sup> RLA-6, Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Chapter Ten, Article 10.22(1).

<sup>27</sup> **RLA-83**, Jorge E. Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 83, 103.

<sup>28</sup> Claimants' Reply Memorial, para. 63.

<sup>29</sup> Respondent's Counter-Memorial, para. 63.

1. **The precautionary principle stems from both international instruments and customary international law**

69. Article 17.12(1) of the DR-CAFTA expressly allows the application of environmental agreements which the Parties are also a party to:

**"The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements.** The Parties further recognize that **this Chapter** and the ECA **can contribute to realizing the goals of those agreements.** Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party." (emphasis added)

70. This provision essentially stresses the importance of environmental agreements to which DR-CAFTA Contracting States are a party, establishing that those treaties must become applicable to achieve the environmental objectives. Thus, it is not an "untenable theory" that mandates their application to the case at hand, but the plain text of the DR-CAFTA.

71. Costa Rica is a member of more than 30 multilateral environmental agreements.<sup>30</sup> A number of those agreements signed with other DR-CAFTA Contracting States enshrine the precautionary principle as a key standard to be complied with. That standard has guided the conduct of all institutions in Costa Rica regarding environmental matters.

72. The Convention on Biological Diversity (to which all DR-CAFTA parties are signatories) states in its Preamble that, "[n]oting that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source."<sup>31</sup>

73. In addition, Principle 15 of the Rio Declaration (to which United States, Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador are signatories) provides:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."<sup>32</sup>

74. In turn, the United Nations Framework Convention on Climate Change (to which all DR-CAFTA parties are Contracting States), sets forth in Article 3.3 that:

"Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing... [regulatory] measures, taking into account that policies and measures

<sup>30</sup> Respondent's Counter-Memorial, paras. 54-60.

<sup>31</sup> RLA-39, Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 ILM 818

<sup>32</sup> RLA-40, Rio Declaration on Environment and Development, 1992.

to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."<sup>33</sup>

75. Moreover, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer<sup>34</sup> and the UN to Fish Stocks Agreement,<sup>35</sup> both of which United States and Costa Rica are also parties, envisage the precautionary principle.
76. Furthermore, not only the precautionary principle stems from international agreements, but also forms part of customary international law. In this regard, it has been stated by Professor James Crawford in no uncertain terms that "...practice of various international tribunals confirms that to this day it cannot be said without doubt that there exists an international customary law rule imposing on States an obligation to apply the precautionary principle"<sup>36</sup> and that, "*the precautionary principle has indeed crystallized into a norm of customary international law.*"<sup>37</sup> Therefore, as a norm pertaining to customary international law, the Tribunal should apply it under the mandate of Article 10.22 of DR-CAFTA.
77. Claimants allege that although Respondent's relied on Professor Sands, "*the bottom line is that even these authors admitted in the same book that the ICJ and the WTO Appellate Body have refused to make that the very finding with respect to 'precaution', when presented the opportunity.*"<sup>38</sup> On the contrary, Professor Sands expressly states in the most recent edition of the same book that the ICJ "...appears to have recognised that the principle is not without effect...",<sup>39</sup> and that "...ITLOS has also been presented with arguments invoking precaution, and has shown itself to be notably more open to the application of the principle..."<sup>40</sup>, bringing decisions on which the principle has been invoked by these international courts. Hence, the bottom line is that Professors Sands does recognize the application that the international judiciary has been making of the precautionary principle.
78. In sum, the precautionary principle clearly emanates from a number of international agreements to which DR-CAFTA Contracting States are parties, whose application becomes mandatory under Article 17.12(1) DR-CAFTA, and at the same time deriving from customary international law. According to Article 10.22 of DR-CAFTA, they are applicable

<sup>33</sup> **RLA-107**, United Nations Framework Convention on Climate Change, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992), 9 May 1992.

<sup>34</sup> **RLA-108**, *Montreal Protocol on Substances that Deplete the Ozone Layer*, Montreal, 16 September 1987, *United Nations Treaty Series*, vol. 1522 No. 26369, 30.

<sup>35</sup> **RLA-134**, United Nations Fish Stocks Agreements Articles 5(c) and 6.

<sup>36</sup> James R Crawford and others, *The law of International Responsibility* (OSAIL 2010) 532.

<sup>37</sup> **RLA-61**, Owen McIntyre and Thomas Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997) 9(2) *Journal of Environmental Law* 221, 241.

<sup>38</sup> Claimants' Reply Memorial, para 63.

<sup>39</sup> **RLA-137**, Philippe Sands and others, *Principles of International Environmental Law* (CUP 2012) 224

<sup>40</sup> *Ibid.*

rules of international law, and thus, the Tribunal must consider that standard as an interpretative tool for its analysis. Claimants' attempt to marginalize the precautionary principle by incorrectly stating that Respondent characterized it as a "general principle" is misplaced.

## **2. The precautionary principle stems from Costa Rican law**

79. The precautionary principle also forms part of Costa Rican law. Article 10.22 established that the tribunal shall decide the issues in dispute in accordance with the DR-CAFTA. According to Chapter 17 of the Treaty, and more particularly, to Articles 17.1, 17.2 and 17.3, Costa Rican environmental law is entirely applicable.

80. As stated above, Claimants did not advance any argument regarding the relevance of these articles to the case at hand, and for such reason, Respondent stands by paragraphs 443-444 and 446-459 of its Counter-Memorial in order to sustain that Costa Rican law, which supports the precautionary principle, shall be applicable to the case at hand. Certainly, when it suits them, Claimants are quick to cite and rely on Costa Rican law and its application to this dispute.<sup>41</sup>

81. The precautionary principle is implemented in Costa Rica law through Article 11 of the Biodiversity Law. As Dr Jurado explains:

"Article 11 of the Biodiversity law enshrines the precautionary principle by establishing that where there is scientific uncertainty about the potential negative impact of a particular activity, the action in question must be restricted or suspended through the enforcement of protective measures."<sup>42</sup>

82. Judge Chinchilla, Respondent's expert on Costa Rican criminal law, also makes some remarks along the same line:

"The precautionary principle is essential in environmental matters. It is contained in international instruments ratified by [Costa Rica] – thereby taking primacy over domestic law – and in internal regulations. It has also been accepted by the Constitutional Chamber, through binding jurisprudence (Article 13 of the Constitutional Jurisdiction Act) [...]."<sup>43</sup>

## **3. The content and effect of the precautionary principle**

a) *The "better safe than sorry" standard as a key principle in environmental law*

83. As stated in the Respondent's Counter Memorial, the mere risk of impact to the environment triggers an obligation for the competent authorities to act and protect the

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<sup>41</sup> Claimants' Reply Memorial, paras. 95, 260.

<sup>42</sup> Second Witness Statement of Julio Jurado, para. 84.

<sup>43</sup> Expert Report of Rosaura Chinchilla, para. 48.

environment without a need to be supported by scientific evidence.<sup>44</sup> That decision-making is guided by the precautionary principle, based on the specificity of environmental damage and its irreversibility.<sup>45</sup> In this sense:

"[T]he precautionary principle states that in order to ensure the protection and preservation of the environment and attain sustainable development, lack of scientific certainty shall not be used as a reason for deferring measures to enhance the quality of the environment."<sup>46</sup>

84. The aim of the precautionary principle is to achieve sustainable development:

**"[T]he application of the precautionary principle is widely regarded as essential for the achievement of sustainable development,** which is commonly defined as development in a way and at a rate that suits the needs of present generations of human beings without compromising the ability of future generations to meet theirs.

The purpose of the precautionary principle is the adequate protection of the environment, both for its own sake and for the good of humankind...Generally speaking, the precautionary principle calls for action at an early stage in response to threats of environmental harm, including in situations of scientific uncertainty. Applying the principle **means giving the benefit of the doubt to the environment: in dubio pro natura.**"<sup>47</sup> (emphasis added)

85. From the approaches that the international legal instruments mentioned above have made to the precautionary principle and from the references made by legal scholars, it has been considered that although there might be diversity in its formulation, such slight differences do not affect the overall coherence of the precautionary concept:

"[W]hat such diversity serves to reinforce is the context-dependent nature of precautionary decision-making. **The principle is a call for scientific uncertainty to be taken into account in making decisions on how to address threats of health or environmental damage, rather than a hard-and-fast rule that dictates the same result in every case.**"<sup>48</sup> (emphasis added)

86. States have adopted similar versions of the precautionary principle in their domestic law<sup>49</sup> and Costa Rica is not an exception. In its Counter Memorial, Respondent has pointed out that the said standard is embedded in its legal system, and works as an acting guide for all

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<sup>44</sup> Respondent's Counter-Memorial, para. 63.

<sup>45</sup> Id., para. 63.

<sup>46</sup> **RLA-58**, Ellen Hey, "The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution" (1992) 4(2) *The Georgetown International Environmental Law Review* 303, 311.

<sup>47</sup> **RLA-74**, Arie Trouwborst, "Prevention, Precaution, Logic and Law: The Relationship Between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions" (2009) 2(2) *Erasmus Law Review* 105, 107-8.

<sup>48</sup> **RLA-97**, Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (The Federation Press 2005) 18.

<sup>49</sup> **RLA-109**, Jonathan B. Wiener, "Precaution" in Daniel Bodansky and others, *The Oxford Handbook of International Environmental Law* (OSAIL 2008), 599.

state agencies.<sup>50</sup> This would and should have been expected by Claimants when they arrived in Costa Rica and sought to develop their interests in the country.

87. In effect, as explained by Dr Jurado in his second witness statement:

"An environmental regulation must serve the social purpose that it was intended to promote. Accordingly, this regulation must be interpreted and integrated consistently with the hermeneutic principle of *in dubio pro natura*. It follows from this that all acts by the public administration and individuals in environmental matters must be carried out with adequate care to avoid risks, and serious and irreversible damages. In other words, if there is uncertainty about the risk of the activity with respect to the possibility of serious and irreversible damages, the legal authority must interpret and apply the regulation so as to preclude the execution of those kinds of activities until there is scientific certainty that they will not constitute a risk of damage."<sup>51</sup>

[...]

"The precautionary principle, which permeates and influences environmental law in a comprehensive fashion, establishes a presumption in favor of the environment that makes it possible to avert the negative effects on the environment caused by any human activity."<sup>52</sup>

[...]

"In environmental law, the precautionary principle amplifies the characteristics of the precautionary measure as the tool to prevent the continuation of environmental damage caused by a project or activity. In this regard, both the urgency as well as the alleged inherent irreversibility of the damage to the environment are of greater relevance.

[...]

"The applicable case law has found that the protection in environmental matters must be immediate and not subsequent precisely to prevent the damage from causing serious and irreversible consequences for both environment and public health. "<sup>53</sup>

88. All these definitions agree on three main elements of the precautionary principle: (i) a degree of certainty of future harm if the threat remains unaddressed, (ii) the lack of scientific evidence at the time of the decision, and (iii) making a decision before having this scientific certainty.

89. The lack of scientific certainty when there is a threat of environmental damage is what triggers the application of the precautionary principle in the decision-making. In effect, it

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<sup>50</sup> Counter-Memorial, paras. 357-60.

<sup>51</sup> Second Witness Statement of Dr Julio Jurado, para. 167.

<sup>52</sup> Id., para. 83.

<sup>53</sup> Id., paras. 85-86.

has been sustained that "there must clearly be some minimum threshold of scientific uncertainty in order for the precautionary principle to be applied."<sup>54</sup>

90. Following the same line of reasoning, it has been stated that:

"[T]he precautionary concept may require preventive action before scientific proof of harm has been submitted. Otherwise stated, it rejects a policy whereby activities or substances are regulated or banned only if they have been scientifically proven to be harmful to the environment."<sup>55</sup>

91. In the instant case, although at the time of action of Costa Rican agencies there was no certainty on the existence of wetlands which have been drilled, filled, terraced and on the existence of a forest which was felled without permits, the reasonable doubts triggered by the number of complaints received were sufficient to allow the implementation of the precautionary principle.

92. As regards the threshold of harm that might be experienced in the case of inaction, it has also been expressed in a variety of different forms: threats of serious or irreversible damage,<sup>56</sup> threat of significant reduction or loss of biological diversity,<sup>57</sup> potential adverse effects.<sup>58</sup>

93. Needless to say, wetlands and forests have an important contribution to the environment:

"Wetlands play an integral role in the ecology of the watershed and ecosystem. Wetlands can be thought of as "biological supermarkets." They provide great volumes of food that attract many animal species. Many species of birds and mammals rely on wetlands for food, water and shelter, especially during migration and breeding. These animals use wetlands for part of or all of their life-cycle.

The functions of a wetland and the values of these functions to human society depend on a complex set of relationships between the wetland and the other ecosystems in the watershed, such as upland forests. These complex habitats act as giant sponges, soaking up rainfall and slowly releasing it downstream over time. Wetlands are also like highly efficient sewage treatment works, absorbing chemicals, filtering pollutants and sediments, breaking down suspended solids and neutralizing harmful bacteria. Wetlands' microbes, plants and wildlife are part of global cycles for water, nitrogen and sulfur.

[...] Wetlands store carbon within their plant communities and soil instead of releasing it to the atmosphere as carbon dioxide, a greenhouse gas whose increased concentrations in the atmosphere are in

<sup>54</sup> **RLA-80**, Caroline E. Foster, "Reversing the burden of proof to give effect to the precautionary principle" in *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011) 240, 257.

<sup>55</sup> **RLA-58**, Ellen Hey, "The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution" (1992) 4(2) *The Georgetown International Environmental Law Review* 303, 305.

<sup>56</sup> RLA-40

<sup>57</sup> RLA-39, Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 ILM 818, preamble.

<sup>58</sup> **RLA-112**, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Cartagena, 29 January 2000, in force 11 September 2003, 39 ILM 1027, Articles 10(6) and 11(8).

part responsible for global warming. Thus, wetlands and wetland restoration help to moderate global warming conditions and mitigate the impacts of climate change.

[...] These environments constitute unique habitats for the maintenance of aquatic biodiversity and provide significant ecological services to the surrounding seasonal dry forest.

[...]

Biological diversity is the basis for a wide array of goods and services provided by forests. The variety of forest trees and shrubs play a vital role in the daily life of rural communities in many areas, as sources of wood and non-wood products, as contributors to soil and water conservation, and as repositories of aesthetic, ethical, cultural and religious values.

Of all the outputs of forests, water may be the most important. Stream flow from forests is the life-blood, providing the ecosystem with a clean, sustainable water supply. Precipitation is captured by leaves and branches (interception), eventually falling to the forest floor where the water is absorbed by the soil and replenishes the groundwater levels like a sponge filling up with water. The groundwater fills depressions with water forming wetlands and streams."<sup>59</sup>

94. Dr Jurado in his Second Witness Statement stresses the importance of wetlands, highlighting Costa Rican decisions in this regard:

"In order to protect this legal asset [the wetland], the Constitutional Chamber has relied on the environmental protections provided for at the constitutional level, as well as those found in international treaties ratified by Costa Rica. Furthermore, it has taken note of the importance of these ecosystems for humanity, which it has repeatedly embodied in its judgments: 'Wetlands are comprised of a series of physical, biological and chemical components that affect soils, water, animal and plant species, and nutrients...the importance of wetlands stems from, among other things, the ease with which they form in countries that foster their development and conservation. Wetlands sustain great habitat biodiversity. Wetlands are also important as a habitat with positive socio-economic impacts on the segments of the population that exploit them sustainably. Further, wetlands are landscapes characterized by singular beauty and wildlife diversity that form part of a country's cultural heritage and are an important source of tourism for these countries or regions...'

The position of the Constitutional Chamber compliments and is consequent to the normative development of [environmental protection]. For example, Article 41 of the Organic Environmental Act declares wetland ecosystems to be of public interest, whether or not they are protected by an applicable regulation. The regulation itself does not distinguish between wetlands that have and have not been formally identified as such; the protection of this ecosystem is universal, due to the social and environmental importance of this legal asset."<sup>60</sup>

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<sup>59</sup> First KECE Report, paras. 30-33, 36-37.

<sup>60</sup> Second Witness Statement of Julio Jurado, para. 159-160.

95. Taking into account the role that wetlands and forests play in the environment, the negative impact and the threat of irreversible damage is more than evident. For instance, and in the case of removal of forest, the First KECE Report explains that:

"Removing forest cover disrupts the important natural process of forest hydrology by accelerating the rate that precipitation becomes streamflow. Without the forest vegetation to absorb the rainfall, it falls directly to the ground. The soil is no longer stabilized by the tree roots causing the water to quickly flow along the ground surface, eroding the valuable top soil and destroying wetlands and streams below by disrupting their supply of water.

Such conditions are particularly exacerbated by the construction of drainage ditches. Drainage of the cleared forests further accelerates the speed and quantity of the water flowing down slope by draining and lowering the groundwater. As the water is quickly drained from the surface it reduces groundwater levels and shortens wetland hydro-periods downslope adversely impacting wetland health.

Removing trees and reducing forest cover results in other negative ecological impacts, such as loss of habitat and other ecosystem services otherwise provided by forests. Reducing forest cover also results in changes in water flow paths in soils and subsoils. Impervious surfaces (roads and trails) and altered hillslope contours (cut slopes, drainage ditches and fill slopes) like those now found at Las Olas Ecosystem, modify water flow paths, increase overland flow and deliver overland flow directly to stream channels creating cut channels and sedimentation.

In some areas, like the Las Olas Ecosystem, cutting trees reduces the quantity of water once safely stored in the forest ecosystem, causing an unhealthy increase in the volume of water flowing downstream. This practice can ultimately degrade water quality and increase vulnerability to flooding downstream.

Forests cycle water from precipitation through soil and ultimately deliver it as streamflow into wetlands and rivers. Forested, headwater areas like the Las Olas Ecosystem (which include the tributary wetlands and streams that feed into the Rio Aserradero) influence the quantity and quality of downstream water resources. In this way, forests, water and local communities are closely intertwined."<sup>61</sup>

96. The actions that were performed by Claimants —by drilling, filling and terracing the wetlands and the felling of trees— represented a real threat for the environment, which reasonably and lawfully triggered an immediate response from Costa Rica. If it were not for Costa Rica (acting under the precautionary principle), timely suspending the project the damage would have been irreparable.

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<sup>61</sup> First KECE Report, paras. 38-42.

b) The effect of the precautionary principle

97. Having evidenced that the precautionary principle has to be applied by the Tribunal to the interpretative analysis of the case under the mandate of Article 10.22 DR-CAFTA, Respondent rejects Claimants argument that it has failed *"to explain the particular end to be achieved in so doing."*<sup>62</sup> In fact, it is quite surprising that Claimants argue that Costa Rica failed to do so when in the preceding sentence they indicated that the consequence of the application of the precautionary principle, according to Respondent, is to shift the burden of proof regarding the lack of harm to the environment onto the person who wishes to carry out an activity.<sup>63</sup>
98. Indeed, the shift of the burden of proof is one of the consequences of the application of the precautionary principle that Respondent also outlined in the Counter Memorial,<sup>64</sup> in addition to the effect that it has on the interpretation of the legal framework applicable to the dispute, and on the conduct of the Costa Rican agencies.
99. When the precautionary principle is implemented, the burden of proof has to be reversed on the party contributing to the harm to give effect to it. Claimants attempt to escape such obligation by blaming Respondent of converting the case *"into one in which the question is whether the Claimants acted consistently with Costa Rican law."*<sup>65</sup> As will be explained further below, whether the Tribunal looks to Costa Rican law or international law, Claimants comprehensively fail to establish either compliance with the applicable environmental standards or the standards of protection they allege are applicable to find a breach against Respondent.
100. Moreover, the *quid pro quo* of this case is Claimants' lack of compliance with international and domestic environmental law provisions, something that prevents them from taking advantage of the protection of the Treaty. Indeed, since environmental matters are the key elements of the present case, the burden of proof has to be reversed on Claimants, consistent with international law's recognition of the precautionary principle.
101. For example, it has been considered that international courts and tribunals are allowed to contemplate a reversal in order to accommodate the precautionary principle:  
"Decisions about the burden's allocation are partially substantive and partially procedural, and this becomes especially obvious in a dispute involving scientific uncertainties. International courts and tribunals cannot maintain a rigid approach that turns a blind eye to the substantive effects of applying the rules on burden of proof where

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<sup>62</sup> Claimants' Reply Memorial, para. 61.

<sup>63</sup> Id., para. 61.

<sup>64</sup> Respondent's Counter-Memorial, para. 471.

<sup>65</sup> Claimants' Reply Memorial, para. 66.

fairness requires a specific modification to the rules, or to the way in which they are applied."<sup>66</sup>

102. In effect, such reversal is expressly provided in Costa Rican law:  
"The precautionary principle is of such significance in environmental law that it substantiates the shifting of the burden of proof in this matter. As per Article 109 of the Biodiversity Law, the burden of proof corresponds to whoever is accused of causing environmental damage."<sup>67</sup>
103. Accordingly, the reversal of the adjudicatory burden of proof offers a way to ensure that proper account is taken of the risks faced in disputes involving scientific uncertainty. In other words, shifting the burden of proof seems a fairly straightforward way to ensure that greater weight will be given to the "prognosis of doom."
104. In addition, the precautionary principle is also an interpretative guide of the entire environmental legal protection order of Costa Rica.<sup>68</sup>
105. This has a strong effect also on the behavior of its public agencies, which have to comply with the precautionary principle as soon as it comes to their knowledge that there is a likelihood of impact to the environment. The agency does not have to be certain of the existence of damage, but the likelihood of it is sufficient for it to undertake the necessary measures to prevent any impact on the environment. This stands to reason given the irreversible damage that can be caused by unauthorized construction work.<sup>69</sup>
106. Together with the precautionary principle, Respondent contends that the preventative principle also forms part of the protection framework under which Claimants decided to develop the Project, and should also inform the Tribunal's decision. Certainly, it should form a cornerstone of the legitimate expectations of Claimants at the time they purported to make their investment.
107. By contrast, Claimants allege that:  
"[I]t has no specific application in the instant case...Indeed, the closest this principle comes to the instant case is in demonstrating how the Respondent's lack of transparency deprived Claimants of access to relevant environmental information on a timely basis."<sup>70</sup>

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<sup>66</sup> **RLA-80**, Caroline E. Foster, "Reversing the burden of proof to give effect to the precautionary principle" in *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011) 240, 240.

<sup>67</sup> Second Witness Statement of Julio Jurado, para. 86.

<sup>68</sup> *Id.*, para. 187.

<sup>69</sup> Respondent's Counter-Memorial, para. 357.

<sup>70</sup> Claimants' Reply Memorial, para. 64.

108. The preventative principle and the precautionary principle are two sides of the same coin,<sup>71</sup> and it has even been considered that the precautionary principle must be regarded as having absorbed the preventative principle, or alternatively, as being its most developed form.<sup>72</sup> Therefore, it cannot be denied its application to the case at hand. Indeed, the preventative principle has been expressly established in Article 11 of the Biodiversity Law (which becomes applicable under Article 10.22 DR-CAFTA), providing that it is of vital importance to anticipate, prevent and attack the causes of loss or threats to biodiversity.
109. Claimants attempt to restrict the application of the principle to "State liability for transboundary pollution" or "State's general obligation to implement appropriate regimes for the purposes of conducting environmental assessments."<sup>73</sup> However, the preventative principle should be held apart from the duty of States to avoid transboundary environmental harm:
- "Although both the duty to avoid transboundary harm and the preventative principle as it is generally understood mandate the adoption of preventative measures, the fundamental distinction between them lies in their respective objectives. Whereas the former derives from respect for the principle of state sovereignty, the latter – like the precautionary principle- seeks to protect the environment as an end in itself. Accordingly, the scope of the preventative principle –again like the precautionary principle- is not confined to transboundary damage."<sup>74</sup>
110. Thus, Claimants would have the Tribunal believe that it faces a choice between investor protection and environmental protection. However, this is a red-herring. There is no choice according to DR-CAFTA. The respect for environmental protection is paramount and investor protection bends to that treaty-based will. Moreover, an embedded principle of international law (as much as Costa Rican law – and therefore equally relevant to Claimants' purported legitimate expectations) are the precautionary principle and the preventative principle – both specific vehicles for the implementation of environmental protection.
111. As much as Claimants would pretend, this is not an investment protection case wherein there exists a discretion to consider (or not) the significance of environmental harm. This case concerns the profound environmental risks facing a Contracting Party to DR-CAFTA

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<sup>71</sup> **RLA-76**, Nicolas de Sadeleer, The principles of prevention and precaution in international law: two heads of the same coin? in Malgosia Fitzmaurice, David M. Ong, and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing Limited 2010) 182.

<sup>72</sup> **RLA-74**, Arie Trouwborst, "Prevention, Precaution, Logic and Law: The Relationship Between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions" (2009) 2(2) *Erasmus Law Review* 105, 105.

<sup>73</sup> Claimants' Reply Memorial.

<sup>74</sup> **RLA-74**, Arie Trouwborst, "Prevention, Precaution, Logic and Law: The Relationship Between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions" (2009) 2(2) *Erasmus Law Review* 105, 112.

that must remain protected. The standards of investment protection adapt to that clearly legislated principle.

**D. The non-regression principle as an interpretative tool of environmental laws**

112. Not only should the precautionary principle inform the Tribunal in its decision, but also the non-regression principle plays an important role as an interpretative tool.

113. The principle is focused on the environmental legislation, in the sense that its enactment and interpretation must not be made in the detriment of environmental protection:

"Borrowed from the field of international human rights law and incorporated into national human rights legislation particularly in civil law countries, the principle of non-regression **is an international environmental legal principle strongly advocated for by the legal academy and non-governmental organizations. As applied to environmental legislation, a general non-regression principle argues that existing environmental law must not be modified to the detriment of environmental protection. The emergence of the principle is based on pre-existing principles including the duty to prevent harm, public participation, intergenerational equity, and precaution.**"<sup>75</sup> (emphasis added)

114. The principle of non-regression is well supported by international instruments signed by Costa Rica and Costa Rican domestic law, which all become applicable pursuant to Article 10.22 of DR-CAFTA.

115. As regards Costa Rican international environmental law,<sup>76</sup> it has been sustained that:

"[I]t is also possible to ground the existence and content of the principle of non-regression in international treaties and agreements (hard law) in force in Costa Rica, on the grounds that generally all of them seek to achieve a high level of environmental protection, to improve the environment, to enhance biodiversity, to protect biotic and abiotic natural resources, and of course, to finish, decrease and eliminate pollution and environmental degradation; this leads to infer the impossibility of regression, under international treaties and their application within State, based on the fact that international environmental law is mandatory in Costa Rica and it enjoys full enforceability."<sup>77</sup>

116. The non-regression principle is not only provided in international environmental instruments but also in free trade agreements such as the DR-CAFTA:

"It is also possible to affirm the existence and application of the principle of non-regression in environmental obligations assumed by

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<sup>75</sup> **RLA-110**, Anastasia Telesetsky, "An emerging legal principle to restore large-scale ecoscapes" in Christina Voight (ed) *Rule of Law for nature: new dimensions and ideas in environmental law* (CUP 2013) 175, 185.

<sup>76</sup> Respondent's Counter-Memorial, paras. 55-57.

<sup>77</sup> **R-436**, Mario Peña Chacon, "El principio de no regresión ambiental en la legislación y jurisprudencia costarricense," in Mario Peña Chacon (ed) *El principio de no regresión ambiental en el derecho comparado* (PNUD Costa Rica 2013) 28.

Costa Rica when it signed and ratified the....DR-CAFTA... Coupled with the above obligations [Articles 17.1 and 17.2.1.a] there is also Article 17.2.2. Article 17.2.2 aims to avoid "environmental dumping" and the existence of "pollution havens," by categorically prohibiting environmental regressions through the reversing, weakening or worsening of environmental resolutions."<sup>78</sup>

117. Moreover, Costa Rican domestic environmental law also provides for the non-regression principle. In this regard, Dr Jurado points out that:

"Complementing these environmental principles, Regulation 2012-13367 of the Constitutional Chamber developed the non-regression principle as a substantive guarantee of environmental rights which prohibits the State from adopting measures and policies, or modifying regulation that would worsen, without reasonable proportionate justification, the rights previously enjoyed. This derives from the progressive human rights principles, the *principio de objectivación* of environmental protection and the non-retroactivity of regulations."<sup>79</sup>

118. Therefore, the application of the non-regression principle evidently guides the interpretation that the Tribunal should follow in the present case.

#### **IV. JURISDICTIONAL OBJECTIONS**

119. Due to the consolidated nature of these proceedings, Respondent raises its jurisdictional objections in this Rejoinder Memorial, in support of the objections made in the Counter Memorial.

##### **A. David Aven is not a protected investor under DR-CAFTA**

120. In spite of the clear wording of Article 10.28 DR-CAFTA and that the facts of the case indicate Mr Aven's Italian nationality as dominant and effective excluding him from the protection of the DR-CAFTA, Claimants continue to maintain that for the purposes of this arbitration, he is a national of the U.S.<sup>80</sup>

121. Respondent contends that first, Mr Aven's claims as a U.S. national are barred since DR-CAFTA excludes claims by dual nationals whose dominant and effective nationality is of a non-Contracting State. Second, Mr Aven's claims as a U.S. national constitute an exercise of treaty shopping which deny him the protection of DR-CAFTA. Lastly, regardless of his nationality, Mr Aven in his capacity as a mere representative of the Investors and the Enterprises does not qualify as an "investor of a Party" under applicable standards of international law.

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<sup>78</sup> Ibid., 34.

<sup>79</sup> Second Witness Statement of Julio Jurado, para. 169.

<sup>80</sup> Claimants' Reply Memorial, paras. 27-37, 348-351.

1. **Mr Aven's claims as U.S. national are barred since DR-CAFTA excludes claims by dual nationals whose dominant and effective nationality is of a non-Contracting State**

122. While a number of investment treaties have not expressly addressed the issue of dual nationality – leading arbitral tribunals to vary in their interpretation– DR-CAFTA is explicit on whether natural persons having dual or multiple nationalities may qualify as "Investor of a Party." This would not be apparent from Claimants' response to this question facing the Tribunal. DR-CAFTA provides a well-defined test: a natural person who is a dual national shall be considered exclusively a national of the State of his or her "dominant and effective nationality."<sup>81</sup>

123. Cases of dual nationality encompass different scenarios: on the one hand, where a national of a Contracting Party is also a national of the respondent Contracting Party; and on the other, where a national of a Contracting Party is also a national of another Contracting Party –other than the respondent Contracting Party– or of a third State.

124. The scenario presented by Mr Aven's dual nationality clearly falls within the second scenario: where a national (Mr Aven) of a Contracting Party (U.S.) to DR-CAFTA is also a national of a third State (Italy).

125. Claimants assert that this scenario is not supported by Article 10.28 DR-CAFTA, which only deals with hypothesis where a national of a Contracting Party is also a national of the respondent Contracting Party.<sup>82</sup> On the contrary, the context of this case is exactly what the drafters of DR-CAFTA had envisaged, as opposed to other investment treaties where dual nationality is only addressed in relation to the host State:

"[M]odern [investment treaties] contain clear guidance to determine whether treaty protection is granted to a dual national. A negative answer is found, for example, in the ACIA [ASEAN Comprehensive Investment Agreement], which does not grant the right to arbitration to a person possessing the nationality of the host state and in the 2004 Canada Model Treaty, which explicitly excludes investors of the other party that possesses the citizenship of Canada from its coverage. However, the ACIA is silent on the situation of a dual national who does not have the citizenship of the host State...The answer in the 2004 and 2012 US Model Treaty, ***the DR-CAFTA depends on the investor's dominant and effective nationality, rather than on the nationality of the host State, because a dual national shall be deemed to be***

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<sup>81</sup> RLA-6, Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Chapter Ten Article 10.28.

<sup>82</sup> Claimants' Reply Memorial, paras. 37, 348.

***exclusively a national of the state of his or her dominant and effective nationality.***<sup>83</sup> (emphasis added)

126. Respondent's argument is not, as Claimants imprecisely suggest, that a third State (i.e. Italy) would be better placed to make the claim.<sup>84</sup> Instead it is that DR-CAFTA establishes in cases of dual nationality that either when a national of a Contracting Party is also a national of the host Contracting Party, or of another Contracting Party, or of a third state, the dominant and effective nationality of the investor prevails.
127. This provision is designed to limit the protection of Chapter 10 to 'real' investors<sup>85</sup> but also, in the context of a multilateral agreement, to 'real' investors of others Contracting parties. DR-CAFTA Parties did not envisage providing the protection of the Treaty to nationals of States which are not a Party to the treaty.
128. Claimants also raise an unnecessary discussion on the customary international law of nationality.<sup>86</sup> While investment tribunals have debated whether the dominant and effective nationality test should be read into treaties where it is not expressly mentioned, the DR-CAFTA does not open the door to such discussion since it **expressly** provides the solution for cases of dual nationality. There is no need to resort to the rules on customary international law or to any discussion on the content of such rules:
- "[T]ribunals should assign primacy to the *lex specialis* language of treaties (including the ICSID Convention) when interpreting their provisions on nationality. Not only is this approach legally correct, it also yields the practical benefit of greater certainty and harmony amongst cases. The burden of defining nationality would be shifted to treaty drafters, and tribunals could avoid often cumbersome attempts to reconcile their treaty interpretations with customary international norms."<sup>87</sup>
129. Therefore, in order to determine whether Mr Aven has access to the arbitral jurisdiction of the DR-CAFTA, it is conclusive to turn to the text of the Treaty, without looking further than the ordinary meaning of "dominant and effective nationality." This is the mandate of the rules on treaty interpretation provided in the 1969 Vienna Convention on the Law of Treaties,<sup>88</sup> requiring that interpretation must be based above all upon the text of the treaty.<sup>89</sup>

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<sup>83</sup> **RLA-85**, Trinh Hai Yen, "Conflicts II – adjudication mechanisms" *The Interpretation of Investment Treaties* (Martinus Nijhoff 2014) 203, 209.

<sup>84</sup> Claimants' Reply Memorial, para. 37.

<sup>85</sup> Id., para. 35.

<sup>86</sup> Id., paras. 28, 32-33.

<sup>87</sup> **RLA-96**, Roberto Aguirre Luzi and Ben Love, "Individual nationality in investment treaty arbitration: the tension between customary international law and *lex specialis*" in Andrea K Bjorklund and others (eds) *Investment Treaty Law* (BIICL 2009) 185, 187.

<sup>88</sup> **RIA-114**, Vienna Convention on the law of treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33, 8 LLM 679, Article 31(1).

<sup>89</sup> **RLA-59**, *Territorial Dispute (Libyan Arab Jamahiriya//Chad)*, Judgement, ICJ Rep (1994) 6, para. 41.

130. Claimants allege that Respondent did not provide an elucidation of the applicable law in this regard, and that it attempted to rely only on the ICSID decision *Champion Trading et al v. Egypt*.<sup>90</sup> Immediately after, Claimants provide a set of justifications as to the alleged inapplicability of ICSID jurisprudence to the instant case,<sup>91</sup> in a desperate attempt to exclude the elements of such decision to this case. This is irrelevant discourse that the Tribunal can ignore.
131. Claimants' cannot ignore the straightforwardness of the case at hand, which demands the Tribunal only to determine the dominant and effective nationality of Mr Aven, in accordance with Article 10.28 of DR-CAFTA. It is for this reason that Respondent illustrated the facts that different tribunals have taken into account to determine nationality, firstly resorting to *Nottebohm* –being the landmark case on dominant and effective nationality– and secondly to a decision particularly in the context of an investment dispute.<sup>92</sup>
132. When tribunals have faced questions of dual nationality, they have decided measuring different factors: habitual residence, family ties, and evidence of attachment shown to a particular country, among other elements.<sup>93</sup> The ICJ stated in *Nottebohm* that:
- "Different factors are taken into consideration, and their importance will vary from one case to the next [...]"<sup>94</sup>
133. In the context of investment arbitration, the nationality used to establish an investment must be considered as a relevant factor to decide on cases of dual nationality. This was the reasoning that the arbitral tribunal followed in *Champion Trading v. Egypt*:<sup>95</sup>
- "What is relevant for this Tribunal is that that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality."<sup>96</sup>
134. The tribunal was then convinced that the claimants in that case had sufficient ties to Egypt, being the relevant nationality that they used for the registration of their business.
135. In the instant case, in the conduct of his business in Costa Rica, during the establishment of his investment, and in all proceedings derived from it, Mr Aven introduced himself as an

<sup>90</sup> Claimants' Reply Memorial, para. 28.

<sup>91</sup> Id., para. 29-31.

<sup>92</sup> Respondent's Counter-Memorial, paras. 261-262.

<sup>93</sup> CLA-132 / RLA-9, *Nottebohm Case (Liechtenstein v Guatemala) (second phase)*, Judgment, ICJ Rep (1955) 22; Nasser Esphahanian v. Bank Tejaratran, US Claims Tribunal, cited by **RLA-60**, Mohsen Aghahosseini, "The Claims of Dual Nationals Before the Iran-United States Claims Tribunal: Some Reflections" (1997) 10(1) *Leiden Journal of International Law* 21, 24-25.

<sup>94</sup> CLA-132 / RLA-9, *Nottebohm Case (Liechtenstein v Guatemala) (second phase)*, Judgment, ICJ Rep (1955) 22.

<sup>95</sup> Respondent's Counter-Memorial, para 262.

<sup>96</sup> RLA-10, *Champion Trading Co. et al. v Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, 17.

Italian national.<sup>97</sup> Therefore, within the context of an individual seeking to garner protection by virtue of his nationality – it is entirely permissible to look at how he has regarded himself (in terms of his nationality) when conducting himself in Costa Rica. What better demonstration exists than the fact Mr Aven himself holds himself out as an Italian national before the Respondent.

136. Mr Aven stated in his Second Witness Statement that he elected to get an Italian passport for the sole reason that it was available to him, and to use it to travel since many Americans are purportedly targeted when travelling abroad, affirming that it was a choice made for convenience.<sup>98</sup> If it has been for convenience too to hold himself out as national of Italy to pursue his investment in Costa Rica, the abrupt shift to his American nationality is also motivated by said convenience, something which we examine below cannot be upheld by the Tribunal.

137. Moreover, the implications of ICSID dispute settlement mechanism that Claimants use to question the applicability of *Champion Trading v. Egypt* to this case do not affect Respondent's arguments that the nationality used to set an investment is a significant factor to decide when a case involves issues of dual nationality in the context of an investment dispute.

138. Claimants affirmed in this regard that the ICSID Convention is a *lex specialis* and inconsistent to the standard provided in customary international law treatment of nationality, and for such reason, the jurisprudence on nationality has nothing to offer in this context.<sup>99</sup> On the contrary, ICSID Convention opens the door to the customary international principles of effective nationality and genuine link:

"As the ICSID Convention does not define nationality, the principle of international law governing this matter come into play instantly. Cardinal among such principles is that of effectiveness. Ever since the *Nottebohm* case, this has been the accepted premise in international law [...]."<sup>100</sup>

139. In effect, since the ICSID Convention does not provide a definition of nationality, the rules on customary international law come into play. The ICSID Convention then is not inconsistent to the standard provided in customary international law treatment of

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<sup>97</sup> Respondent's Counter-Memorial, paras. 263-267.

<sup>98</sup> Second Witness Statement, David Aven, paras. 17, 22.

<sup>99</sup> Claimants' Reply Memorial, paras. 28, 30.

<sup>100</sup> **RLA-72**, *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, Partial Dissenting Opinion of Francisco Orrego Vicuña. He clarified in this point that he and his colleagues agreed that *Nottebohm's* "effectiveness" principle applies to the ICSID Convention.

nationality, being ICSID tribunals ready to discuss the dominant and effective test.<sup>101</sup> Claimants' argument that Respondent could not rely on ICSID case law is meritless.

140. Moreover, Claimants' wrongfully assert that the Draft Articles on Diplomatic Protection ". . . is the only reasonable source from which to commence one's analysis in a nationality dispute under DR-CAFTA Article 10.28."<sup>102</sup>

141. Claimants make, as they also did when referencing other instruments in their Reply, a partial reading of the 2006 Draft Articles on Diplomatic Protection. Article 17 provides that:

"The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments."<sup>103</sup>

142. It is clear that the 2006 Draft Articles on Diplomatic Protection do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. Therefore, Claimants' argument that it is the only reasonable source for the Tribunal to analyze the nationality of the investors does not have any legal basis. Much like their reference to Article 59 of the VCLT, Claimants' random word search for comparable terms provides no sophisticated basis to challenge the authority supporting Respondent's position.

143. All in all, Mr Aven's claims are barred since DR-CAFTA excludes claims by dual nationals whose dominant and effective nationality is of a non-Contracting State. As it was stated in Respondent's Counter-memorial, U.S. nationality does not survive the scrutiny of the test, having Mr Aven genuine links with Italy.<sup>104</sup>

## **2. Mr Aven's claims of being a U.S. national constitute an exercise of treaty shopping which prevents himself of the protection of DR-CAFTA**

144. Mr Aven, being an Italian national, has brought to this arbitral proceeding the U.S. nationality only to gain access to the substantive and procedural protection provided in Chapter 10 of the DR-CAFTA. We know this because when he wished to invest he held himself out and relied upon his Italian nationality. And yet when it becomes a convenient moment to invoke a U.S. citizenship, he resorts to a new approach. Such conduct is a clear example of treaty shopping, prohibited by Article 10.28 of the DR-CAFTA. It also undermines principles of good faith and reciprocity, which are aimed to prevent the misuse of the law.

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<sup>101</sup> **RLA-63**, *Mr. Eudoro Armando Olquín v Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, paras. 61-62.

<sup>102</sup> Claimants' Reply Memorial, paras. 28, 32.

<sup>103</sup> **RLA-68**, UNGA, 2006 ILC Draft Articles on Diplomatic Protection. in "Report of the Commission to the General Assembly of its fifty-eighth session" (2006) (2)2 UNYB 26, Article 17.

<sup>104</sup> Respondent's Counter-Memorial, paras. 263-267.

145. The definition of "investor of a Party" in the DR-CAFTA is limited to the confirmation of a dominant and effective nationality. It has been stated that such definitions of nationality, encompassing the limitation requirement of a "genuine link," are an attempt to avoid the problem of "treaty shopping."<sup>105</sup> This phenomenon refers to the conduct of foreign investors manipulating their nationality for the purpose of acquiring the benefits of investment treaty protection in their host state through third countries.<sup>106</sup> This prohibition is particularly justified in circumstances such as the present ones, where the particular investor has otherwise held himself out as having a distinct nationality (Italian).
146. Although treaty shopping is associated more commonly with legal persons, investment treaties might also be subject to abuse by natural persons. The result of allowing such phenomenon from individuals would entail that an investor might be able to "pick and choose" among its nationalities in order to gain access to the protection of a particular investment treaty which best safeguards his or her interests.
147. Investment tribunals and legal doctrine have, on a number of occasions, considered whether the manipulation of nationality by an investor to gain access to treaty protections does constitute an abuse of the system of international investment protection. Although those decisions and opinions are focused primarily on legal persons, the principles derived from them are also useful to illustrate the case of individuals, as Mr Aven.
148. In general, treaty shopping has been considered to be a clear violation of the principles of good faith and reciprocity, by way of exercising rights in an abusive manner.
149. The principle of good faith has been recognized by the International Court of Justice as one of the basic principles governing the creation and performance of legal obligations.<sup>107</sup> In the context of investment treaty arbitrations, and particularly in relation to the investor's conduct in bringing a claim, it can be interpreted as an obligation to proceed fairly and reasonably, to represent motives and purposes truthfully, and to refrain from taking unfair advantage.<sup>108</sup> Although referred to inter-state relations, but also applicable to investor-state, good faith has been understood as follows:

"[I]nternationally, good faith is presumed, and the State is entitled to rely on the word of another State. Without such a presumption, international intercourse could not continue. The essence of bad faith,

<sup>105</sup> CLA-147, Lee M Caplan and Jeremy K Sharpe, United States. in *Chester Brown (ed), Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013), 769.

<sup>106</sup> **RLA-77**, Matthew Skinner, Cameron A. Miles, and Sam Luttrell, "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3(3) *Journal of World Energy Law & Business* 260, 260.

<sup>107</sup> **RLA-55**, *Nuclear Tests Case (New Zealand v France)*, Judgment, ICJ Rep (1974) 457, paras. 46, 49; **RLA-57**, *Border and Transborder Armed Actions (Nicaragua v Honduras)*, *Jurisdiction and Admissibility*, Judgment, ICJ Reports (1988) 69, para. 94.

<sup>108</sup> **RLA-75**, *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No. ARB/06/5, Award, 16 April 2009, para. 107.

then, is the discordance between the stated reason and the actual reason. It derives from the principle that one cannot be allowed to say one thing at one moment and another at the next [...]."<sup>109</sup>

150. Therefore, the manipulation of Mr Aven by resorting suddenly to U.S. nationality in order to gain access to the protection of DR-CAFTA –to which otherwise he would not be entitled– when all the dealings with Costa Rica have been as an Italian national constitutes a breach of the good faith principle. Mr Aven cannot be allowed to shift to his U.S. nationality solely to bring a claim against Costa Rica, when he has informed the authorities at most times that he was an Italian national in order to establish his alleged investment in the country.<sup>110</sup>
151. Mr Aven's claims based on its U.S. nationality for the sole purpose of gaining benefit from DR-CAFTA constitute an abusive exercise of rights, which cannot be accepted from any point of view. As Hersch Lauterpach points:
- "There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused."<sup>111</sup>
152. Mr Aven's exercise of treaty shopping entails also a clear violation of the principle of reciprocity on which investment agreements are based, and as such undermine the legitimacy of the investor-state dispute settlement.<sup>112</sup> Investment treaties are purported to establish reciprocal rights and obligations between the contracting states. However, the principle of reciprocity will be breached if allowing investors with no substantial ties to a Contracting state to unfairly benefit from investment treaty protection, even if the actual home state does not assume any of the converse obligations.<sup>113</sup>
153. Thus, accepting Mr Aven's claims as a U.S. national would have the effect of giving him protection "for free" since Italy (his place of birth to which he has a "genuine link") does not have to offer the same standards of protection to other investors in Costa Rica. In fact, Costa Rica and Italy have not concluded any agreement in this regard, which permits us to infer that Mr Aven attempted to internationalize a dispute under DR-CAFTA that in any event should be resolved by domestic courts.

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<sup>109</sup> **RLA-56**, G.D.S. Taylor, LL.M., PH.D., The Content of the Rule Against Abuse of Rights in International Law. in Professor Sir Humphrey Waldock and Professor R. Y. Jennings (eds), *The British Year Book of International Law: Volume 46: 1972-1973* (Oxford University Press 1975) 323, 334.

<sup>110</sup> Respondent's Counter-Memorial, paras. 263-267.

<sup>111</sup> **RLA-54**, Hersch Lauterpach, *The Development of International Law by the International Court* (Stevens & Sons Limited 1958) 158.

<sup>112</sup> **RLA-78**, Rachel Thorn and Jennifer Doucleff, "Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of 'Investor'." in Michael Waibel and others (eds) *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 20.

<sup>113</sup> **RLA-81**, Roos van Os and Roeline Knotternerus, "Dutch Bilateral Investment Treaties: A gateway to 'treaty shopping' for investment protection by multinational companies" (SOMO, 2011) <<https://www.somo.nl/nl/dutch-bilateral-investment-treaties/>> accessed 19 October 2016, 12.

154. Tribunals have examined among other factors the timing of the investment and the timing of the claim in order to determine whether the shift in nationality has been made *bona fide*, agreeing that if it occurs after the dispute, it can be considered an abusive exercise of rights.<sup>114</sup> As stated, Mr Aven made the investment and conducted all proceedings in relation to it as an Italian national, but at the time to submit his claims against Costa Rica in this arbitration, he suddenly decided to appear as an American. Therefore, his last minute change of nationality in the face of an existing dispute should be rejected.
155. Further, Mr Aven's "justifications" to have used his Italian nationality in the establishment and operation of its alleged investment lies on an alleged "*bias against Americans*."<sup>115</sup> However, in his own business dealings in the United States, Mr Aven also appears to be using his Italian nationality. For instance, the alleged "Google deal" Mr Aven was engaged on was to be conducted through his company, Litchfield Associates Ltd., a company incorporated using his Italian nationality.<sup>116</sup> Clearly, Mr Aven used his Italian nationality in his normal course of business and it was not a case of "bias against Americans."
156. In this context, the "pick and choose game" played by Mr Aven is an exercise of treaty shopping, which disregards principles of good faith and reciprocity in international law. Consequently, Mr Aven cannot be granted the protection of DR-CAFTA.

3. **Mr Aven in his capacity as a mere representative of Claimants does not qualify as "investor of a Party" under the Treaty**

157. Claimants contend that Respondent would be liable for any treatment provided to Mr Aven acting in his capacity as "representative" or "agent" of any of the investors or any of the Enterprises, regardless of his nationality.<sup>117</sup> Claimants do not provide any legal support for that argument – because there is no legal support to that conclusion. The idea behind Claimants' assertion is that the alleged breaches committed against Mr Aven as an investor, whether he is considered Italian or American, would also be committed against the other investors and the Enterprises in his capacity as a representative of all of them. This is an absurd conflation of private law principles of agency in order to establish a nexus on a public international law plane where (as we have seen) there are strict rules against cherry-picking.

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<sup>114</sup> **RLA-75**, *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No. ARB/06/5, Award, 16 April 2009, paras. 136 et seq; **RLA-1**, *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 10 June 2010, paras. 199 et seq; **RLA-90**, *Philip Morris Asia Ltd v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 554.

<sup>115</sup> Second Witness Statement of David Aven, para. 22.

<sup>116</sup> R-212. Litchfield Associates Ltd. Annual Return, 1 August 2015. See also Second Hart Report, para. 83.

<sup>117</sup> Claimants' Reply Memorial, para. 38.

158. Even if Mr Aven is considered an agent or representative of Claimants or the Enterprises, he does not enjoy the protection of DR-CAFTA in that capacity since he does not fall within the notion of investor as provided in the Treaty.

159. The DR-CAFTA does not indicate that "representatives" are protected investors. Therefore, it has been sustained that:

"[T]he treaties must be understood to not protect the personality rights of natural persons who are not investors. The result is that if the representative sustains infringements on his or her personality rights, he or she cannot bring an action directed at the recovery of his or her losses against the State relying on breach of a BIT."<sup>118</sup>

160. Consequently, any alleged breaches committed against Mr Aven by Respondent, could not be considered committed against the other investors and the Enterprises since he is a mere representative not included in the express definition of an investor under Article 10.28 DR-CAFTA.

**B. The Tribunal has no jurisdiction over the properties that Claimants do not own**

161. Claimants make light of the lack of ownership, and how fatal it is to the qualification as an investment and therefore to the jurisdiction of the Tribunal, and yet the broad-brushed approach Claimants would advocate is far from permissible under the objective scrutiny of the law. Nonetheless, Claimants allege that:

"The reality is that the Respondent has stopped short of pleading any real challenge or specific objections to the Claimants' ownership Enterprises as there is no basis for such an argument. This sideshow is yet another attempt at obfuscation and misdirection by the Respondent."<sup>119</sup>

162. In short, Claimants have failed to satisfy the conditions that the Tribunal has jurisdiction. In particular, they have not furnished satisfactory evidence of their ownership of the land they claim is part of their alleged investment:

"Each Claimant indirectly owns assets, in the form of property rights in land, towards which he or she has committed capital with an expectation of gain, consistent with the subparagraph (g) definition of "investment" under CAFTA Article 10.28(h)."<sup>120</sup>

163. A thorough investigation of the properties Claimants allege make up their investment in Costa Rica has shown that Claimants do not own 78 properties making up the Project Site's land. The consequence of this failure should not be without repercussions, and respectfully, the Tribunal must refuse jurisdiction.

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<sup>118</sup> **RLA-84**, Ingeborg Schwenzer, Moral Damages in International Investment Arbitration. in Stefan Michael Kroll, Loukas A. Mistelis, Pilar Perales Viscasillas and Vikki M. Rogers (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 411, 423.

<sup>119</sup> Claimants' Reply Memorial, paras. 335.

<sup>120</sup> Claimants' Memorial, para. 262.

164. Claimants have on each and every occasion failed to establish by reference to credible evidence that such qualifying investments have been made and continue to exist. Claimants Exhibit C-5, proved ownership of only a portion of the properties listed as belonging to the Enterprises in Annex A of Claimants' Memorial. In its Counter Memorial, Respondent noted that Claimants had failed to prove ownership of numerous properties included in Claimants' Annex A and reserved its rights to request from Claimants' the missing information at the appropriate stage.<sup>121</sup> Respondent further reserved its rights to revise any recognition of valid ownership or interest on the part of Claimants in the Enterprises, the parcels of land allegedly acquired, or the concession held by La Canícula.<sup>122</sup>
165. During the document production stage, Respondent requested proof of ownership of the specific properties that allegedly belonged to the Enterprises. Claimants, however, constantly refused to disclose proof of ownership of the properties that made up the Las Olas Project site pointing to an alleged "break-in at the Las Olas offices" in 2012. Claimants further allege that on March 1, 2013, just a few months prior to Claimants' submission of their Notice of Intent to submit a claim to arbitration of September 17, 2013, Claimants executed replacement registrations of shareholder books.<sup>123</sup>
166. In their Reply Memorial, Claimants have once again failed to disclose proof of ownership of all of the properties that make up the Las Olas. The truth is that Claimants did not disclose those titles because those properties were either (i) never owned by Claimants when submitting their Claims at the beginning of this arbitration, or (ii) were sold to third parties during the course of the arbitration. Claimants do not own properties making up the Condominium site and the Easements and other lots site. It is nothing other than an objectively fatal flaw to the integrity of their claim – Claimants' are pointedly incapable of discharging the strict burden of proof and establishing the ownership required to maintain this claim.
167. First, Claimants allege that the Condominium site was composed of 288 lots.<sup>124</sup> Claimants do not own 28 of those lots. These lots were sold to third parties between 2010 and 2015, before the initiation of this arbitration.
168. Second, Claimants listed in Annex A of their Memorial 81 properties, which are actually located on the Easements and other lots site. A total of 50 lots out of the 81 properties

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<sup>121</sup> Respondent's Counter-Memorial, para. 129.

<sup>122</sup> Respondent's Counter-Memorial, para. 112.

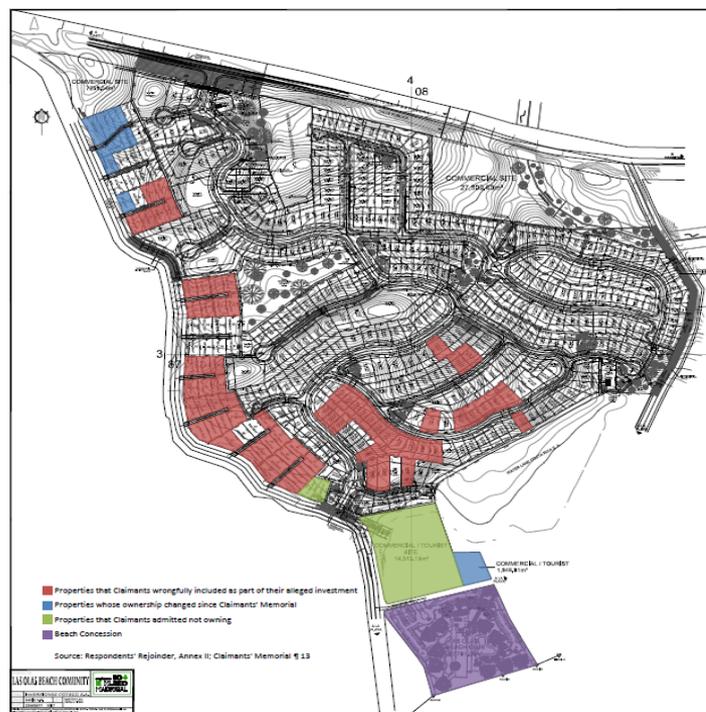
<sup>123</sup> Second Witness Statement of David Aven, para. 32.

<sup>124</sup> Claimants' Memorial, para. 40.

claimed by Claimants as being of part of their alleged investment belong to third parties, unrelated to the Enterprises.<sup>125</sup>

169. Respondent respectfully invites the Tribunal to review Annex II of the Rejoinder Memorial and confirm that Claimants not only included properties that did not belong to them as part of their alleged investment but also failed to disclose ongoing sales of the lots to third parties during the course of this arbitration.

170. As shown in the Second Hart Report, most of those lots are strategically located close to the beach access area, are more valuable than the others located further north of the beach:



171. Since no ownership of those lots has been shown by Claimants, there is no investment capable of protection under Article 10.28 of DR-CAFTA. Therefore, Respondent objects to the Tribunal's jurisdiction to hear any Claims arising out of the 78 properties (28 belonging to the Condominium site and 50 belonging to the Easements and other lots site) that are not part of Claimants' alleged investment.

<sup>125</sup> See Annex II; **R-322**, Properties belonging to the Condominium site that Claimants wrongfully included as part of their alleged investment; and **R-323** Properties no longer owned by Claimants.

<sup>126</sup> Second Hart Report, Exhibit 6.

**C. The Tribunal has no jurisdiction over the Concession and the Concession site**

172. In their Reply Memorial, Claimants have tried to explain their chain of ownership in the Concession in a desperate attempt to cover the illegalities committed during its acquisition and operation. Claimants explain their acquisition of the Concession as follows:

- On February 6, 2002, Claimants entered into the Option Agreement to purchase property No. 6-001004-Z-000 from Mr Carlos Monge. The acquisition was contingent upon the granting of the Concession;<sup>127</sup>
- On April 1, 2002, Mr Aven entered into the SPA to purchase **the totality of shares** in La Canícula from Mr Monge;<sup>128</sup>
- On April 30, 2002, Esquivel & Asociados S.A., allegedly acting as trustor, created a trust agreement transferring the totality of shares in La Canícula to a trust to be managed by the Banco Cuscatlán de Costa Rica S.A., where Mr Aven was one of the beneficiaries;<sup>129</sup>
- On March 8, 2005, Claimants allegedly assigned to Ms Murillo 51% of their interest in La Canícula; and
- On May 10, 2010, Claimants once again assigned to Ms Murillo 51% of their interest in La Canícula;

173. Given Claimants' half-finished explanation of their acquisition of the Concession, Respondent is once again required to complete the missing pieces of Claimants' story and clarify the inaccuracies in Claimants' history of ownership of the Concession.

174. Respondent agrees with Claimants that on February 6, 2002, Mr Aven entered into the Option Agreement to acquire Property No. 6-001004-Z-000.<sup>130</sup> The Option Agreement was contingent upon the granting of the Concession to La Canícula.<sup>131</sup>

175. On March 5, 2002, the Costa Rican Institute of Tourism granted the Concession to La Canícula<sup>132</sup> and on March 6, 2002, La Canícula and the Municipality entered into the Concession Agreement.<sup>133</sup>

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<sup>127</sup> Claimants' Reply Memorial, para. 339.

<sup>128</sup> Id., para. 341.

<sup>129</sup> Second Witness Statement of David Aven, para. 37.

<sup>130</sup> C-27.

<sup>131</sup> Id., Clause II.

<sup>132</sup> C-28.

<sup>133</sup> R-2, Concession Agreement between La Canícula and the Municipality of Parrita, 6 March 2002.

176. On April 1, 2002, Mr Aven entered into the SPA to purchase **the totality of shares** in La Canícula from Mr Carlos Alberto Monge Rojas. As it will be further developed in the next section, when Mr Aven entered into this transaction, Mr Aven breached the rules applicable to the Concession under Costa Rican law.
177. On April 30, 2002, Mr Aven, and not Esquivel & Asociados S.A. as Mr Aven asserts in his Second Witness Statement,<sup>134</sup> entered into the a trust agreement to transfer the totality of shares he owned in La Canícula, to a trust to be administered by the Banco Cuscatlán de Costa Rica S.A. (the "**Trust Agreement**"). The Trust Agreement provided that:
- The trust was to be named "LA CANÍCULA S.A. – PACIFIC CONDO S.A. – DAVID AVEN – BANCO CUSCATLÁN DE COSTA RICA S.A.,"<sup>135</sup>
  - The named beneficiaries of the trust were Mr Carlos Monge and Pacific Condo Park S.A., the other parties to the SPA Agreement;<sup>136</sup>
  - The object of the Trust Agreement was to guard the share certificates of La Canícula until there was full compliance with the conditions agreed by the trustor, Mr Aven, and the trust beneficiaries designated in the Option Agreement;<sup>137</sup>
  - The term of the trust was of one year but the Trust Agreement provided that it could be terminated in advance if the parties fulfilled the obligations undertaken in the Option Agreement;<sup>138</sup> and
  - The Trust Agreement was governed by Costa Rican law.<sup>139</sup>
178. According to this Trust Agreement, once the conditions in the Option Agreement were fulfilled, namely (i) the granting of the Concession to La Canícula and (ii) payment to the trust beneficiaries; the trust was to be terminated. After the trust's termination, the ownership of the shares would be transferred back to Mr Aven, as the trustor.
179. Under Costa Rican law, the structure of the Trust Agreement is one of an escrow (*fideicomiso de garantía*), under which property (La Canícula's shares) are held by a neutral third party (the Banco Cuscatlán de Costa Rica acting as escrow agent) in trust for a beneficiary (Mr Monge and Pacific Condo Park S.A.).<sup>140</sup>

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<sup>134</sup> Second Witness Statement of David Aven, para. 37

<sup>135</sup> C-237.

<sup>136</sup> Id., Clause 1.

<sup>137</sup> Id., Clause 5.

<sup>138</sup> Id., Clause 15.

<sup>139</sup> Id., Clauses 21 and 22.

<sup>140</sup> R-393, Commercial Code's provisions on trusts, Article 648, 27 July 1964.

180. Since Claimants have not provided any information as to when payment was made to the trust beneficiaries by Mr Aven, Respondent is unable to determine the exact date when the Trust Agreement was terminated. However, since the Trust Agreement had a one-year term, it is fair to assume that the Trust Agreement terminated on April 30, 2003, one year after its execution, after (i) the Concession had been granted to La Canícula and (ii) payment had been made to Mr Monge and Pacific Condo Park S.A.
181. Under Costa Rican law, upon the expiry of the escrow, the property held as the subject matter of the escrow automatically relates back to the trustor.<sup>141</sup> Thus, on April 30, 2003, upon the extinction of the trust due to the fulfillment of the conditions set forth in the Trust Agreement, the **totality of the shares** in La Canícula were transferred to Mr Aven, its original titleholder. For a second time now, this transaction violated the rules applicable to the Concession under Costa Rican law.
182. Claimants have neither explained when the 49% of the shares in La Canícula were sold to the rest of Claimants nor have disclosed any record of those transactions. Mr Aven alleges having sent a letter to the other Claimants on October 4, 2004 where he communicated the percentage of shares each would hold in the Enterprises.<sup>142</sup> However, no reference is made in this letter to the actual date when the shares in La Canícula were transferred from Mr Aven to the other Claimants.
183. Under Costa Rican law, the transfer of shares in a corporation requires (i) physical delivery of the share certificates to the shareholder and (ii) registry in the books of the company.<sup>143</sup> Claimants have not produced adequate proof of any transfer of shares to Ms Murillo.
184. Claimants allege in their Reply Memorial that, contrary to what they held on Claimants' Memorial,<sup>144</sup> on March 8, 2005, Mr Aven assigned 51% of his interest in La Canícula to Ms Murillo.<sup>145</sup> So, according to Claimants, since that date, and not May 10, 2010, Ms Murillo has owned 51% of the shares in La Canícula.
185. In any event, Mr Aven and/or Claimants owned the **totality of shares** in La Canícula, during the period between the extinction of the Trust Agreement, on April 30, 2003, and Ms Murillo's alleged "acquisition" of her 51% stake in La Canícula on March 8, 2005.
186. Claimants' continuous noncompliance with the 51% rule forfeited its acquisition of the Concession and therefore, Claimants hold no rights over it.

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<sup>141</sup> **R-393**, Commercial Code's provisions on trusts, 27 July 1964.

<sup>142</sup> C-241.

<sup>143</sup> **R-394**, Commercial Code's provisions on the transfer of shares, Article 688, 27 July 1964.

<sup>144</sup> Claimants' Memorial, para. 16.

<sup>145</sup> Claimants' Reply Memorial, para. 337.

1. **Claimants' failure to comply with the 51% ownership rule forfeits its acquisition of La Canícula**

187. As Claimants admit in their Memorial,<sup>146</sup> under article 47 of the ZMT law, a concession cannot be awarded to a corporation unless at least half of the shares in that corporation are owned by a Costa Rican national (the "**51% ownership rule**"). As Mr Jurado explains in his Second Witness Statement, local case law has understood that the policy behind this rule involves notions of public interest and social function of public assets.<sup>147</sup>

188. Article 53 of the ZMT Law establishes that the sanction for *any* breach of the rules applicable to the Concession is the cancellation of the concession. In the case of the 51% ownership rule, the ZMT Law goes further than prescribing the cancellation of the concession but also nullifies any transaction that has been entered into against the rule set forth in article 47 of the ZMT Law. Article 47 of the ZMT Law establishes that:

"A concession will not be granted to:

a) Foreigners that have not resided in the country for at least five years;

[...]

c) Corporations or entities incorporated abroad;

d) Corporations incorporated in the country by foreigners;

e) **Entities, whose shares, participations or equity, belong in more than fifty percent to foreigners.**

**The entities awarded a concession must not assign or transfer participations or shares, and neither its partners, to foreigners. In any case, any transfer made in violation to this provision, will lack any validity."** (emphasis added)

189. Dr Jurado stresses the consequence of a transaction in violation of Article 47 of the ZMT Law:

"By being an *intuitu personae* right, non-authorized transfers [of a concession right] will be illicit. As explained by the...Constitutional Chamber, "the requirement for previous authorization for an *inter vivos* or *mortis causa* transfer is not a mere procedural requirement, but an *ad solemnitatem* requirement, **as it renders any transfer not authorized by the Administration ineffective and useless for the Administration itself.**"<sup>148</sup> (emphasis added)

190. Dr Jurado also points to other ramifications of such illegal conduct such as a finding of constructive fraud by a criminal court. Dr Jurado, summarizes the legal effects of such conduct:

"*Fraude de ley* can have serious consequences. An administrative act committed in *fraude de ley* is void. In practice, this occurs through a criminal process involving a full investigation of the facts, which permits

<sup>146</sup> Claimants' Memorial, para. 16.

<sup>147</sup> Second Witness Statement of Julio Jurado, paras. 204, 205. .

<sup>148</sup> Second Witness Statement of Julio Jurado, para. 216.

the judge to declare the act's annulment where illicit conduct is found. **Therefore, assuming an infringement of Article 47 of the ZMT Law, the transfer of shares undertaken by the concession holder against the purpose of the regulation would be invalid.**" <sup>149</sup>  
(emphasis added)

191. Furthermore, the clear consequence would be the absence of the developer's ownership of those shares, being that he is non-compliant with the minimum requirements. And the absence of ownership by that individual entails that, in no way, can he be the beneficiary of the concession, and, in consequence, he is lacking any legitimacy to assert his rights to the latter.

192. Claimants have admitted in paragraph 341 of their Reply Memorial that indeed Mr Aven acquired "*the totality of shares of La Canícula from its sole shareholder, Mr Monge.*" Under Article 47 of the ZMT and constitutional case law, Mr Aven's acquisition of the totality of shares in La Canícula on April 1, 2002 is null and void, and therefore, Claimants have no rights in La Canícula or in the Concession.

## **2. Respondent is not estopped from raising its jurisdictional objection**

193. Claimants might argue that Respondent is estopped from raising this objection because:

- None of its agencies had raised it before; or
- a local court has not declared the nullity of the illegal transactions whereby Claimants acquired its rights in the Concession.

194. Notwithstanding, those arguments will not succeed given that Claimants never informed the Costa Rican authorities of these illegal transactions and there was no possible way that Costa Rican agencies could have known of these transactions without Claimants' notifying them.

195. Second, Respondent has just become aware of the series of acquisitions and transfers of the La Canícula's shares right after the document disclosure stage in this arbitration, where:

- Claimants disclosed the Trust Agreement;
- the Tribunal ordered Claimants to disclose "*proof of the date of the transfer of shares in La Canícula (ii) to Ms Paula Murillo and (iii) to Claimants*"; and

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<sup>149</sup> Second Witness Statement of Julio Jurado, para. 226.

- Claimants disclosed a letter dated March 8, 2005 according to which 51% of the shares in La Canícula were "transferred" to Ms Murillo.

196. Further, in paragraph 112 of its Counter Memorial, Respondent reserved its rights to revise any recognition of valid ownership or interest on the part of Claimants in the Enterprises, the parcels of land allegedly acquired, or the concession held by La Canícula.<sup>150</sup>

197. Finally, as will be explained below, it is not for Claimants (or, with respect, the Tribunal) to declare the nullity of this transaction but for Respondent's local courts to initiate the corresponding proceedings in light of the information disclosed by Claimants in this arbitration.

## **V. CLAIMANTS' UNLAWFUL AND ILLEGAL CONDUCT RENDER THEIR CLAIMS INADMISSIBLE**

198. In its Counter Memorial, Respondent has already supported its legal argument that, under international law, Claimants cannot avail themselves of the protections of DR-CAFTA due to the illegalities committed during the operation of their alleged investment in Costa Rica.<sup>151</sup> Respondent will now clarify each of those illegalities in light of Claimants' new submissions.

### **A. Claimants concealment of information misled SETENA into granting the EV to Claimants**

199. Claimants made material misrepresentations regarding the physical conditions of the Project Site and obtained the EV by deceit. SETENA relying on these false misrepresentations issued the EV for the Condominium site on 2008. These deceptions or falsehoods have meant the development is flawed, founded on wrongdoing that cannot sustain Claimants' purported investment.

#### **1. Claimants' duties as developers under Costa Rican law**

200. Claimants owed a duty of good faith to SETENA during their EIA submission. Claimants and Claimants' expert Mr Ortiz, admit that Claimants should have abided by the principle of good faith during the permitting process.<sup>152</sup> Claimants further admit, "*the developer does have the obligation to submit complete and accurate information when obtaining an Environmental Viability.*"<sup>153</sup> Mr Ortiz admits that it is the developer's burden to identify

<sup>150</sup> Respondent's Counter-Memorial, para. 112.

<sup>151</sup> Id., paras. 426-432.

<sup>152</sup> Claimants' Reply Memorial, paras. 229-230.

<sup>153</sup> Id., para. 232.

environmentally fragile areas such as wetlands and forests, within the area where the project is going to be developed:

**"The developer should identify from the beginning of the project the area within the property that is going to be developed that should be considered as being environmentally fragile through a technical report. For example, it should identify the existence of wetlands or forests."**<sup>154</sup> (emphasis added)

201. This duty of good faith is twofold as it requires (i) *the developer* to identify any potential impacts to the environment, and (ii) when doing so providing accurate and truthful information. Such good faith is consistent with international law and EIA best practices.<sup>155</sup>

202. As to the first, Costa Rica's Biodiversity Law provides for an inversion of the burden of the proof both in advance of the initiation of a development, during the environmental clearance process, and during the works:

"The burden of proving the absence of pollution, unauthorized degradation or impact, lies on the applicant for an approval or permit, as well as on the party accused of having caused environmental damage."<sup>156</sup>

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<sup>154</sup> Expert Report of Luis Ortiz, para. 45.

<sup>155</sup> For example, the Recitals of the European Union Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment prescribe the duties of the developer when engaging in the EIA process: "(31) *The environmental impact assessment report to be provided by the developer for a project should include a description of reasonable alternatives studied by the developer which are relevant to that project, including, as appropriate, an outline of the likely evolution of the current state of the environment without implementation of the project (baseline scenario), as a means of improving the quality of the environmental impact assessment process and of allowing environmental considerations to be integrated at an early stage in the project's design; [...] (33) Experts involved in the preparation of environmental impact assessment reports should be qualified and competent. Sufficient expertise, in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality.*" Article 5(3) of the EU Directive on EIA states that: "3. *In order to ensure the completeness and quality of the environmental impact assessment report: (a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts; (b) the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report.*" See, **R-381**, EU Directive on EIA, 13 December 2011. Further, the Principles of Environmental Impact Assessment Best Practice prepared in 1999 by the International Association for Impact Assessment establish a basic principle transparency: "Transparent - the process should have clear, easily understood requirements for EIA content; ensure public access to information; identify the factors that are to be taken into account in decision making; and acknowledge limitations and difficulties." See, R-379, IAIA Principles of EIA Best Practice, 1999. Also, The Endangered Wildlife Trust (EWT), a South African-based, non-governmental, non-profit conservation organization founded in 1973, in its guide "Guide to the Environmental Impact Assessment Process," defines the roles and responsibilities of the developer in an EIA: "Must appoint an Environmental Assessment Practitioner to manage the Application; Must provide the Environmental Assessment Practitioner and Competent Authority with access to all available information relevant to the Application; ust provide the Environmental Assessment Practitioner with truthful information relevant to the proposed identified activity. Seer-420 RLA-113, Endangered Wildlife Trust, 'FAQ: General' (A Guide to the Environmental Impact Assessment Process, 2016) <[http://www.eia.org.za/general.html#general\\_q5](http://www.eia.org.za/general.html#general_q5)> accessed 25 October 2016.

<sup>156</sup> C-207, Article 109.

203. The Guiding Principles of Biodiversity Impact Assessment also place the burden of proof on the developer to identify any threats to biodiversity and take any steps to ensure that the development will not cause harm to biodiversity:

**"Apply the Precautionary Principle. Apply the precautionary principle in any situation where important biodiversity may be threatened and there is insufficient knowledge to either quantify risks or implement effective mitigation. Application of the precautionary principle requires that development consent should be delayed while steps are taken to ensure that best available information can be obtained through consultation with local stakeholders/experts and/or new information on biodiversity can be obtained/consolidated."**<sup>157</sup> (emphasis added)

204. It is clear that under environmental law practice (including the precautionary principle as a cornerstone), it is common for the developer to bear a special burden when it comes to the EIA assessment procedure.

205. As to the duty of truthfulness of the information submitted by the developer, under Costa Rican regulations, Dr Jurado has already explained in his first witness statement how the burden lies on the developer to present transparent and truthful information to the developer is a key step in the EIA assessment procedure under local regulations.<sup>158</sup> Claimants admit that under the principle of good faith, a developer has a duty to submit accurate information within the Environmental Viability application.<sup>159</sup>

206. In sum, in Costa Rica both of these principles crystalize with the requirement that the developer submits a Sworn Declaration whereby the developer assures, under oath, that the information provided to SETENA is *"true, complete and in agreement with environmental legislation."*<sup>160</sup> Claimants submitted this Declaration as part of their EIA submission in 2007 and therefore re-affirmed their duty to stand by the information provided and the commitments thereby undertaken.<sup>161</sup>

## 2. Claimants' invention of a *"shared responsibility"* theory

207. Contrary to the above referenced background, Claimants invent a *"shared responsibility"* theory to shift their original responsibility to provide accurate information to SETENA during their EIA submission for the Project to SETENA. Claimants refer to an *"obligation of SETENA to duly review the information and to control its accuracy."* As Dr Jurado explains, SETENA's role in the EIA process has to be contextualized with the key principles

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<sup>157</sup> R-380, Guiding Principles of Biodiversity Impact Assessment, July 2005, p. 3.

<sup>158</sup> First Witness Statement of Julio Jurado, paras. 84-86.

<sup>159</sup> Claimants' Reply Memorial, para. 231.

<sup>160</sup> Second Witness Statement of Julio Jurado, para. 56.

<sup>161</sup> R-397, Claimants' sworn affidavit submitted to SETENA, March 6, 2008.

of environmental law such as the precautionary principle, the shift of the burden of proof and strict liability.<sup>162</sup> After making that analysis, Dr Jurado concludes that:

"Under this premise, it **seems logical that it would be the developer, and not SETENA, that is responsible for the information contained in the administrative file on the environmental impact assessment.** It is up to the developer to delimit his own responsibility, by foreseeing any type of damage that can be caused by his development, as per the current conditions of the property. In this regard, SETENA is obliged to oversee the responsibilities and commitments that the developer has assumed as a condition of carrying out the project. SETENA, as described in the previous section, has the tools to do this."<sup>163</sup> (emphasis added)

208. Claimants also rely on the visit that a SETENA officer conducted to the property before granting the EV.<sup>164</sup> As clarified by Dr Jurado, these inspections are summary and rely on the information previously submitted by the developer with their D-1 Form:

"Although SETENA has the authority to carry out inspection rounds *ex ante*, these are facultative and do not need to be performed for each environmental impact assessment analysis. **These visits serve the purpose of verifying the socioeconomic, cultural and technical aspects that were included in the environmental impact assessment by the developer. The Regulation does not establish, at any point, the responsibility of verifying elements solely of environmental nature (the existence of protected areas, for example). The confirmation of these elements is outside of the scope of [SETENA's] mandate and competence.** This is made clear through the exhaustive list of duties assigned to SETENA under section 17 of the Environmental Organic Law."<sup>165</sup> (emphasis added)

209. It would be foolish to have SETENA officers verifying each of the elements of an environmental nature that the developer has submitted and, that are expected to be accurate and true, in a summary site visit whose purpose is otherwise. SETENA could not have determined the existence of wetlands or forests, first, because of the brief nature of those visits and second, because it is not the competent body to do so. Thus, Claimants cannot rely on the *ex ante* site visit performed by SETENA to deduce that "SETENA concluded that the project did not affect wetlands."<sup>166</sup>

### 3. Claimants submitted inaccurate and incomplete information to SETENA

210. In the Counter Memorial, Respondent identified the information and reports that Claimants knowingly concealed from SETENA when undertaking their EIA submission for the Condominium site.<sup>167</sup> Claimants have denied concealing any information or misleading SETENA. Respondent will now address each of those allegations. But first, Respondent

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<sup>162</sup> Second Witness Statement of Julio Jurado, paras. 60, 63.

<sup>163</sup> Ibid., para. 59.

<sup>164</sup> Claimants' Reply Memorial, para. 236.

<sup>165</sup> Second Witness Statement of Julio Jurado, para. 44.

<sup>166</sup> Claimants' Reply Memorial, para. 236.

<sup>167</sup> Respondent's Counter-Memorial, paras. 286-302.

notes that Claimants' own "environmental consultant," Mr Mussio, admits that the environmental clearance process for the Las Olas Project was easy:

"Despite the complexity of the process, in the Las Olas project, **the environmental challenges were not relevant** and my firm managed to obtain all environmental and urban development permits required by a real estate project in a coastal area."<sup>168</sup> (emphasis added)

211. Of course the process was easy, Claimants never informed SETENA of the existence of wetlands and forests on the Project Site neither did they conduct a comprehensive assessment of all sections of the development, limiting themselves to the Condominium site and willfully leaving aside from the evaluation process: the Concession site, the Easements and the Other Lots site. If Claimants would have disclosed the real physical conditions that the Las Olas Ecosystem held, the EIA procedure would have been as easy as Mr Mussio describes.

a) Claimants' failed to undertake a proper biological survey

212. Claimants allege that a biological survey was indeed submitted by Claimants as part of their EV application.<sup>169</sup> Claimants rely on Mr Mussio's explanation that the biological survey was submitted with SETENA as part of the Environmental Management Plan.<sup>170</sup>

213. While that survey includes a "stunted" chapter on biology, what it is important for this case is that Claimants did not hire a biologist to conduct a proper survey on the Project Site.<sup>171</sup> Mr Mussio describes Geoambiente S.A., the consulting firm in charge of performing Claimants' Environmental Management Plan, as a firm including "*construction engineers, forestry engineers, surveyors, geologists, hydrologists.*"<sup>172</sup> However, the Environmental Management Plan submitted by Claimants to obtain the EV for the Condominium site did not include a biologist:

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<sup>168</sup> Witness Statement of Mauricio Mussio, para. 19.

<sup>169</sup> Claimants' Reply Memorial, para. 238.

<sup>170</sup> Witness Statement of Mauricio Mussio, paras. 50-52.

<sup>171</sup> Siel Siel Report, para. 1.

<sup>172</sup> Witness Statement of Mauricio Mussio, para. 29.

  
Ursula Rehaag Kopanke.  
Coordinadora del trabajo. Abogada.  
Reg. Setena No.059-96

  
Rodolfo Hernández Ramírez.  
Saneamiento Ambiental.  
Reg. No.058-96

  
Eduardo Hernández García.  
Geohidrólogo.  
Reg. No. 108-98

  
Randall Rojas  
Sociólogo  
Reg. No.105- 2003

SON AUTENTICAS:



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214. The Siel Siel Report explains the importance of an evaluation of this type, conducted by a specialized professional (a biologist), in light of the ecosystems that the Las Olas Ecosystem held:

"[T]he need for a biologist was imperative for the development of the Las Olas Project because the property had wet zones – or at least characteristics suggestive of wetlands –as recognized by Dr. Baillie, Dr. Calvo, Dr. Langstroth and Mr. Protti. Neighbors were also aware of the wetlands . However, the Claimants and their professionals preferred not to include a specialized professional to assess their biological analysis, including its value."<sup>174</sup>

215. Further, the Siel Siel Report explains the reasons why this "chapter on biology" was "extremely poor":

"a) It was not prepared by a professional in biology, registered as such with the corresponding professional body (as illustrated below);

b) It contained no technical analysis of the ecosystems present on the site or of the existing types of coverage, including wooded areas, that could be recognized at first sight and which required an exhaustive analysis to determine whether it classified as a forest or not;

c) Beyond marking the Aserradero setbacks, the report lacked any kind of technical analysis to determine the conditions of the aquatic ecosystems on the site and its applicable protection regimes, particularly if one notes that the property contained flooded areas, swamp-like zones and sectors featuring an abundance of water, which are always suggestive of wetlands in this area of the Central Pacific region in Costa Rica;

d) It did not provide a mapping of water courses (other than the Aserradero river), or of the different ecosystems or plant associations which were clearly more than "pastures";

e) It lacked any analysis of wildlife specific to the site, hydrophilic vegetation or any other elements that showed that an expert in the field evaluated and ruled out the presence of forests, wetlands or other important ecosystems or biological features on the site;

<sup>173</sup> R-1, Environmental Management Plan (Plan de Gestión Ambiental), 2007.

<sup>174</sup> Siel Siel Report, para. 4.

f) It did not indicate any type of relationship between the ecosystems on the site and those on their area of influence. In fact, the Plan did not even define the areas of influence;

g) While the planners did identify a waterway named as the Aserradero creek on the Property, the EMP did not identify all of the onsite waterways draining into the Aserradero River (KECE wetlands 6, 7 and 8) or any categorization of associated ecosystems;

h) Likewise, it did not indicate the proximity of, and the relationship between, the Aserradero creek and the Aserradero wetland. Nor did it mention the consequences on that protected, aquatic ecosystem of waste water discharges (even if treated), or of the alterations to the hydric regime of the property due to terracing works, changes in coverages (increases in nonporous areas), and increases in erosion, among others."<sup>175</sup>

216. Nothing seems "*bizarre [or] pathetic*"<sup>176</sup> about the missing information that Claimants omitted in order to conceal the ecosystems that the Project Site contained.

217. In any event, it is no surprise that Claimants did not undertake any of the analysis described by the Siel Siel Report,<sup>177</sup> given Claimants' own advisor admits that they only considered the "*physical and topographic*" conditions of the terrain:

"In the case of Las Olas, Mr Aven provided us with the contours of the land and we verified them in our field inspections, and we worked on designing the plans in accordance with the topography of the land. That is, the design was carried out on the basis of the **physical and topographic reality and [limitations] of the terrain [...]**"<sup>178</sup> (emphasis added)

218. Finally, in an attempt to justify the lack of studies Claimants had an obligation to undertake, Mr Bermúdez states that assuming Claimants did not submit a biological survey, it was SETENA's responsibility to request one:

"If the Claimants did not submit a biological study with their application, they would have been required to justify this omission to SETENA, who apparently allowed the application to proceed on that basis."<sup>179</sup>

"[I]t was SETENA's responsibility to ask for a detailed biological study if they thought it necessary."<sup>180</sup>

219. This ranks as one of Claimants' most absurd remarks. If SETENA "*allowed the application to proceed on that basis*" it was because Claimants did not disclose that they intended to develop their project on land that contained wetlands and forests, environmentally fragile areas under Costa Rican law.<sup>181</sup> SETENA would have requested a biological survey if it

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<sup>175</sup> Siel Siel Report, para. 1.

<sup>176</sup> Claimants' Reply Memorial, para. 237.

<sup>177</sup> Siel Siel Report, para. 6.

<sup>178</sup> Witness Statement of Mauricio Mussio, para. 25.

<sup>179</sup> Second Witness Statement of Esteban Bermúdez, para. 8.

<sup>180</sup> Second Witness Statement of Esteban Bermúdez, para. 9.

<sup>181</sup> C-208, Annex 3.

would have been provided with real information of the physical conditions of the Las Olas Ecosystem. No criticism can be levelled against SETENA in circumstances where it was Claimants' failure or concealment that kick-started the application process.

220. Furthermore, in their sworn declaration, Claimants undertook an oath to disclose truthfully the physical conditions of the site and any impacts that their development would have on the environment.

b) Claimants failed to identify environmentally fragile areas in their D-1 submission

221. Claimants try to escape from their omission to identify any environmentally fragile areas on their D-1 submission. To achieve this, Claimants rely on Mr Mussio's assertion that the master site he prepared indeed considered "*areas of caution*" which the design of the project sought to accommodate.<sup>182</sup> However, none of these areas were identified at all in the Environmental Management Plan submitted by Claimants to SETENA.<sup>183</sup>

222. The Second KECE Report outlines very clearly how these "*sensitive areas*" would have never granted any protection to the ecosystems at Las Olas and show graphically what these areas really purported to do with the Wetlands on the Project Site:

"a) The open areas on the master site plan include parks, recreation areas, and children's play grounds.

**b) These open area uses are not equivalent to natural resource protection areas. Site activities within these open areas may include any number of activities undertaken by the developer to meet the definition of a park, recreation area, or a playground which could significantly alter the natural conditions of these sensitive areas.**

**c) The location of an open area identified as "Parque" (park) on the master plan in the vicinity of ERM depression D1 (KECE Wetland 5), near the northeast corner of the northwest corner of the site, does not guarantee protection of the wetland. Portions of the wetland are clearly impacted by site infrastructure including a road and sewage treatment plant.**

**d) A similar condition occurs at the southeast corner of the site in a drainage way identified by KECE as Wetland 8 and described by Dr. Baillie (Baillie, 2016) as the bottom of an Aserradero tributary, which holds water (Figure 12). Here while a portion of the identified wetlands is shown as parks, a review of the master plan shows that the tributary is impacted by roads, development, drainage easements, a sewer treatment plant.**

**e) The location of a sewer treatment plant, identified in the D-1 application documents as providing secondary treatment and**

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<sup>182</sup> Witness Statement of Mauricio Mussio, para. 30.

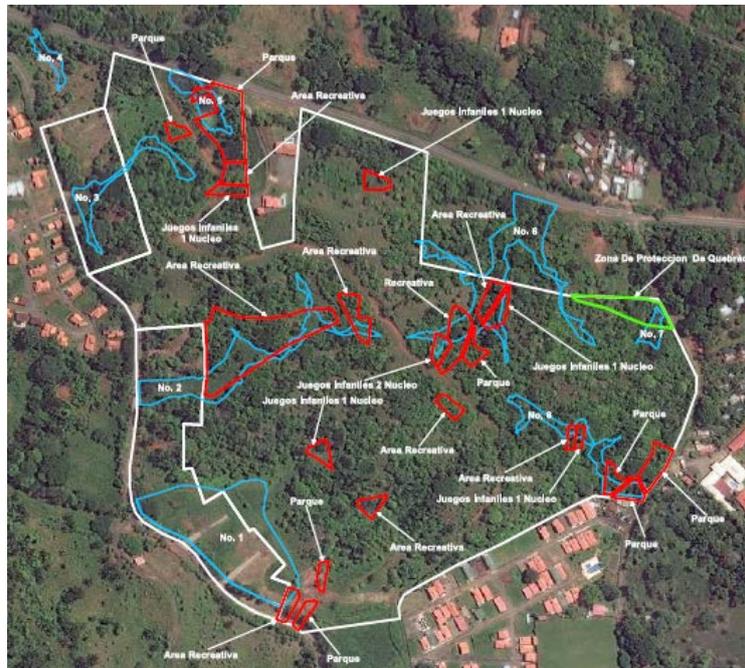
<sup>183</sup> Second KECE Report, para. 150.

discharging into the onsite water management system is particularly of concern. The water quality ramifications of this design is disturbing as both areas are wetlands, and both areas have been confirmed by the Claimants' Soil Expert (Baillie, 2016) as tributaries draining into the Aserradero River .

f) Pursuant to the master plans, a portion of depression D1 (KECE Wetland 2) is identified as a recreational area (Figure 12). But this designation does not provide evidence of environmental protection, as a recreational area may be used as high impact development such as filled and levelled as a sports field. Additionally, the wetland is not protected as the site plan shows residential lots extending into the wetland/valley floor and the plans shows a drainage canal through the middle of this wetland system.

g) Additionally, the Las Olas development plans for the easements show significant impacts to the areas identified by ERM as depressions D1 and D2 (KECE Wetlands 2 and 3). While the easement areas not included in the 2007 master site plan for the Las Olas Condominium site, a separate development plan was submitted the the Municipality in 2010 for the construction of the western easements, and these plans show dense residential development within these two wetlands as well as in the disputed southwest area (KECE Wetland 1).

h) Another set of open spaces are located on the master plan along the western arm of the northeast Aserradero tributary, that KECE has identified as Wetland 6. However, these areas do not cover the entire wetland area (or adjacent vegetative buffers), and include drainage easements in the wetland, and site activities do not preclude converting the areas to non-native condition to support the park or playground designations."<sup>184</sup> (emphasis added)



<sup>184</sup> Second KECE Report, para. 147.

223. The reality is that Claimants never identified any environmentally fragile areas as required by Costa Rican law. This is also confirmed by the Siel Siel Report:

"In their environmental impact assessment submission for the Condominium site, Claimants did not disclose to SETENA any "environmentally fragile areas" or any alleged "sensible areas." The fact that they marked half of a wetland area as a "recreation park" clearly does not equate to the disclosure of an environmentally fragile area as required by the General Regulations on the Procedures for Environmental Impact Assessment."<sup>185</sup>

224. As pointed out by Mr Erwin, the sole fact that Mussio Madrigal Arquitectos allegedly identified these areas as "sensitive," shows that those "*sensitive areas were known by the project team as early as 2007, implying that they were purposely concealing the identification of these areas from Costa Rica.*"<sup>186</sup>

225. Mr Bermúdez gives a misleading example of the alleged identification of environmental fragile areas referring to the mention of the location of the Aserradero River close to the Project Site.<sup>187</sup> Of course SETENA knew that the Project Site was close to a river but that is totally different from pretending to develop on a site with wetlands and forests.

#### **4. Claimants were aware of the existence of wetlands on the Project Site**

226. First, Claimants deny concealing the Protti Report from SETENA and accuse Respondent of "*completely mischaracterizing*" its contents.<sup>188</sup> Second, Claimants allege that Respondent's assertion that Claimants concealed information from SETENA "*relies on only one document – the 'Protti Report'.*"<sup>189</sup> To Claimants' misfortune, after the Document Production stage of this arbitration, Claimants disclosed two new sources of evidence that should have also alerted Claimants of the existence of wetlands. These are considered below.

##### a) The Protti Report

227. Claimants challenge everything about the existence of the Protti Report: its willful concealment from SETENA, its submission to SINAC four years later from its conduction, its contents and findings, and the duties that Claimants and their advisors had after knowing them. In the next sections, all of these challenges will be proved baseless.

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<sup>185</sup> Siel Siel Report, para. 27.

<sup>186</sup> Second KECE Report, para. 149.

<sup>187</sup> Second Witness Statement of Esteban Bermúdez, para. 10.

<sup>188</sup> Claimants' Reply Memorial, para. 239.

<sup>189</sup> Claimants' Reply Memorial, para. 239.

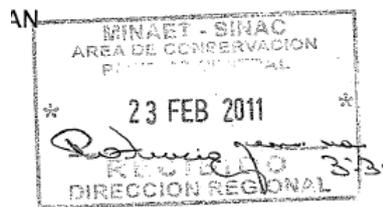
ii. *The Protti Report was submitted by Claimants to SINAC in 2011*

228. Claimants demand that Respondent's allegations regarding the Protti Report "*simply be ignored*" because Respondent has not explained, "*how or when it supposedly got to [SINAC] or what the Claimants had to do with it.*"<sup>190</sup> This is a most bizarre method of trying to avert the Tribunal's attention from a contemporaneous document that is materially relevant to the admissibility of Claimants' claim.

229. Mr Mussio also challenges Respondent's assertions that the Protti Report was actually submitted to SINAC by Claimants in 2011.<sup>191</sup> Mr Aven also denies having anything to do with the Protti Report:

"I had nothing to do with the Protti report and do not recall the genesis of that Report from 2007. It may have been something that Mussio Madrigal or one of its subcontractors ordered as part of their work, but I was not involved in any decision or ordering that report and never saw it until recently. It clearly says on the report that a Costa Rican company, called Tecnocontrol, ordered it. That study could have even been done without Mussio Madrigal's knowledge. But for sure it was not ordered by the Claimants as asserted by the Respondent in its Counter-Memorial, which led them to falsely accuse me of "duping" SETENA and asserting it proves I knew there were wetlands. This is just another scurrilous and far-fetched assertion with no basis in the truth."<sup>192</sup>

230. This is false. Respondent explained in paragraphs 420-421 of the Counter Memorial that it was Mr Aven himself who submitted the Protti Report to SINAC on February 23, 2011 erroneously alleging that said survey "*conclude[d] there are neither wetlands nor problems of flooding in the property.*"<sup>193</sup> Claimants' Exhibit C-113 contains the letter submitted and signed by Mr Aven to SINAC that annexed the Protti Report. This letter has an official stamp from SINAC acknowledging the receipt date:



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231. Also, Respondent's Exhibit R-11, which contains the Protti Report, has the official stamp from SINAC in all of its pages. But, in any case and for avoidance of any doubt raised by

<sup>190</sup> Claimants' Reply Memorial, para. 249.

<sup>191</sup> Witness Statement of Mauricio Mussio, para. 49.

<sup>192</sup> Second Witness Statement of David Aven, para. 92.

<sup>193</sup> C-113.

<sup>194</sup> Ibid.

Claimants, SINAC has certified that the Protti Report is part of the record assigned to the Las Olas Project that lies in that office.<sup>195</sup>

232. Mr Mussio tries to disassociate himself from the Protti Report by referring to a "*different name*" given to the Project, which is allegedly unknown to him:

"The report is addressed to Tecnocontrol and indicates that it was requested by this company. I do not recall that any project called "Condominio y Villas Esterillos Oeste." We have always known the project as "Condominio Las Olas" and that is how it appears in the documentation."<sup>196</sup>

233. The developers intended to develop Las Olas as a large project regardless of the name they used in several occasions: the Protti Report referred to "Condominium and Villas Esterillos Oeste;"<sup>197</sup> the Castro de la Torre Report referred to "Three-floors buildings Esterillos Oeste."<sup>198</sup> In any event, both of these surveys show the developers' intent to develop an enormous real estate project for which they decided to fragment the environmental impact assessment.

234. Notwithstanding Mr Mussio's intentions to escape liability, Claimants admit that they knew of the existence of the Protti Report and allege that because "*it did not meet the requirements*" from the SETENA Guidelines, it was not submitted to SETENA.<sup>199</sup> If Claimants and its advisors were so rigorous when analyzing the report's content and scope as to conclude that it was not good enough to be submitted to SETENA, why did they omit looking into the red flags it identified?

235. Claimants fall into the same trap, when relying on Mr Madrigal's explanation of why Geoambiente S.A. decided to replace the Protti Report with a Physical Environmental Protocol prepared by Mr Eduardo Hernández (the "**Hernández Report**"). Claimants argue that because Mr Protti was a geologist and not a hydrogeologist such as Mr Hernández, the Protti Report was not submitted to SETENA.<sup>200</sup> Indeed, this is their principal justification for the concealment of this fundamentally impractical request. However, Claimants and their advisors fall foul of a significant misrepresentation or oversight, since they failed to follow up with biologists and hydrologists after looking at the findings of the Protti Report.

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<sup>195</sup> R-378, SINAC's certification that the Protti Report is part of the record for the Las Olas Project, September 28, 2016.

<sup>196</sup> Witness Statement of Mauricio Mussio, para. 46.

<sup>197</sup> R-11, Geological HYdrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007.

<sup>198</sup> R-349, Castro de la Torre Report, July 8, 2002.

<sup>199</sup> Claimants' Reply Memorial, para. 242.

<sup>200</sup> Id., para. 245.

236. Moreover, Mr Mussio's "assumptions" of why the Protti Report was substituted by the Hernández Report lack any logic when one realizes that Claimants submitted a "biological survey" without the participation of a biologist. Claimants and their advisors were not rigorous when scrutinizing the professional qualifications of Mr Protti since they ended up submitting a "biological survey" without a biologist.
237. However, Claimants' assertions are completely false and solely prove their desperate attempt to avoid any connection with the Protti Report. Official information from Costa Rica's College of Geologists shows that Mr Roberto Protti is a **hydro-geologist** and Mr Hernández is not.<sup>201</sup>

**Hidrogeología**

Arredondo Li Sandra	Herrera Ocampo Jorge Arturo	Rodríguez Estrada Hugo Virgilio
Castro Matamoros Ana Lucía	Losilla Penón Marcelino	Vargas Campos Carlos Alonso
Echandi Echeverría Ernesto	Mora Castro Daniel	Vargas Sanabria Asdrúbal
Gómez Cruz Alicia	Morera Guillén Sigifredo	Vásquez Fernández Mauricio
Gómez Tristán María	Pérez Morales Jose William	Zúñiga Mora Héctor Enrique
Guzmán Alpizar Guillermo	<b>Protti Quesada Roberto</b>	

238. But not only that, Claimants in fact seem to acknowledge this fact in paragraph 95 of their Reply Memorial:

"**The Protti Report** was apparently commissioned by Tecnocontrol S.A. [...] **and was prepared by a hydro-geologist**, who made no attempt to analyze the site for the presence of hydric conditions [...]."<sup>202</sup>(emphasis added)

239. This is truly staggering that a qualified hydrogeologist, Mr. Protti, should have his report so significantly concealed, when there was every reason to disclose it. Further, Claimants make the following arguments in a desperate attempt to justify why the Protti Report was buried and replaced with the Hernández Report.
240. First, Claimants argue that the Protti Report did not meet the requirements for a Geology Protocol as established in Annex 6 of the SETENA Guidelines (Decree 32712-MINAE).<sup>203</sup> Annex 6 requires that the geological survey contains 3 fundamental data: (i) geological, (ii) hydrological and (iii) threat and natural risks conditions related data. Annex 6 gives further details on the information that these three sub-studies should contain and covers them in Sections II, III and IV of the Annex.<sup>204</sup>
241. In footnotes 282 and 283, Claimants quote the required information for "Section II: geological data" and apply it to the Protti Report, which according to the Siel Siel Report is

<sup>201</sup> **R-424**, Rafael González Ballar and Mario Peña Chacón, *The Environmental Process in Costa Rica* (ISOLMA 2015), 2015.

<sup>202</sup> Claimants' Reply Memorial, para. 95.

<sup>203</sup> Id., para. 242.

<sup>204</sup> C-215.

a hydrogeological survey and not a geological one.<sup>205</sup> The required information for the "hydrogeological data" is in Section III of Annex 6 and it does not require the survey to "integrate geotechnical information" as Claimants allege.<sup>206</sup>

242. Second, Claimants allege that they submitted geotechnical information from the Castro de la Torre Report. As will be explained below, this report also pointed to the existence of wetlands. Claimants do not explain why it is relevant to the existence and concealment of the Protti Report that they also engaged Castro de la Torre to conduct a geotechnical survey.
243. Further, Claimants misleadingly assert that "*the Claimants did submit [the Castro de la Torre Report] as part of their Environmental Impact Assessment.*"<sup>207</sup> Indeed, Claimants submitted this report as part of their submission for the EV for the Concession site (File No. 551-2002-SETENA), not the Condominium site (File No. 1362-2007-SETENA). Then, SETENA did not evaluate the findings of this report when analyzing Claimants' EIA submission for the Condominium site. This shows exactly how willful fragmentation of the EIA evaluation, adversely affects the evaluation procedure conducted by the regulator, in this case, SETENA.
244. Third, Claimants try to excuse the replacement of the Protti Report with the Report prepared by Mr Hernández, arguing that he "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."<sup>208</sup> This is false. Mr Protti did in fact conduct onsite surveys and that is clear from the annexes to his report.<sup>209</sup> Also, if Mr Hernández was so diligent to conduct an onsite soil survey drilling, why did he omit pointing to the swamp-type flooded areas that Protti did? This is even more concerning when one compares the findings of the Hernández survey and Mr Mussio's admission that the swamp-type flooded area, identified by Protti, was left as a "sensitive area" in the master site plan.<sup>210</sup>

iii. *The actual contents of the Protti Report*

245. Claimants invent words as part of Respondent's allegations by stating that "*the Protti did not state, as the Respondent alleges, that any area within the project site was a protected wetland*" and therefore Claimants knew of its existence and intentionally decided to keep

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<sup>205</sup> Siel Siel Report, para. 42.

<sup>206</sup> C-215.

<sup>207</sup> Claimants' Reply Memorial, para. 243.

<sup>208</sup> Claimants' Reply Memorial, para. 244.

<sup>209</sup> R-11, Geological Hydrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D1), July 2007.

<sup>210</sup> Witness Statement of Mauricio Mussio, para. 30.

this information from SETENA.<sup>211</sup> Respondent has never alleged that the Protti Report "stated that an area in the project site was a protected wetland." First, it is undisputed that all wetlands are protected in Costa Rica, Claimants' qualification of *protected* wetland is irrelevant. Second, the Protti Report pointed to a swampy area, which was a clear signal that required follow up surveys. Nothing was done, and instead a blind eye was turned in order to not slowdown the preferred development.

246. Claimants cynically allege that:

"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.**"<sup>212</sup> (emphasis added)

247. Both Mr Aven and Mr Bermúdez challenge the findings of the Protti Report, alluding to an alleged problem of "poor drainage" in Esterillos Oeste to generalize one of the causes that Mr Protti suggested would be the reason for the presence of swamps on the Project Site. The Siel Siel Report explains why these "theories" of an alleged poor drainage (trying to hide the existence of an actual wetland) are incorrect:

"[S]low drainage is one of the physical characteristics of wetland areas. When Mr. Aven describes poor drainage as a "problem," he does so without considering the richness of wetlands as protected ecosystems. Moreover, it is absurd to liken the momentary flooding of a Municipality building to areas – such as wetlands – which are flooded over long periods of time.

At the same time, we recognize that some areas of Esterillos Oeste exhibit "poor drainage," which is one of the necessary conditions for the occurrence of wetlands. It is not the sole condition, but is nonetheless an important one. Poor drainage is caused by the (i) topography of concave portions on the property, (ii) presence of clay soils and (iii) level of precipitation in the zone. All of these factors, in addition to the tropical temperatures, create the basic conditions for wetlands to develop over the years.

Mr. Bermúdez and Mr. Mussio allege, misleadingly, that the causes of this "poor drainage" are the location of the public road and the blockage of the rainwater sewage. While this might be true in other areas, experts for both parties have already indicated the presence of not one, but several wetlands on the Project Site. What Mr. Protti identified was not "momentarily standing water caused by a blocked culvert," as the Claimants intend to point out, but rather a swamp-type flooded area which necessarily means an ecosystem hosting water that, as evidenced in the First and Second KECE Report, and in the EMR witness statement, also holds hydrophilic vegetation. Finally, when referring to the swamp-type flooded area identified in the Protti Report, Mr Bermúdez states that, "if SETENA was concerned about this area of

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<sup>211</sup> Claimants' Reply Memorial, para. 241.

<sup>212</sup> Claimants' Reply Memorial, para. 246.

the project site, it should have pointed that area out [in a field inspection] and requested additional studies."<sup>213</sup>

iii. *The Protti Report should have alerted Claimants of the existence of wetlands on the Project Site*

248. Claimants deny that any findings on the Protti Report could have alerted them or their advisors of the existence of wetlands on the Las Olas Ecosystem.

249. Mr Bermúdez simply states "*I do not accept that the Protti Report provides any indication as to the existence of wetlands*"<sup>214</sup> but provides no further support or evidence for his opinion. Mr Bermúdez states that:

"[...] the Protti Report describes an area of poor drainage located on the Condominium Site and the area of the easements.

Although I am no expert in wetlands identification, in my view poor drainage of rain water is not a conclusive indication of the presence of a wetland."<sup>215</sup>

250. The truth is that the Protti Report did not point to an area of "poor drainage" as Mr Bermúdez asserts, but rather **literally** pointed to a "flooded zone" (*zona anegada*) and to a "swamp-type flooded area" (*zona de tipo pantanosa*):

"[...] to the western zone there is a swamp-type flooded area, possibly developed due to poor drainage conditions in that sector."<sup>216</sup>

251. The report points:

· Estos terrenos no muestran condiciones de amenaza de inundación estacional ya que se ubican fuera de la zona de influencia de cualquier sistema fluvial capaz de generar este tipo de condiciones, sin embargo, hacia la zona oeste se encuentra una zona de tipo pantanosa; posiblemente desarrollada por las pobres condiciones de drenaje en dicho sector.

252. The Siel Siel Report explains the reasons why Claimants' advisors should have been alerted to the findings of the Protti Report:

**"The Protti Report is not a technical demonstration of the existence of a wetland on the property, and that is not what the Respondent has asserted. However, references to "flooded area" and "swamp-type flooded area" were sufficient to alert Claimants and its advisors, had they been serious enough about their development, to undertake further investigations and studies.** More importantly, the Protti Report's findings back in 2007 have now been confirmed by the Claimants' own experts. Dr. Baillie concludes that the area presents "hydric soils" and the EMR Report also confirms

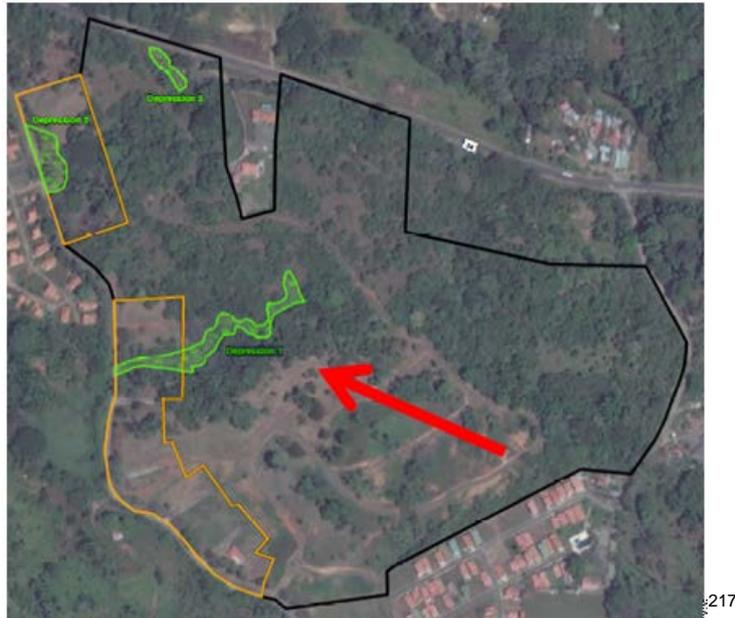
<sup>213</sup> Siel Siel Report, paras. 36-38.

<sup>214</sup> Second Witness Statement of Esteban Bermúdez, para. 16.

<sup>215</sup> Second Witness Statement of Esteban Bermúdez, paras. 13-14.

<sup>216</sup> R-11, Geological Hydrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007.

the area to be a "Potential wetland," calling it "Depression 1" and confirming the existence of hydrophilic vegetation:



253. Mr Mussio makes similar assertions:<sup>218</sup>

"[I]n any case the Mr Protti's report (sic) does not indicate that there were wetlands in the area, nor does it suggest that there was even some degree of probability of their existence and the need for further studies. He never even uses the term when referring to the area in question."<sup>219</sup>

254. As the Siel Siel Report explains, Mr Mussio's explanations are misleading:

"First of all, a swamp is itself a type of wetland. Second, any professional that claims familiarity with the environmental procedures and regulations of the country, as Mr. Mussio suggests of himself, would know the precautionary principle and its implications, and would have been alerted by those findings and, consequently, would have ordered the undertaking of further studies or at least, provided the results to SETENA. Third, the fact that Mr. Protti did not use the term "wetland" in his report is irrelevant. Mr. Protti is a hydrogeologist, not a wetland specialist, and as such he was not looking for wetlands on the property. Mr. Protti's findings should have prompted the Claimants' professionals to engage a biologist and a hydrologist to survey the area."<sup>220</sup>

255. Claimants lastly conclude that they "*presented more comprehensive surveys than the Protti Report and SETENA verified these surveys, including by conducting a site visit.*"<sup>221</sup> First, Claimants never submitted the Protti Report to SETENA so it was never able to "verify" the

<sup>217</sup> Siel Siel Report, para. 33.

<sup>218</sup> Witness Statement of Mauricio Mussio, para. 47.

<sup>219</sup> Witness Statement of Mauricio Mussio, para. 47.

<sup>220</sup> Siel Siel Report, para. 44.

<sup>221</sup> Claimants' Reply Memorial, para. 247.

real information of the physical conditions of the property. Claimants admit that their advisors refrained from submitting the Protti Report to SETENA:

"It is therefore unsurprising that **the developer's agents included other reports in its submission to SETENA instead of the Protti Report.**"<sup>222</sup> (emphasis added)

256. Second, the visits the SETENA officers conduct are summary by nature and are designed based on the information submitted by the developer for the EIA evaluation. Clearly, if Claimants were to have submitted the Protti Report, SETENA's site visit would have paid special attention to the "swamp-type flooded area" identified by the survey.

iv. *Claimants' recurring contradictions regarding the flooding at Esterillos Oeste*

257. In trying to justify why they buried the Protti Report, Claimants once again contradict themselves regarding the flooding problems in Esterillos Oeste. First, in the Environmental Management Plan that Claimants prepared in 2007, Claimants denied the existence of any flooding problems on the Las Olas Ecosystem:

"[T]he project will not be affected by flooding, according to neighbors the property has never been affected by the overflowing of gorges and rivers."<sup>223</sup>

258. Now, with the purpose of covering up the findings of the Protti Report, Claimants hold that the Protti Report just shown flooding, a "longstanding problem in Parrita." Mr Aven states that:

**"The Protti Report also references poor drainage, which was a problem known to the town and the Municipality already. Parrita has poor drainage, and I have seen the Municipality building totally flooded with heavy rains."**<sup>224</sup> (emphasis added)

259. These contradictions only reflect that Claimants' juggling in order to challenge the Protti Report's existence, findings and conclusions – all of which prove to be completely unsuccessful.

b) *The Castro de la Torre Report*

260. During the Document Production stage, Claimants disclosed a "Geotechnical Study and Soil Mechanics" prepared by Castro de la Torre S.A. on July 8, 2002 (the "**Castro de la**

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<sup>222</sup> Claimants' Reply Memorial, para. 242.

<sup>223</sup> R-1, Environmental Management Plan (Plan de Gestión Ambiental), 2007, p. 35.

<sup>224</sup> Second Witness Statement of David Aven, para. 93.

**Torre Report").**<sup>225</sup> Claimants acknowledge its existence in paragraph 243 of their Reply Memorial but conveniently omit to submit it as an exhibit.

261. It seems history repeats itself and the Siel Siel Report explains why this report should have also alerted Claimants and its advisors of the existence of wetlands on the Las Olas Ecosystem:

**"The survey's results show extremely shallow water tables, especially in the location of P5, which corresponds to Wetland No. 1 identified in the First KECE Report:**



Thus, it was not only the findings of the soils studies conducted on the Project Site, but also **the mere superficial observation of the terrain that indicated the presence of large amounts of water on the property. Moreover, the presence of water was not the "puddles caused by the blockage of culverts," alleged by the Claimants, but by way of a concave area at the foot of a hill zone, located in a region of heavy rains and warm temperatures, in a tropical region, all of which favor the occurrence of wetlands. This important fact should have been sufficient to alert the professionals engaged by the Claimants of the need to carefully examine the property for any wetlands that required protection from the intended development.**"<sup>226</sup> (emphasis added)

c) *The Tecnocontrol Report*

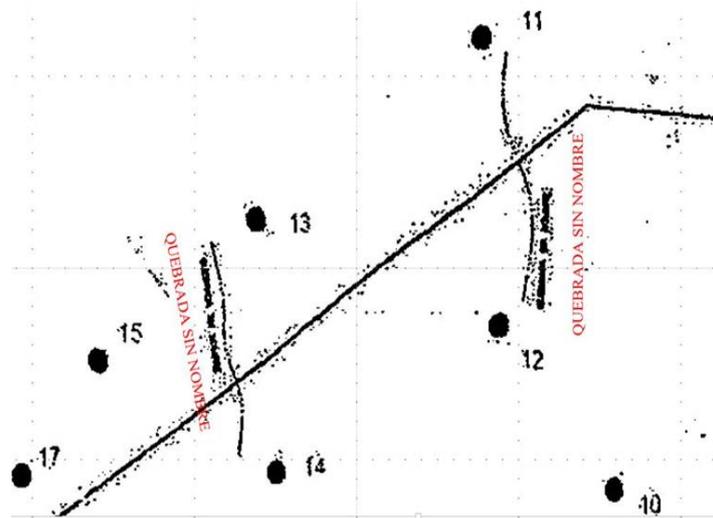
262. After a thorough review of the Geotechnical Engineering Report prepared by Tecnocontrol S.A. submitted by Claimants as part of their D-1 submission in 2007 (the "**Tecnocontrol**

<sup>225</sup> **R-349**, Castro de la Torre Report, 8 July 2002.

<sup>226</sup> Siel Siel Report, paras. 50-51.

Report"),<sup>227</sup> the Siel Siel Report points to another "red flag" that should have alerted Claimants of the existence of wetlands on the Las Olas Ecosystem:

"The figure on page 14 identifies two brooks, or "quebradas" in Spanish:



Each of the creeks shown above constitutes a protected wetland. The existence of creeks in the area shows a tendency for the existence of wetlands."<sup>228</sup>

5. **Claimants' fragmentation of their EIA submission concealed the existence of ecosystems on the Project Site**

263. Fragmentation involves the fragmenting of the EIA for a unique project instead of engaging in one sole comprehensive EIA for the whole project. SETENA and the TAA have condemned this practice whenever developers attempted to submit fragmented EV applications for the same project. Claimants dedicate two paragraphs of their Reply Memorial to address this illegality. Claimants rely on Mr Ortiz, Mr Bermúdez and Mr Mussio's opinions to allege that this is an "unjustified and baseless complaint."<sup>229</sup> Claimants ignore that the developer's obligation to conduct a comprehensive and holistic EIA of the proposed project is one of the basic cornerstone principles of EIA worldwide that has been reproduced in Costa Rican regulations.

a) An EIA must be comprehensive and holistic

264. Several key instruments regarding EIA have established the obligation that the EIA has to be comprehensive and holistic in order to allow full consideration of the potential impacts that a project or activity might have on the environment. The Preliminary Note of the

<sup>227</sup> R-13, Complete D1 form for Condominium site, 8 November 2007.

<sup>228</sup> Siel Siel Report, paras. 53-54.

<sup>229</sup> Claimants' Reply Memorial, para. 279.

United Nations Environmental Program of 1987, established as one of the key principles of EIA the conduction of a "comprehensive" EIA:

"Principle 1:

States (including their competent authorities) should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects. Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, **a comprehensive environmental impact assessment should be undertaken in accordance with the following principles.**"<sup>230</sup> (emphasis added)

265. In the same way, the IAIA Best Practice Principles also establish as a principle that the EIA should be systematic:

"Systematic - the process should result in full consideration of all relevant information on the affected environment, of proposed alternatives and their impacts, and of the measures necessary to monitor and investigate residual effects."<sup>231</sup>

266. The Recitals of the EU Directive on EIA also confirm the holistic approach to EIA:

"(22) In order to ensure a high level of protection of the environment and human health, screening procedures and **environmental impact assessments should take account of the impact of the whole project in question**, including, where relevant, its subsurface and underground, during the construction, operational and, where relevant, demolition phases.

(23) **With a view to reaching a complete assessment of the direct and indirect effects of a project on the environment**, the competent authority should undertake an analysis by examining the substance of the information provided by the developer and received through consultations, as well as considering any supplementary information, where appropriate."<sup>232</sup> (emphasis added)

267. Finally, Professor Neil Craik on his book "The International Law of Environmental Impact Assessment" reinforces **the developer's obligation** to conduct a **comprehensive EIA**:

"EIAs are clearly one of the central mechanisms used by states to acquire knowledge respecting the environmental consequences of their actions. **EIAs address foreseeability by requiring project proponents to comprehensively analyze the likely impacts of proposed activities**, [...]"<sup>233</sup> (emphasis added)

268. The principle applies the same under Costa Rican regulations.

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<sup>230</sup> **R-366**, Goals and Principles of EIA, UNEP, 16 January 1987.

<sup>231</sup> **R-379**, IAIA Principles of EIA Best Practice, 1999.

<sup>232</sup> **R-381**, EU Directive on EIA, 13 December 2011.

<sup>233</sup> **R-420**, Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008) 54, 64.

b) Fragmentation of the EIA is illegal in Costa Rica

269. The Biodiversity Law was enacted in Costa Rica, in order to comply with the provisions of the Convention on Biological Diversity, to which Costa Rica is a signatory. Both the Convention and the Biodiversity Law establish the principle that any EIA must be comprehensive and holistic.<sup>234</sup>

270. In incorporating this principle to the day-to-day practice, Costa Rican regulations have established that fragmentation of the EIA is illegal. The Siel Siel Report explains that:

**"The environmental impact assessment must be comprehensive and holistic (integral) to allow for the analysis of social characteristics and natural ecosystems, the identification of potential impacts and the means to avoid or prevent them, where possible, or ultimately, to compensate for them.** This is the logic behind any environmental impact assessment process, and the laws of Costa Rica are no different in this respect. [...]

**SETENA and the Environmental Administrative Tribunal have condemned this practice and penalized when attempted by developers. It is important to note that according to these resolutions, not only do the sub-projects need to be evaluated as a whole, but also the project areas and the impacts must be evaluated in a comprehensive and integrative manner."**<sup>235</sup>  
(emphasis added)

271. Fragmentations are discouraged from the environmental assessment standpoint because they:<sup>236</sup>

- prevent the analysis of fragile ecosystems from being omitted in the environmental impact assessment;
- prevent regulators from conducting proper environmental assessments of the developer's total intended works, affecting its conclusions on ecosystems geographically related with the area to be developed and the areas of direct and indirect influence;
- discourage citizen participation on EIA for medium or large projects, that when fragmented, do not have to go through this process; and
- prevent authorities from determining whether the projected development property contains any forested areas, which may be negatively impacted, as determined by the Forestry Law.

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<sup>234</sup> C-207, Article 3.

<sup>235</sup> Siel Siel Report, paras. 66, 68.

<sup>236</sup> Siel Siel Report, Section VII.

272. In particular, Costa Rican criminal case law has strengthened the principle of non-irreducibility of the forests.<sup>237</sup> It is interesting to note the inalienable nature of the right to a healthy environment and the strengthening of a principle that empowers judges to enforce the restitution of the land use, ensuring the protection of forests. This decision fortified the principle of non-irreducibility of the forests in other judicial decisions, and even promoted at the administrative level that authorities started questioning the segregation of properties when pretending to evade the definition of the Forestry Law.<sup>238</sup>

273. SETENA has expressly addressed the illegality of fragmentations and rejected developers' projects that intended to fragment the EIA evaluation for various projects that formed part of one sole project. For example, in resolving an administrative review challenge, where Rio Coronado Land Company filed for three different EVs for three sub-projects located in three different lots within the same area of a main project, SETENA held:

"According to the technical criteria, this is a single project, operated over three adjoining properties by the same developer and for similar works, even though [one relates] to earthworks to provide access to a road. SETENA cannot permit the violation of environmental regulation, for the sake of other interests or factors and to the detriment of the environment, by permitting a division of the environmental assessment or applying less rigorous or environmentally significant assessment tools. [...]

In light of the above, we are bound to operate in accordance with article 94 of [the Biodiversity Law], which provides:

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

The text of this article is decisive in that it determines that this project should be evaluated in its entirety for the three properties, with reference to all the elements that will be affected. Adjoining lots, limits or human barriers will not be considered in the evaluation of the project. As such, it does not make sense in the present case to purport that the Environmental Impact Assessment be done individually for each of the lots in Form D2. For the sake of proscribing the environmental impact, the assessment should be done in a single Form D1 for the entire project. This is the application of the precautionary principle and pro natura principle, the guiding principles of environmental law."<sup>239</sup>

274. In the same way, in another case, involving the submission of two EVs for the development of a condominium and the construction of a groundwater concession within the same property and to be developed by the same developer, SETENA decided to *"unify the*

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<sup>237</sup> **R-365**, Tribunal de Casacion Penal, Decision 2003-0396, 8 May 2003.

<sup>238</sup> Siel Siel Report, para. 72.

<sup>239</sup> **R-344**, SETENA rulings on fragmentation in the Rio Coronado Land Company's Project, 2015.

*evaluation of both projects...so that the assessment is done in its entirety" relying on Article 94 of the Biodiversity Law.*<sup>240</sup>

275. After understanding Costa Rica's legal and regulatory framework against fragmentation, it is hard to understand Mr Mussio's assertion that:

"[I] have a broad knowledge acquired from my professional practice and experience to be able to manage a project at the various stages of its life, that is, planning, execution, control and completion, from start to finish. But this does not mean that I am familiar with the various regulations, rules, laws, and environmental and urban development guidelines that must be fulfilled to obtain the permits."<sup>241</sup>

276. If Mr Mussio has broad experience with environmental regulations, he simply could not have (and should not have) advised or allowed Claimants to fragment their development in violation of environmental regulations in Costa Rica.

c) Claimants incurred fragmentation in order to mislead SETENA

277. In its Counter Memorial, Respondent has already explained how Claimants willful fragmentation of the EIA for the Las Olas Project misled SETENA into granting the EV.<sup>242</sup> Therefore, Respondent will only address the defenses Claimants have raised against this illegality in solely two paragraphs of their Reply Memorial.<sup>243</sup>

278. First, Claimants intend to cover up the illegal fragmentation for a "development in stages." As the Siel Siel Report explains, (i) fragmentation even if conducted in stages is illegal and (ii) Claimants did not make an evaluation "in stages" of their project:

**"[A]ccording to article 94 of the Biodiversity Law and SETENA's resolutions, it is clear that "fragmentation," is always illegal under Costa Rican law and that projects developed in stages must equally be assessed in a comprehensive fashion.**

**Despite this, the Claimants did not make an "evaluation in stages" of their project. The EV for the Concession site was obtained in 2005, but the site was never developed. The EV for the Condominium site was obtained in 2008 and the development was due to commence in 2010. As explained by the Second KECE Report, works started in the Easements in March 2009, without obtaining an EV. The development of the "Other lots site" never had a file at SETENA. Clearly the Claimants cannot assert that they were going to submit the Easements site for SETENA's evaluation at a later stage, because they had already started the development of this area without an EV from SETENA. What Claimants did is pure fragmentation, thereby violating Costa Rican law. It is no coincidence that the exact site where Claimants started works without an EV was Easement # 9. This was precisely the area where the neighbors had reported the existence of a "seasonal lagoon"**

<sup>240</sup> R-345, SETENA ruling on fragmentation in the Rubi Business Corporation's Project, 19 March 2015.

<sup>241</sup> Witness Statement of Mauricio Mussio, para. 11.

<sup>242</sup> Respondent's Counter-Memorial, paras. 303-307.

<sup>243</sup> Claimants' Reply Memorial, paras. 279-280.

(palustrine wetland), where KECE determined the existence and the the refilling of a wetland, which had not been authorized by an EV from SETENA or any other permit."<sup>244</sup> (emphasis added)

279. Second, Claimants attempt to assimilate fragmentation with lots' segregation. Claimants rely on Mr Ortiz's opinion to argue that fragmentation "*is perfectly permissible.*"
280. In this sense, Claimants have entangled two legal institutions that are completely different with the purpose of hiding the illegal development of the Las Olas Project. Claimants intentionally confuse, on the one hand, fragmentation as the segregation of lots to develop real estate projects; and on the other, fragmentation as an illegal practice in the development of residential projects used to engage the regulator in the evaluation of a fragmented environmental assessment.
281. Mr Ortiz states that according to the National Control Fragmentation Rules and Regulations, "*the law authorizes fragmentation of land using easements.*"<sup>245</sup> Indeed, Respondent has never argued that segregation of land using easements is illegal. What Respondent argues is that fragmentation of the environmental impact assessment of a project is illegal under Costa Rican law. Mr Ortiz intends to apply the rules of fragmentation of land – segregation of land into lots – to an illegal practice in the development of real estate projects known as "fragmentation of the EIA."
282. In order to divert the discussion of Claimants' illegal conduct, Mr Ortiz argues that under the National Control Fragmentation Rules and Regulations, which are binding to the National Institute of Urban Housing and the municipalities only, fragmentation of lots using easements is legal. Mr Ortiz omits to explain the scope of application of these rules. Article I.9 of the National Control Fragmentation Rules and Regulations defines fragmentation as:
- "The division of any property in order to sell, transfer, negotiate, distribute, exploit or use the resulting plots separately."<sup>246</sup>
283. The definition of fragmentation in this context deals with the technical concept of the segregation of land and has nothing to do with environmental impact assessment. Further, the specific rules applicable to fragmentation under the National Control Fragmentation Rules and Regulations apply exclusively to the municipalities:
- "The purpose of this chapter is to define the urban and technical conditions necessary for municipalities to authorize fragmentations."<sup>247</sup>
284. As the development of a condo or lot housing complex will necessarily require fragmentation of the main property, the National Control Fragmentation Rules and Regulations contain a chapter applicable to these types of residential projects. However,

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<sup>244</sup> Siel Siel Report, paras. 75-76.

<sup>245</sup> Expert Report of Luis Ortiz, para. 108.

<sup>246</sup> **R-409**, National Control Fragmentation Rules and Regulations, I.9. "Fragmentation."

<sup>247</sup> *Ibid.*, Chapter II.

the scope of application of the provisions in Chapter IV refers exclusively to the segregation of lots to create a condo complex and has nothing to do with environmental impact assessment:

"This chapter refers to the rules for the development of residential projects or fragmentation that include as part of it the construction of residential units [...]."<sup>248</sup>

285. Mr Ortiz recognizes that the fragmentation he is referring to requires a filing of information with the National Registry and approval from the Municipality.<sup>249</sup> Fragmentation in this sense is an administrative authorization to segregate land and does not involve an authorization to engage in works to physically segregate a property into lots, for which an EV and construction permits are required.

286. Mr Ortiz then goes on to state without relying on any legal authority that:

"A developer may request and obtain several EV's for a same project, a general one and other EV's to develop the project in later stages/phases. For a single Project there would only be one; for a Project to be developed in stages/phases, then there would be a possibility to obtain several EV's that are going to be issued for each development once the owner decides to execute a certain phase of the project."<sup>250</sup>

"If each fragmentation within the Project requires an EV because the property is going to be used for the development of a condo or of a housing complex, SETENA would analyze each case and determine if the project meets the environmental criteria."<sup>251</sup>

287. Mr Ortiz's assertions are in total contradiction to SETENA's express rulings on the illegal practice of fragmentation described.

**B. Claimants' work on the Easements and other lots site required the obtaining of an EV**

288. It is undisputed that Claimants did not obtain an EV for the works performed on the Easements and other lots site. Claimants have denied that those works were illegal and qualify this illegality as "*specious*."<sup>252</sup> The truth is that Claimants intended the fragmented portion of their development called "Easements and other lots site" to be an urban development and not solely a "*subdivision of lots*." Further, in denying that the obligation to obtain an EV actually exists, Claimants bring no legal support for those allegations except for a misinterpretation of Costa Rican environmental regulations by Mr Ortiz.

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<sup>248</sup> Ibid., Chapter IV.

<sup>249</sup> Expert Report of Luis Ortiz, para. 112.

<sup>250</sup> Expert Report of Luis Ortiz, para. 111.

<sup>251</sup> Ibid., para. 111.

<sup>252</sup> Claimants' Reply Memorial, para. 275.

289. Claimants therefore comprehensively fail to rebut the finding of illegality, and it does not suffice to simply label something as "specious" in order to satisfy a standard of proof capable of displacing the evidence building up against Claimants.

**1. Claimants started to build an urban development without an EV on the Easements and other lots site**

290. The miscalled "*easements and related lots*"<sup>253</sup> (a name unilaterally imposed by the Claimants) actually constituted and were intended to be an urban development which, as explained, must have undergone the clearance process of environmental assessment before SETENA regardless of whether it was or not a part of the "Claimants' development," although in this case it was since Claimants included it as part of the Las Olas Project master site plan.<sup>254</sup>

291. When one looks at the legal definitions of "fragmentation," "housing development" and "easement," it is clear that the Easement and other lots site were intended to be a housing development rather than just some "internal roads or accesses." The Urban Planning Act and the Regulations on Constructions of INVU define urban "fragmentation" and "housing development" as follows:

**"Fragmentation**, is the division of any property in order to sell, transfer, trade, distribute, exploit or use separately, the resulting plots; it includes both judicial or extrajudicial partitions, adjudications of undivided rights and mere segregations held by the same owner, such as those located in housing developments or new constructions that are of interest to the control of the formation and use of urban real estate."<sup>255</sup>

**"Housing development**, is the fragmentation and fitting out of land with urban purposes, through the opening of roads and provision of services."<sup>256</sup> (emphasis added)

292. On the other hand, the same regulations define "easements" as:

**"Easement**, restriction to the ownership of a property, which is granted in the public interest or of another property"<sup>257</sup> (emphasis added)

293. It is clear from Claimants' own submissions<sup>258</sup> that the intention in the miscalled easements was to construct a housing development of 72 lots, plus 500 meters of streets and more

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<sup>253</sup> Claimants' Memorial, para. 50(c).

<sup>254</sup> C-54.

<sup>255</sup> C-219, Article 1.

<sup>256</sup> C-219, Article 1; C-206, Article I.3.

<sup>257</sup> C-206, Article I.3.

<sup>258</sup> Claimants' Memorial, para. 50(c); R-42, Environmental Contingencies Plan for Land Movements (Plan de Mitigación Ambiental), July 22, 2010.

than 36,000 square meters of impacted terrain.<sup>259</sup> Consequently, this development should have been submitted to SETENA.

294. Claimants allege that it was "*perfectly legitimate for the Claimants to have carved out the easements*" without obtaining an EV. Claimants intended to urbanize this area, which according to the master site was part of the Las Olas Project. A construction contract entered into by Claimants and a construction company in January 1, 2011 proves that Claimants were not engaging in the construction of "mere roadways" but this constituted the first stage in their scheduled development.<sup>260</sup> The contract provided for the "construction of two streets in two different lots" whose "structural area will be of seven hundred and forty four square meters...as part of the development of the Las Olas Project."<sup>261</sup>
295. In any case, any works undertaken to fit out accesses – regardless of whether they were registered as easements at the Public Registry – must have been included in the studies submitted to SETENA and should have been assessed from the environmental perspective. They were not and consequently violated Costa Rican law.

## **2. Claimants' works on the Easements and other lots site were not exempted from obtaining an EV from SETENA**

296. Claimants rely on Mr Mussio's witness statement and Mr Ortiz's report to argue that there is no requirement to obtain an EV for "*the creation of easements and subdivision of lots.*"<sup>262</sup> Mr Ortiz refers to Article 2 of the General Regulations on the Procedures for Environmental Impact Assessment and states that:

"[Article 2] establishes the need to obtain an EV regarding the fragmentations in which a condo or a lot housing complex is going to be developed. The developer will need an EV to be able 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."<sup>263</sup>

297. While speaking about fragmentation, Mr Ortiz confuses two legal issues: the need of an EV for segregations with urban purposes as established in Article 2 and the need of an EV prior to the start of *any* activities, project or works. Indeed, Article 2 does not support Mr Ortiz's conclusion. Article 2 states:

**"Article 2. Procedure of EIA for activities, works or projects.** For its nature and purpose, the procedure for **the Environmental Impact**

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<sup>259</sup> Siel Siel Report, para. 85. The Easements and other lots site has 3.6 hectares, calculated by multiplying 72 lots of 500 square meters of area each.

<sup>260</sup> **R-398**, Construction contract for the Easements and other lots site, 15 January 2011.

<sup>261</sup> Id.

<sup>262</sup> Claimants' Reply Memorial, para. 276.

<sup>263</sup> Expert Report of Luis Ortiz, para. 109.

**Assessment (EIA) must be completed and approved prior to the start of any project activities, work or activity.** This is particularly relevant in the case of the approval of pre-projects, projects and segregations with urban or industrial purposes, procedures relevant to land use, building permits and exploitation of natural resources."<sup>264</sup> (emphasis added)

298. It is certainly shocking how Mr Ortiz could conclude from the reading of this article that the creation of easements lots does not require an EV. This is more concerning when it is precisely Article 2 which states the general rule of EIA in Costa Rica that "any project, work or activity" requires the preparation of an EIA. Article 3 of the Regulations define what "activity, work or project" shall mean:

**"3. Activities, works or projects:** Shall be construed as such, any activity, works or project seeking **development** after the entry into force of these Regulations and one which presents one or a combination of the following characteristics:

[...]

- Involves the change of land use.
- Is listed in Annex No. 2 of these Regulations."<sup>265</sup> (emphasis added)

299. As explained in the Second KECE Report, the building of roads involves a change of land use. Also, Claimants' intended development for the Easements and other lots site falls under the list of activities of Annex No. 2 of the Regulations because it involved the construction of buildings.<sup>266</sup>

300. Further, Claimants avoid referring to SETENA's specific regulations which deal exclusively with projects or activities of "very low impact" that **do not** require undergoing an EIA procedure before SETENA.<sup>267</sup> As explained in detail in the Siel Siel Report, none of those exceptions applied to the works Claimants conducted on the Easements and other lots site.<sup>268</sup>

301. Finally, Claimants point to the fact that the Municipality granted the construction permits without requiring them to obtain an EV.<sup>269</sup> Claimants offer no support for this assertion. The holding of a construction permit does not exonerate one from the duty of obtaining an EV and no regulation or statute states that.

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<sup>264</sup> C-208.

<sup>265</sup> Ibid.

<sup>266</sup> Siel Siel Report, paras. 83-84.

<sup>267</sup> **R-363**, SETENA Resolution 583-2008-SETENA, 13 March 2008; **R-364**, SETENA Resolution 2653-2008-SETENA, 22 September 2008.

<sup>268</sup> Siel Siel Report, Section VIII.

<sup>269</sup> Claimants' Reply Memorial, para. 278.

**C. Claimants' illegal works damaged the ecosystems on the Project Site**

**1. Starting March 2009 Claimants performed works without any permits**

302. In their Memorial, Claimants admit that the construction permits for the easements were issued on July 16, 2010 and for the Condominium site on September 7, 2010.<sup>270</sup> After Respondent has pointed to Claimants' illegal works which occurred mainly on the Easements and other lots site as early as March 2009, Claimants have tried to change the record, and allege that the first construction permits granted to the project in 2007 were for the construction of *"two easements on the Easements section."*<sup>271</sup> This is false. First, Claimants themselves admit in paragraph 87 of their Memorial that those permits were obtained for the Concession site. Second, Claimants' Exhibit C-40, called "Construction permits for the Concession" shows that those permits were granted for the Concession site solely and not for the Easements and other lots site.

303. Thus, Claimants were not entitled to undertake any works on the Easements and other lots site nor on the Condominium site prior to July 16, 2010. Notwithstanding, neighbors' complaints dated 2009, various DeGA reports from 2009 and 2010, plus Ms Vargas' witness statements in this arbitration, confirm that Claimants started impacting the ecosystems on the Project Site as early as 2009 without having any construction permits.

304. Surprisingly, Claimants allege that Respondent has not proved that works were being carried out on the Project Site in 2009:

*"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."*<sup>272</sup>

305. The truth is that Claimants' illegal works since March 2009 were documented in the April 2009 DeGA Report prepared by Ms Vargas.<sup>273</sup> That is why Claimants have tried to undermine the accuracy of its findings and even questioned its authenticity. Mr Aven, Mr Damjanac and Mr Arce have all tried to undermine the importance of the April 2009 DeGA Report by alleging that:<sup>274</sup>

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<sup>270</sup> Claimants' Memorial, para. 278.

<sup>271</sup> Claimants' Reply Memorial, para. 226(e).

<sup>272</sup> Claimants' Reply Memorial, para. 197.

<sup>273</sup> **R-26**, Inspection Report (DeGA-049-2009), 26 April 2009.

<sup>274</sup> Claimants' Reply Memorial, para. 270.

- The report was based on "*unsubstantiated complaints made by individuals*" who had no scientific or technical background;
- Ms Vargas's information was limited to a visual check from the property boundary; and
- The report is dated on a Sunday.

306. All of these accusations are less than persuasive. First, as Ms Vargas explains, neighbors are fully entitled to raise with the public authorities any conduct which they consider might be causing an environmental damage:

**"The neighbors are fully within their rights to denounce those acts which they consider to be contrary to environmental regulations and capable of causing environmental damage.** It is the role of DeGA to process these complaints and direct them to the competent authorities to assess their merit. This is precisely the reason why DeGA solicited reports from the competent authorities, such as the MINAE and the TAA: to enable itself to pronounce on the complaints of the existence of wetlands and forests on the project site.

**Furthermore, in Costa Rica, every person has the right to present a complaint, which public institutions are obliged to address. In the case of DeGA, any complaint implicates the possibility of environmental damage must be processed, irrespective of the identity of the complainant or his scientific or technical background. To do otherwise would breach the right of all Costa Ricans to live in a healthy environment, as enshrined in Article 50 of the Political Constitution of Costa Rica.**" <sup>275</sup> (emphasis added)

307. Second, Ms Vargas did not have to be inside the Project Site in order to see the damages since she could see from outside the property' boundaries that works were being undertaken or that vegetation, later confirmed by SINAC and KECE to be a forest, was being cut down and burned.

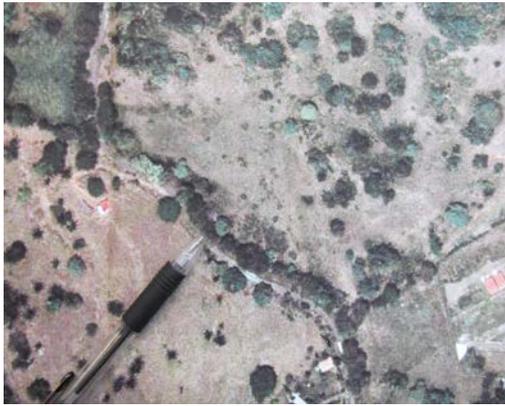
308. Third, the fact that the report is dated on a Sunday has no bearing upon its validity, public officials can work on non-working days and by no means are their acts deemed invalid. This proves absolutely nothing, and Claimants have made no affirmative claim about this. It is a non-issue.

309. Nonetheless, while Ms Vargas' first hand evidence and the facts as they occurred at the time and documented in the April 2009 DeGA Report, are "sufficient proof" of Claimants wrongdoing, in addition the Second KECE Report also provides aerial photographs from 2005 and 2009 that show how the works on the roads that were being undertaken at that time, impacted the forest and Wetland No. 1:

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<sup>275</sup> Second Witness Statement of Mónica Vargas, paras. 16-17.

2005



2009



310. Thus, the reality is, Claimants engaged in illegal works in 2009 to silently start draining a wetland and destroying a forest. What Claimants did not expect was that the neighbors concerned about the damage to the environment would trigger the enforcement of applicable environmental laws.
311. Claimants also rely on DEPPAT's bi-monthly reports *"which do not record any work being undertaken prior to issue of the relevant construction permits."*<sup>276</sup> The most concerning issue about this assertion is, after looking at the impacts on the Project Site on 2009 as the above photographs illustrate, how could Mr Bermúdez not have reported those in his "bi-monthly" reports?
312. On May 21, 2010, Ms Vargas visited the Project Site for a second time and once again, saw that works were being undertaken. Claimants have tried to undermine the veracity of this report, on the same basis as the April 2009 DeGA Report: the neighbors' lack of technical or scientific background, and Ms Vargas's "biased" observations, among other things.
313. After the works that were observed, Claimants continued without any permits, it was the Municipality itself that notified them of their wrongdoing on June 14, 2010 and demanded that Claimants obtain the required construction permits before engaging in any further works.<sup>277</sup> Mr Damjanac denies ever being notified of this communication,<sup>278</sup> however, the record at the Municipality proves the opposite.<sup>279</sup>
314. Finally, Claimants, once again try to prioritise counsel's submissions ahead of the documentary evidence, by alleging that they notified SETENA of the start of works on June

<sup>276</sup> Claimants' Reply Memorial, para. 299.

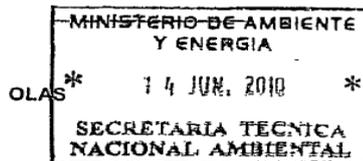
<sup>277</sup> R-35, Letter from the Department of Urban Development to David Aven (OIM No. 114-2010), 14 June 2010.

<sup>278</sup> Claimants' Reply Memorial, para. 300.

<sup>279</sup> R-368, Notification via fax of Letter No. OIM 114-2010, 14 June 2010.

1, 2010 and not June 14, 2010 because Claimants' letter to SETENA is dated June 1, 2010. Respondent has not questioned that the letter is dated June 1, 2010 but the official stamp of SETENA, expressly states that this letter was submitted by Claimants on June 14, 2010:

San José, 01 de junio, 2010



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315. In any event, this notification of the start of works is irrelevant because Claimants started their illegal works as early as March 2009 without any construction permits, permits to cut trees or permits to impact a wetland.

## 2. Claimants' drained and refilled wetlands

### a) Claimants distort the physical conditions of the Las Olas Ecosystem

316. Claimants allege that Respondent has not proved "that a wetland or forest existed at Las Olas during the relevant time period" and that the only "permissible evidence that the Respondent can rely on are the contradictory reports of SINAC, INTA and the PNH."<sup>281</sup> As it will be explained, the PNH, the competent entity within SINAC to identify wetlands in Costa Rica, determined in March 2011 the existence of a palustrine wetland on the Project Site. The PNH relied on soil sampling conducted in situ by INTA to determine the existence of hydromorphic soils on the wetland. SINAC also conducted a technical assessment in October 2011 on the Project Site and determined the existence of a forest on the Project Site.

317. Claimants allege that, "*the Las Olas site consists of overgrown pasture land.*"<sup>282</sup> The actual conditions of the Las Olas Ecosystem are extensively dealt with in paragraphs 23-26 of the First KECE Report. The Second KECE Report reaffirms the existence of seven wetlands on the Project Site, identifying 108 different plant species, 73 wildlife species among those; are 57 species of birds, 4 species of mammals, 12 species of reptiles and amphibians.<sup>283</sup> The photographs annexed to the Second KECE Report speak for themselves:

<sup>280</sup> R-31, Delayed notice of the start of works to SETENA, 14 June 2010.

<sup>281</sup> Claimants' Reply Memorial, para. 269.

<sup>282</sup> Claimants' Reply Memorial, para. 111.

<sup>283</sup> Second KECE Report, Appendix A, E.



318. The practice of describing land, that actually held ecosystems, as "overgrown pasture land" was patent in Mr Mussio's submissions with SETENA.

319. For instance, in the Costa Montaña Project for which his firm also prepared the EV for the developer, Mr Mussio described the land as "pastures for cattle,"<sup>284</sup> when it actually contained a forest. As it will be explained below,<sup>285</sup> not only did the the TAA shut down the Costa Montaña Project, but criminal charges were also brought against the developer (who was foreign like Claimants), and Mr Mussio himself faced an administrative proceeding before the Federal College of Engineers and Architects for misleading SETENA on the actual conditions of the land.

320. Claimants' simplification of the Las Olas Ecosystem has no support in the real facts, and this is more evident given that Claimants' own experts have admitted the existence of three wetlands, ecosystems protected under Costa Rican law, on the Project Site.

b) The correct determination of wetlands under Costa Rican law

321. While Claimants recognize that there are several laws and statutes that define "wetlands" under Costa Rican law, they rely on a highly restrictive interpretation of a "wetland" under the MINAE Decree No. 35803, which is a regulation issued by the MINAET on April 16, 2010.<sup>286</sup> As explained by Dr Jurado, the fact that wetlands are regulated under the RAMSAR Convention and many other laws is a clear sign that the Costa Rican legal system grants special protection to these ecosystems<sup>287</sup>

322. Claimants allege that "the MINAE Decree No. 35803 provides the technical criteria that must be followed to 'determine and mark out a specific area of land as a wetland'."<sup>288</sup> Claimants rely on the expert opinion of Mr Ortiz, who, under a very restrictive interpretation of the legality principle, concludes that SINAC "has no discretionary powers in regard to the determination of a wetland as all its elements are regulated [in the MINAE Decree No. 35803]."<sup>289</sup> This interpretation does not correspond to the environmental law framework in force in Costa Rica and directly contradicts the supra-constitutional protection that Costa Rica affords to wetlands.

323. First, the protection of wetlands under Costa Rican law has been internationalized, given Costa Rica's ratification of several international treaties that establish the protection of wetlands as "natural resource of great economic, cultural, scientific and recreational

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<sup>284</sup> **R-375**, EV for the Costa Montana Project, 14 June 2006.

<sup>285</sup> See, section VI.B.

<sup>286</sup> C-218.

<sup>287</sup> Second Witness Statement of Julio Jurado, para. 232.

<sup>288</sup> Claimants' Reply Memorial, para. 119.

<sup>289</sup> Expert Report of Luis Ortiz, para. 102.

value;"<sup>290</sup> such as, the RAMSAR Convention, Convention Concerning the Protection of the World Cultural, Convention on International Trade in Endangered Species of Wild Fauna and Flora, among others. All treaties that encompass environmental rights, which are part of the third category of Human Rights, enjoy of a supra-constitutional protection under Costa Rican law. Therefore, the legal protection of wetlands is guaranteed by international law as part of Costa Rican law.

324. Second, the interpretation of environmental regulation in Costa Rica requires a purpose-oriented interpretation where "its primary purpose is protecting life, health and an ecological balance."<sup>291</sup> Dr Jurado explains that the operator interpreting and applying a regulation shall:

"[F]ind that interpretation which will allow for an application of the Regulation that **will 'protect further and contaminate less'** and **'increase biodiversity and lessen contamination'** without losing sight of the need for a 'rational use of natural resources' that satisfies the needs of present and future generations. [...]

"[The regulations] should be interpreted and integrated in agreement with the principle of *in dubio pro natura* and the other environmental principles mentioned herein [...] that better satisfies the fundamental objectives of environmental law, be it the protection of life, health or ecological balance. The application of these norms requires merely the existence of a potential risk of environmental harm."<sup>292</sup> (emphasis added)

325. Therefore, any interpretation of environmental laws should consider and integrate the precautionary principle or *indubio pro natura* which, "implies that all acts by the public administration and individuals in environmental issues be completed with the necessary care to avoid risks and serious and irreversible damage."<sup>293</sup>
326. Costa Rican constitutional case law has also developed the non-regression principle which bans the state from adopting measures, or modifying regulations that would worsen environmental rights previously fulfilled, without reasonable proportionate justification.
327. Both the non-regression principle and the *principio de objetivación* of environmental protection imply that the operator must "*interpret and apply environmental regulation under the laws of science and technique.*"<sup>294</sup>

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<sup>290</sup> Second Witness Statement of Julio Jurado, para. 157.

<sup>291</sup> Id., 77.

<sup>292</sup> Id., 164, 173.

<sup>293</sup> Id., 167.

<sup>294</sup> Id., 171. The general principle of "objetivación" in environmental protection law, also known as the principle of deference to scientific knowledge and evidence, consists of the obligation to base environmental decisions on scientific studies and evidence. In other words, all administrative decisions that may affect the environment should be scientifically supported. The proper application of the objectivation principle limits the discretion of administrative bodies with regard to the taking of any

328. Third, the legality principle as regards environmental law needs to be applied considering international environmental law principles, which are part of Costa Rican law and developed by local jurisprudence. Among those principles, is the *principio de objetivación* of environmental protection, "*this principle refers to the obligation to accredit environmental decision making with scientific and technical studies, be it in relation to administrative rules, individual or general dispositions, both legislative and regulatory.*"<sup>295</sup>

329. Against this background, Dr Jurado concludes that conducting a restrictive interpretation of the criteria set forth in the MINAE Decree No. 35803, would be contrary to Costa Rican environmental law, its principles and case law:

"A normative analysis of these types of ecosystems must take into account these principles and be carried out on the basis of scientific knowledge. The interpretation and enforcement will always be dependent on a series of technical factors that are to be assessed in each individual case in order to carry out an objective identification of the criteria set forth in the regulation and, in this case, Decree 35803-MINAET. As a form of ecosystem, it is to be expected that each wetland will have a particular set of characteristics and thus **it must be identified by reference to technical scientific criteria.**

**A restrictive interpretation of the criteria established in Decree 35803-MINAET would be neither correct nor convenient for the protected legal good (wetlands, in this case). To do so would go against the ample protection, guaranteed by national and international legislation, that our courts have afforded to the protection of environmental goods, and specifically to wetlands.**"<sup>296</sup> (emphasis added)

330. Thus, it is not for the legal operator to decide on what corresponds to the scientific and technical arena. If one of the criteria set forth in the regulation is not present in the ecosystem, in no way can the expert be bound to conclude that there is no ecosystem when clearly according to the scientific and technical expertise he employs, there is an ecosystem. That is why Dr Jurado explains that the legal operator should defer to the scientific and technical criteria when determining the existence of wetlands under Costa Rican law:

"It is the technical and scientific criteria, together with environmental principles, that determine the manner in which one must consider the characteristics enumerated in Decree 35803-MINAET for identifying a wetland. Environmental law, by its nature, invariably seeks to protect the environment, especially when it is susceptible to being affected. This is the objective one must have in mind when applying [Decree 35803-MINAET]." <sup>297</sup>

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measures that will impact the environment. (see R - 439, Mario Peña Chacón, "The Principles of Objectivation of Environmental Protection and Irreducibility" (2013) 108 Costa Rica Judicial Review).

<sup>295</sup> Id., para. 196.

<sup>296</sup> Id., paras. 188-189.

<sup>297</sup> Id., para. 190.

c) The "Classification of Land Methodology" is not the appropriate instrument to identify hydric soils

331. Claimants rely on Dr Baillie to allege that the Official Methodology for the Classification of Land in the Country (the "**Classification of Land Methodology**") is the correct methodology for the determination of hydric soils.<sup>298</sup> Claimants rely on Dr Baillie's assertion that the Classification of Land Methodology "*is the most practicable way of identifying hydric soils in the field in Costa Rica.*"<sup>299</sup> Claimants' reliance on Dr Baillie's opinion is questionable given that (i) he is not a local soil scientist, (ii) he did not rely on any local soil scientists to provide this opinion and (iii) neither INTA nor Mr Cubero have ever confirmed this opinion.

332. Claimants ignore that under Costa Rican law or under standard hydric soils identification practice, the Classification of Land Methodology is not considered an instrument that provides technical or scientific criteria to identify hydric soils.

333. First, the recitals and Article 1 of the Classification of Land Methodology expressly establish its scope of application:

"It is necessary for the country to have an official methodology **to promote land management propitious to the expectations of national development.**

[...]

Article 1. **For the purposes of carrying out land evaluation, classification and planning**, the "METHODOLOGY FOR THE DETERMINATION OF LAND USE CAPABILITY OF COSTA RICA," contained below, is hereby established [...]

The need for inflow of foreign currency, coupled with the increased food demand to maintain the population in the next century and a decrease in the availability of agricultural land, requires the use of agricultural and forestry systems that achieve the maximum benefit without damaging natural resources.

The planning process aimed at developing sustainable systems requires **an adequate inventory of land and climate resources, which can be combined in an integrated manner to establish a land use capability system. This system must classify land into groups that reflect the most intensive and sustainable use to which an area of land can be subjected.**<sup>300</sup> (emphasis added)

334. Claimants' allegation that this is the correct instrument to determine hydric soils in Costa Rica has no support under Costa Rican law. Mr Cubero himself explained in his trial testimony that the purposes of the Methodology are agricultural, ranching and forestry, and not "identification of hydric soils" whatsoever:

<sup>298</sup> Claimants' Reply Memorial, para. 287(d).

<sup>299</sup> Id., para. 128.

<sup>300</sup> **R-401**, Classification of Land Methodology (Decree No. 20501-MAG-MIRENEM), 5 May 1991.

"[...] Remember that this methodology is used for agricultural, ranching and forestry purposes, and not for civil infrastructure purposes."<sup>301</sup>

335. Second, Dr Jurado's interpretation of the relevant provisions and principles also points to the use of the most adequate methodology from the standpoint of science and technical assessment:

"By the same token, it would be a technical and scientific decision whether the [Classification of Land Methodology] or another recognized scientific methodology is used as a reference for the classification of lands. The relevant factor is that the interpretation is based in scientific and technical criteria (*principio de objetivación*)."<sup>302</sup>

336. Mr Erwin, an expert in the determination of wetlands, explains why this instrument is not appropriate as a methodology for the identification of soils characteristic of wetlands:

"[The Classification of Land Methodology] does not define hydric soils under Costa Rican Law. The land use classification...was not created or intended to be a hydric soil indicator evaluation and, it appears that Class VII and VIII soils are only associated with areas having the most acute flooding restrictions (resulting in gleyed soils), and **would not capture other hydric soil indicators typical of many seasonal/intermittent wetland areas which are identified as wetland under Costa Rican law.**"<sup>303</sup> (emphasis added)

337. Fourth, Drs. Perret and B.K. Singh, soil scientists from Costa Rica unlike Dr Baillie, also confirm that the Classification of Land Methodology is not an instrument used for the determination of hydric soils:

"[T]he Land Use Capability method is intended to classify land into groups which reflect the most intensive and sustainable agriculture and forestry use, and it was not intended to determine classification of wetland type or hydric soils. While no specific hydric soil indicator method is identified within the [Environmental] Organic Law or in Decree 35803, a generally accepted method is the Field Indicators of Hydric Soils in the United States."<sup>304</sup> (emphasis added)

338. Against this background, Claimants argue that Respondent has not pointed to what methodology should be employed for the determination of hydric soils.<sup>305</sup> The Second KECE Report explains that the Field Indicators of Hydric Soils in the United States (the "**USDA Methodology**") is a standard instrument used in the field to conduct those determinations:

"[A] generally accepted method in the region is the Field Indicators of Hydric Soils in the United States, which is identified in Baillie's

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<sup>301</sup> C-272.

<sup>302</sup> Second Witness Statement of Julio Jurado, para. 191.

<sup>303</sup> Second KECE Report, para. 99.

<sup>304</sup> Green Roots Report, p. 51.

<sup>305</sup> Claimants' Reply Memorial, para. 287(d).

Bibliography, and under this method hydromorphic soils are synonymous with hydric soils per Costa Rican criteria."<sup>306</sup>

339. Also, Drs Perret and B.K. Singh, soil scientists based in Costa Rica, agree that the use of the USDA Methodology is the accepted instrument for the identification of hydric soils:

"A generally accepted method to assess hydric conditions is the Field Indicators of Hydric Soils in the United States."<sup>307</sup>

340. But not only that, the reality is that both Mr Cubero from INTA and Dr Baillie employed the USDA Methodology to conduct their soil surveys on the Project Site. If Mr Cubero also used the Classification of Land Methodology is because there is no other instrument in Costa Rica to conduct soils analysis but that however, cannot automatically imply that the Classification of Land Methodology was neither intended nor applicable to the determination of hydric soils. That is why Mr Cubero admitted during his testimony at the criminal trial that the USDA was the **scientific instrument** he used to conduct his soil survey at the Project Site:

"[The Classification of Land Methodology] is utilitarian and **the USDA or US Department of Agriculture is scientific.**"<sup>308</sup>

"[T]his is the way the classification is done, and it is classified using the Land Use Capacity Methodology, which is a legal instrument, and **using the USDA methodology, which is scientific.**"<sup>309</sup> (emphasis added)

341. In any event, out of an abundance of caution, but only on the instruction of counsels, Dr Perret also conducted their soil analysis under the Classification of Land Methodology and concluded that the soils in the mantle, which have been highly disturbed by Claimants' refilling and drainage works, indeed comprised a Class V under the Classification of Land Methodology. However, when Dr Perret went deeper, beyond the landfill (which neither Mr Cubero nor Dr Baillie did), he found that the soils were of Class VII, a hydric soil according to the Classification of Land Methodology.<sup>310</sup> This is a critically important finding and highly damaging to Claimants' case. These findings will be explained below.

d) The Second KECE Report reaffirms the existence of wetlands on the Las Olas Ecosystem

342. In late August 2016, KECE conducted a second site visit whose main purpose was to *"identify and map boundaries of all the wetlands"* on the Project Site.<sup>311</sup> The Second KECE Report reaffirms the existence of 7 wetlands within the Project Site and one other wetland

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<sup>306</sup> Second KECE Report, para. 105.

<sup>307</sup> Green Roots Report, p. 7.

<sup>308</sup> C-272.

<sup>309</sup> Ibid.

<sup>310</sup> Green Roots Report, 51.

<sup>311</sup> Second KECE Report, Introduction.

located "just outside of the boundary of the northwest corner of the property" (Wetland No. 4).<sup>312</sup>

343. After the second site visit, KECE's findings can be summarized as follows:

- Multiple wetlands, not previously reported by Claimants, existing on the Las Olas Ecosystem; and
- Wetland No. 1 was filled and drained by Claimants over a period starting as early as of March of 2009, continuing through 2011.

344. Respondent will now address each of Claimants allegations against KECE's findings on the First KECE Report.

i. *Wetland No. 1*

345. Claimants object to the existence of any wetland indicator in this area. To reach that conclusion, Claimants disregard the fact that since March 2009 Claimants conducted refilling works on Wetland No. 1 and those works disturbed the ecosystem's natural conditions. One could not expect that after those impacts an ecosystem remain unaltered. The First and the Second KECE Reports note Claimants' impacts against Wetland No. 1:

"The Claimants conducted many activities since 2009, including the drainage and filling of wetlands by construction of the roads, excavation of ditches, placement of culverts, and the removal of the vegetative strata of the forest, that have directly impacted the Las Olas Ecosystem."<sup>313</sup>

"A review of project aerial photographs, agency reports, and claimants construction logs clearly identifies **that earthwork within this area continued for at least three years beginning by March 2009 and continuing through 2011**. In the 2005 aerial submitted with the project Environmental Viability evaluation, this area can clearly be seen as a heavily vegetated by herbaceous vegetation similar to Wetland #2 and topography of the area as shown on the 2007 So+Mussio Madrigal site drawings show the area was a depression of greater than one meter in depth. **March 2009 aerial photography shows construction activities have begun during the 2008-2009 dry season including scraping and grading the area and building road base for the two east-west access roads**. Local municipality reports from April 2009 through June 2010 **document construction activities on the site including clearing/land grading, construction of roads, establishment of a house pad, excavation of drainage ditches, and installation of electrical utilities**. Claimants construction logs from 2011 document installation of the deep drainage system, ditch

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<sup>312</sup> Second KECE Report, para. 10.

<sup>313</sup> First KECE Report, para. 190.

**maintenance, and continued terracing of the adjacent hills.**"<sup>314</sup>  
(emphasis added)

346. Thus, it is clear that Claimants' demand that this wetland present all of the characteristics of a normal, non-impacted wetland are out of place. Notwithstanding, in his second site visit, KECE was still able to find indicators of wetland conditions.

347. First, KECE used the presence of hydrophytic vegetation, mostly Mexican crowngrass as Claimants allege, to estimate the boundaries of Wetland No. 1. Claimants rely on the critique by Drs Calvo and Langstroth of KECE's findings of hydric vegetation arguing that KECE bases his assessment on the dominance of Mexican crowngrass, which does not necessarily indicate that an area is a wetland.<sup>315</sup> While this statement might be true, this is not the only element that KECE found to determine the existence of Wetland No. 1. KECE found that even if Wetland No. 1 cannot be described as a "fully functional wetland" due to impacts that have completely altered it. However, KECE found that Wetland No. 1 still retains some characteristics of a wetland such as hydrology, wetland vegetation and hydric soils.

348. KECE also notes how the refilling conducted by Claimants has inevitably affected the presence of vegetation on Wetland No. 1, although KECE found several wetland species in this area:

**"87% of the 90% ground cover in Wetland 1 consists of plant species that are associated with wetland systems, or hydrophytes.** According to the U.S. Department of Agriculture nomenclature, hydrophytes include all plant species with the following indicator status: Facultative, Facultative Wetland or Obligate Wetland (USDA 2014). In addition, **14% of the Wetland 1 ground cover estimate consists of plant species that are found in wetlands only.** The very presence of these species indicates that a wetland once existed (and portions of it still exist), before it was drained and filled circa 2009. Finally, the subcanopy of Wetland 1 was estimated at **30% cover, represented by only one species, *Mimosa pigra*, which is a wetland species. Prior to being filled and drained, Wetland 1 met the Costa Rican definition of a wetland.**"<sup>316</sup> (emphasis added)

349. Second, as to hydric conditions, Drs Calvo and Langstroth allege that, "*there is no indication of ponding or saturation*" because "*the area is not concave enough to allow for ponding.*"<sup>317</sup> This conclusion is wrong, as explained in the Second KECE Report. KECE observed groundwater exhibiting wetland hydrology:

"Based on our observations, groundwater is close to the existing soil surface throughout Wetland 1, suggesting that Wetland 1 is still

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<sup>314</sup> Second KECE Report, para. 91.

<sup>315</sup> Claimants' Reply Memorial, para. 146.

<sup>316</sup> Second KECE Report, para. 18.

<sup>317</sup> Claimants' Reply Memorial, para. 147.

exhibiting wetland hydrology today, even though it has been filled, and hydric soils appear to be forming within the fill material itself."<sup>318</sup>

350. Third, as regards hydric soils, Dr Baillie concludes that there are no hydric soils on Wetland No. 1.<sup>319</sup> According to Dr Baillie the soils in Bajo B1 (Wetland No. 1) qualify "*as imperfectly drained and non-hydric.*"<sup>320</sup> KECE explains that not all of the soil samples that Dr Baillie undertook show a "non-hydric" result. In fact, 4 of the soil samples conducted by Dr Baillie did show gleyed soils but nonetheless Dr Baillie classified them as "*marginally hydric*", incorrect under Costa Rican law:

"[A] total of 4 (36%) of the Baillie soil samples in Bajo 1 had gleyed soils within one meter of the current surface, including 3 (50%) of the mini-pits. These areas are shown as "marginally hydric" in Figure 6 of the Baillie report.

[...]

**The identification of the "marginally hydric" soils by Baillie, should be identified as hydric under the precautionary principle of Costa Rican law** and size of wetland impacts would be irrelevant as any impact would constitute a violation."<sup>321</sup> (emphasis added)

351. To reach this conclusion, KECE explains the fundamental errors Dr Baillie committed in reaching his conclusions:<sup>322</sup>

- Dr Baillie assumed a wrong project fill depth (which will be explained in detail below); and
- Dr Baillie downplayed the amount of development impacts on Wetland No. 1's area.

352. Furthermore, Respondent also instructed Drs Johan Perret and B. K. Singh to conduct soil sampling on Wetland No. 1 to confirm KECE's findings; their conclusions are presented in the Green Roots Report. Using the USDA, Drs Perret and Singh confirmed the existence of hydric soils for all the soil horizons they analyzed.

353. KECE also determined a fill of 1.75m on the southern portion of Wetland No. 1 and of 1.58m on its northern portion. In order to understand the magnitude of the refilling activities conducted by Claimants, Drs Perret and Singh excavated a soil pit on the northern portion of Wetland No. 1. Drs Perret and Singh found a layer of refill of over 1m of thickness and point out that:

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<sup>318</sup> Second KECE Report, para. 12.

<sup>319</sup> Claimants' Reply Memorial, para. 148.

<sup>320</sup> Baillie Report, para. 8.

<sup>321</sup> Second KECE Report, paras. 85, 86.

<sup>322</sup> Second KECE Report, paras. 87-89.

**"The transported material...has been moved horizontally onto a pedon from a source area outside of that pedon by purposeful human activity usually with the aid of machinery or hand tools**

The profile shows indications of prolonged superficial water saturation (aquic conditions) which in turn affects the oxidation state of important elements (Fe, Mn) evidenced by the presence of Fe and Mn in mottles, pore linings, concretions and nodules

**Gley is encountered throughout the profile confirming hydric condition of the profile. [...]**

The **buried genetic (natural) soil condition classifies as Hydric soil.**"<sup>323</sup> (emphasis added)

354. At 109 cm in depth, Drs Perret and B. K. Singh identified a horizon with organic matter, which included "*visible leaf veins and roots*" in early stages of decomposition.<sup>324</sup>



355. The discovery of organic matter after the refill layer shows that life existed prior to the refilling conducted by Claimants. As KECE explains, this buried organic layer represents the former surface of the soil in Wetland No. 1 prior to being filled with sandy clay loam collected from the hillside adjacent to Wetland No. 1.<sup>325</sup>

356. Finally, KECE, after analyzing the Green Roots Report findings concludes that:

"Based on the scientific results of [the Green Roots] report, hydric soils clearly existed in Wetland 1 prior to soils being altered by human activity. Hydric conditions even occur in the soil profile as it exists today (including the fill material)."<sup>326</sup>

<sup>323</sup> Green Roots Report, 20.

<sup>324</sup> Id., 12.

<sup>325</sup> Second KECE Report, para. 14.

<sup>326</sup> Second KECE Report, para. 15.

357. In summary, Respondent was definitely shown that wetlands exist on the Las Olas Project site. Amidst the peripheral issues that Claimants have raised in this arbitration, one fundamental conclusion emerges: the Las Olas Project impacts land that is entitled to be protected. We respectfully ask that the Tribunal never lose sight of this fact – since Claimants do their utmost to avoid this reality.

ii. *Wetlands Nos. 2, 3 and 5*

358. Claimants and their experts admit the existence of Wetlands Nos. 2, 3 and 5. As Claimants' admit, Wetlands 2 and 3 are located mostly on the Easements and other lots site and Wetland 5 on the Condominium site.<sup>327</sup> On the one side, Drs Calvo and Langstroth call them "*potential wetlands*" and "*depressional areas*"; on the other hand, Dr Baillie refers to them as "*valleys*."<sup>328</sup> However, they want to call them, they are wetlands and fulfill all the scientific criteria to be considered as such.

359. Dr Baillie himself admits that the "valleys" **contain hydric soils**:

**"Three of the six valleys have gleyed soils under standing water and qualify for Class VII or VIII in the Land Evaluation system of Costa Rica, and as hydric by the criteria of MINAET."**<sup>329</sup> (emphasis added)

360. KECE also points to Claimants' experts major admission in its second expert report:

**"It is essential to emphasize that Dr Baillie identified hydric soils within three valleys located along the northwestern boundary of the Las Olas property, and that these same three wetlands were identified as having hydric vegetation and wetland hydrology by the Claimants Experts Calvo & Langstroth in their 2016 expert report. The wetlands are identified and mapped in the Baillie report as Bajos B2, B4, and B6, which correspond to KECE wetland #'s 2, 3, and 5.**

[...]

**Not only has it now been agreed that these three areas are wetlands, but based on the soil and environmental data provided by the claimants' experts, they are all areas which in addition to being dominated by wetland vegetation, will be saturated/flooded for a long periods of time required to develop gleyed soils near the soil surface. Also, all three of these wetlands are all located within the Las Olas Condominium site and extend to perimeter roads, where seasonal flows exit the site through culverts under the roads."**<sup>330</sup> (emphasis added)

361. Thus, Claimants' experts do not dispute the physical conditions of these three wetlands. However, in order to divert the Tribunal's attention from such a major admission, Claimants'

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<sup>327</sup> Claimants' Reply Memorial, para. 152.

<sup>328</sup> Id., paras. 153-154.

<sup>329</sup> Baillie Report, para. 6.

<sup>330</sup> Second KECE Report, paras. 77-79.

allege (i) that the boundaries of the wetlands identified by KECE are "exaggerated" and (ii) the wetlands remain unaffected by development at the Project Site.<sup>331</sup>

362. As to the first allegation, the Second KECE Report explains that:

"As was identified in our first report, the map of potential wetlands areas was a preliminary map drawn on site topography maps based on field observations of wetland conditions (hydric vegetation, evidence of seasonal hydrology, and hydric soils). The purpose of the preliminary mapping was to identify areas on the Las Olas site having environmental conditions indicating wetland resources and requiring further evaluation. In August-September of 2016, we conducted a second visit and updated maps of the onsite wetlands as identified in section I of this report. These revised maps were generated by walking the perimeter of each wetland area and recording the boundary with a hand held GPS unit."

363. As to the second, and as explained above,<sup>332</sup> the Second KECE Report confirm that the alleged "areas of caution" or "sensitive areas" that were identified in the Las Olas master site plan prepared by Mussio Madrigal Arquitectos in no way respected these ecosystems.

iii. *Wetland No. 4*

364. It comes as no surprise that Wetland No. 4 is located outside the boundaries of the Las Olas Ecosystem. However, KECE identify it due to its proximity to the Project Site and its similarities with other wetlands identified. As explained in the Second KECE Report, Wetland No. 4, "*was in such close proximity to the site and was so similar to the onsite wetlands that it was included in the assessment.*"<sup>333</sup>

iv. *Wetlands Nos. 6, 7 and 8*

365. Claimants rely on the Calvo and Langstroth Report, to allege that, "*these areas are not wetlands.*"<sup>334</sup> The Calvo and Langstroth Report explain basically that these areas do not present hydric conditions or wetland species.

366. First, as to the presence of hydric conditions, the Second KECE Report explains that these wetlands have "onsite drainage features which have periodic flows draining surface and ground water from the surrounding hills into intermittent streams which flow north and east off site." Thus, as "interment streams" they perfectly qualify as wetlands under the definition of Costa Rican law.<sup>335</sup> After analyzing the Calvo and Langstroth Report assessment for these specific wetlands, KECE concludes:

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<sup>331</sup> Claimants' Reply Memorial, paras. 152-154.

<sup>332</sup> See, section V.A.3.b)

<sup>333</sup> Second KECE Report, para. 32.

<sup>334</sup> Claimants' Reply Memorial, para. 142.

<sup>335</sup> Second KECE Report, paras. 130, 138, 139.

"We disagree that these areas lack required hydrology to develop hydromorphic vegetation and to develop hydric soils. As identified by ERM in their discussion on Coast Rican wetland laws, the identification and classification of wetlands follows the definition established by RAMSAR. While the subsequent definitions provided by ERM in this report are abbreviated, the full definition includes intermittent streams"<sup>336</sup>

367. Second, as to the lack of wetland species that Drs Calvo and Langstroth point to, KECE explains the predominance of hydric vegetation for Wetlands Nos. 6 and 8:

"Canopy cover in **Wetland 6** is estimated at 76%, with 49% of this cover represented by wetland species. Ground cover is estimated at 83%, with the vast majority of that, 66%, represented by wetland species. Subcanopy cover in Wetland 6 is estimated at 26%, with the majority of that, 15%, represented by wetland species. Portions of Wetland 6 even had strictly aquatic plants (Obligate Wetland indicator status) that are only found in wetland habitats.

[...]

Canopy cover in **Wetland 8** is estimated at 48%, with the majority of this cover, 33%, represented by wetland species. Ground cover is estimated at 92%, with the vast majority of that, 80%, represented by wetland species. Subcanopy cover in Wetland 8 is estimated at 29%, represented entirely by wetland species."<sup>337</sup> (emphasis added)

368. As to hydric vegetation on Wetland No. 8, Claimants conveniently omit to mention that this wetland is currently being impacted by the ongoing trespasser's activities, which logically has an adverse effect on the presence of hydric vegetation. Notwithstanding, KECE found the dominance of wetland species in this area as well:

"Canopy cover in Wetland 8 is estimated at 48%, with the majority of this cover, 33%, represented by wetland species. Ground cover is estimated at 92%, with the vast majority of that, 80%, represented by wetland species. Subcanopy cover in Wetland 8 is estimated at 29%, represented entirely by wetland species."<sup>338</sup>

369. Third, Claimants also rely on Dr Baillie to argue that the soil in these areas does not support a finding of wetlands. Dr Baillie reports "*patches that may be marginally hydric but these are not large enough to support wetlands.*"<sup>339</sup> To reach this conclusion, Dr Baillie relies on the Classification of Land Methodology which requires that hydric soils to be "*associated with very long periods of inundation.*"<sup>340</sup> As explained by KECE, this is not a condition for standard hydric soils indicators and such interpretation "*would not capture*

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<sup>336</sup> Second KECE Report, para. 131.

<sup>337</sup> Second KECE Report, paras. 23, 25.

<sup>338</sup> Second KECE Report, para. 25.

<sup>339</sup> Claimants' Reply Memorial, para 144. Note that Claimants have quoted a non existence paragraph from Dr Baillie's Report.

<sup>340</sup> Second KECE Report, paras. 68.

*other hydric soil indicators typical of many seasonal/intermittent wetland areas which are defined as wetlands by Costa Rican law.*"<sup>341</sup>

e) Claimants' critiques of the First KECE Report are baseless and unsupported

370. While Claimants make a series of criticisms of the First KECE Report, Claimants' own experts have conceded the existence of at least 3 of the 8 wetlands identified by KECE in his first expert report. This is fatal to Claimants' case for two reasons: (i) the existence of wetlands conclusively shows that there was a basis for legitimate environmental concerns that were ultimately acted upon in an appropriate and lawful manner by Costa Rican authorities; and (ii) the existence of wetlands would (and should) have alerted Claimants to the need to inquire in ways they comprehensively failed to do – instead preferring to push towards development at the expense of the environment.

371. Respondent will now address each of Claimants' critiques to the First KECE Report.

i. *KECE's alleged failure to address hydric soils as a criteria to identify wetlands*

372. While relying on a strict interpretation of the MINAE Decree No. 35803, Claimants criticize the First KECE Report for not containing "*significant data about soils.*"<sup>342</sup> As KECE explains, during the first site assessment, KECE conducted a site reconnaissance of the property to review the overall site conditions of the property, locating onsite wetlands and investigating water flows and connections to offsite locations.

373. After that preliminary investigation, KECE visited the site for a second time to conduct a more thorough assessment, where it conducted some soil boring analyses and identified and map the boundaries of all wetlands identified in the First KECE Report.<sup>343</sup>

ii. *The alleged discrediting of the INTA Report*

374. Claimants further accuse Mr Erwin of discrediting INTA's findings.<sup>344</sup> In the First KECE Report, KECE reviewed the assessment of INTA in April 2011 contained in the INTA Report. KECE explained that (i) INTA described hydromorphic soils on the Project Site (findings which were considered by the SINAC when issuing the PNH Report on Wetlands); (ii) INTA's conclusion of no hydric soils on Wetland No. 1 was based on a methodology that is not proper to consider the existence of wetlands; and (iii) INTA's conclusion that the cause of the filled wetland was due to land use and not Claimants'

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<sup>341</sup> Ibid.

<sup>342</sup> Claimants' Reply Memorial, para. 123.

<sup>343</sup> First KECE Report, Introduction.

<sup>344</sup> Claimants' Reply Memorial, para. 124.

development works on the site was done without analyzing topographic information and Costa Rican agencies' reports which documented Claimants' impacts since March 2009.<sup>345</sup>

375. Indeed, KECE pointed to its discrepancy with INTA's use of the Land Classification Methodology to conclude that Wetland No. 1 did not present hydric soils and INTA's conclusion as to the causes of the refilling of the wetland. Those two conclusions however bear no relevance to Claimants' claims. First, INTA's conclusion that the soils of Wetland No. 1 were not hydric because they were not Class VII or VIII under the Classification of Land Methodology, had less importance in light of the PNH Report on Wetlands that had already considered INTA's determination of hydromorphic soils during the site visit of April 16, 2011. Second, as explained further below,<sup>346</sup> INTA's determination to the potential causes of the refill were not part of the scope of its report or its competence. As Claimants allege, they were always advised by their local professionals, Claimants could not have welcomed these findings as final.

376. Further, Claimants allege that KECE "fails to acknowledge that INTA...is the competent authority in Costa Rica charged with defining and identifying hydric soils."<sup>347</sup> Claimants refer to paragraph 72 of the Baillie Report to support this assertion. Dr Baillie has no expertise on Costa Rican law to make this assertion and neither does he quote or refer to a legal rule to support such statement.

377. In their Memorial, Claimants constantly argue that INTA was an agency in charge of the determination of wetlands in Costa Rica:

"INTA is a national agricultural research institute with **specific expertise in wetlands classifications.**"<sup>348</sup>

"INTA, the body whom SINAC specifically indicated should be consulted in order **to determine the existence of wetlands on the project site**, has reported that no such wetland exists."<sup>349</sup>

"[T]he criminal prosecutor appears to have had his own agenda, choosing to pursue his case against Mr Aven and Mr Damjanac in spite of clear evidence from the **Respondent's top agency for the determination of wetlands, INTA**, that no such wetland exists on the project site."<sup>350</sup> (emphasis added)

378. Claimants' attempt to place INTA at the center of authorized determinations of wetlands is either sloppy or mistaken.

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<sup>345</sup> First KECE Report, paras. 113-117.

<sup>346</sup> See section V.C.2.e)ii..

<sup>347</sup> Claimants' Reply Memorial, para. 125.

<sup>348</sup> Claimants' Memorial, para. 176.

<sup>349</sup> Id., para. 216.

<sup>350</sup> Id., para. 218.

379. After Respondent explained the legal competence of INTA under its own regulations,<sup>351</sup> Claimants finally admit that SINAC is responsible "*classifying wetlands, and delineating the boundaries of wetlands.*"<sup>352</sup> Further, Dr Baillie, Claimants' own expert, expressly admits that INTA does not have competence to determine the existence of wetlands under Costa Rican law.<sup>353</sup>
380. Now, Claimants have suddenly changed their argument to allege, "*INTA is the competent authority in Costa Rica charged with defining and identifying hydric soils.*"<sup>354</sup> There is no legal provision under Costa Rican law that gives INTA that competence. As explained in the Counter Memorial, INTA's regulations clearly state that its competencies are confined to the "*improvement and sustainability of the agricultural and livestock sector.*"<sup>355</sup>
381. While it is true that Costa Rica does not have a specific body dedicated to the determination of hydric soils for the determination of wetlands, the PNH, within SINAC, may rely on INTA to conduct soil studies for the determination of hydric soils. But, no regulation whatsoever gives INTA the authority to define and identify hydric soils in Costa Rica. In short, Claimants' characterization of INTA is wrong as a matter of Costa Rican law.

iii. *KECE's identification of wetland species on the Project Site*

382. Claimants insinuate that KECE's identification of wetland species on the First KECE Report is biased due to an alleged "*lack of references and citations.*"<sup>356</sup> This is incorrect, as is further clarified in the Second KECE Report, the list of species and classification of those occurring in wetlands was prepared by a botanist from the University of Costa Rica, with the identification of vegetative species occurring in wetlands based on literature documentation of habitat occurrence.
383. The Second KECE Report further explains that:<sup>357</sup>
- Given that there is not yet a regional vegetation classification system for Costa Rica that KECE could rely on, KECE had to undertake a classification done by local references;

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<sup>351</sup> Counter-Memorial, paras. 395-396.

<sup>352</sup> Claimants' Reply Memorial, para. 215.

<sup>353</sup> Baillie Report, para. 72.

<sup>354</sup> Claimants' Reply Memorial, para. 125.

<sup>355</sup> R-202, National Institute for Agricultural Innovation and Technology Transfer Law, 22 November 2001, Article 2.

<sup>356</sup> Claimants' Reply Memorial, para. 132.

<sup>357</sup> Second KECE Report, para. 137.

- Drs Calvo and Langstroth's classification system is questionable given that it assumes "species of the same genus would have the same status which is not valid" and, unlike KECE's lists, it was not reviewed by a local scientist to verify accuracy; and
- Drs Calvo and Langstroth's allegations that genera *Costus*, *Heliconia*, and *Calathea* are not wetland plants, has been found to be false based on the literature review of KECE's local botanist who identified these species as occurring in both wetland and upland areas.

384. Claimants also allege that KECE's indication of *Paspalum fasciculatum* as a wetland indicator should be undermined given Dr Baillie's assertion that it can also be "*found in pastures on imperfectly drained non-hydric soils.*"<sup>358</sup> Respondent has already explained how the identification of *Paspalum fasciculatum* on the area was not the only factor KECE took into account to determine wetland characteristics on the site.

385. Finally, Claimants refer to Mr Arce's critique of "*KECE's methodology for classification and errors in the categorization of tree species as exclusive to wetlands.*"<sup>359</sup> The Second KECE Report explains the irrelevance of Mr Arce's critiques for their overall assessment:

"The only comment [Mr Arce] provides is a technical critique on the scientific name and **wetland status on 1 of the 97 plant species referenced in the [First KECE Report].** [...] the botanist used an older reference manual [which is] **insignificant for the task at hand.**"<sup>360</sup>  
(emphasis added)

iv. *The impact of "public roads and drainage lines" on the Las Olas Ecosystem*

386. This is just one of Claimants' tactics to divert the Tribunal's focus on their illegalities to somebody else. First, the public roads in the vicinity of the Las Olas project were in place decades before Claimants purchased of the Las Olas property, and thus will not have altered the property conditions occurring at the time the Claimants chose to begin their development.

387. Second, the primary wetland impact identified at Las Olas is the filling and drainage of a deep depression in the southwest corner of the property (Wetland No. 1). Between the period of early 2009 - 2011 this wetland was filled with approximately one meter of dirt from the adjacent hill, and drained in order to create an area on which to develop a residential community. The impact included the installation of roads and utilities. It is outrageous that

<sup>358</sup> Claimants' Reply Memorial, para. 134.

<sup>359</sup> Ibid.

<sup>360</sup> Second KECE Report, para. 180.

the Claimants now argue that the conversion of this area from the deep depression, as shown on their pre-construction topographic maps to an area that Dr. Calvo now describes as gently sloping with a water management system moving water "orderly" offsite, is a result of maintenance of the adjacent roads.

388. Finally, it is noted that DeGA, beginning in 2010, began improvements to the drainage of the adjacent road; but it is also true that by this time Claimants had repeatably misled SETENA by insisting that no environmentally significant areas existed on the Las Olas property and, that by the start of the Municipality's improvements Claimants had significantly filled or drained Wetland No. 1.

v. *The interaction of the Las Olas Ecosystem with the Aserradero River Ecosystem*

389. Claimants mix very different issues when explaining "this critique" to the Second KECE Report. First, Claimants refer to Respondent's argument that, as part of the information Claimants' concealed from SETENA, was a proper identification of the impact of the Las Olas Project on the connected system of the Aserradero River.<sup>361</sup> Claimants allege that this argument lacks specificity.<sup>362</sup> It is not for Respondent to do what Claimants should have done back in 2007 when undertaking the EIA for the Condominium Site. Notwithstanding, both the Siel Siel Report and the Second KECE Report confirm the importance of such identification during the environmental clearance process before SETENA.

390. The Siel Siel Report also explains that this information should have been part of a proper biological survey conducted by a biologist:

**"[The chapter] did not indicate the proximity of, and the relationship between, the Aserradero creek and the Aserradero wetland. Nor did it mention the consequences on that protected, aquatic ecosystem of waste water discharges (even if treated), or of the alterations to the hydric regime of the property due to terracing works, changes in coverages (increases in nonporous areas), and increases in erosion, among others."**<sup>363</sup> (emphasis added)

391. KECE also confirms that these connections were not disclosed in Claimants' EV application for the Condominium site and should have been identified and assessed by specialized professionals:

"We found a Quebrada Aserradero occurring in three separate locations in the eastern portion of the Las Olas site as shown by KECE's wetland areas 6, 7, and 8. We strongly believe that the

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<sup>361</sup> Counter Memorial, para. 289.

<sup>362</sup> Claimants' Reply Memorial, para. 165.

<sup>363</sup> Siel Siel Report, para. 1.

identification and protection of these drainage ways is required under Costa Rican law, and that this required, at a minimum, that **the designation and protections applied by So+ Mussio to the Quebrada Aserrado on their master site plan be applied to these three identified eastern drainage ways as well as the other western wetlands which were not identified in the EV submittals.**"<sup>364</sup> (emphasis added)

392. Second, Claimants allege that KECE has failed to "*accurately or precisely*" describe the Las Olas site's interaction with the Aserradero River.<sup>365</sup> Claimants further allege that:

"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. **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.**"<sup>366</sup> (emphasis added)

393. This is incorrect. KECE explains that Wetlands Nos. 6, 7 and 8 are "*valleys with intermittent streams which form tributaries of the Aserradero River.*"<sup>367</sup> As such they protected as wetlands under the definition of wetlands in Costa Rica. KECE explains why Claimants' conclusions are wrong:

"We disagree with ERM and Baillie that these streams are not wet long enough to support the development of hydrophilic vegetation and hydromorphic soils.

These valleys have clearly defined thalwags (stream channels), they have seasonal flows, including periods of ponded water as documented by KECE as well as SINAC staff, they have a dominance of hydrophilic vegetation, and the presence of hydromorphic soils as identified by KECE and reported by Dr. Baillie."<sup>368</sup>

394. Finally, Claimants conveniently omit to mention that, Drs Calvo and Langstroth, their own experts, admit that Mussio Madrigal Arquitectos incorrectly identified Quebrada Aserradero traversing the east of the Project Site.<sup>369</sup> Mr Erwin agrees with Mr Mussio's wrong identification of the Quebrada Aserradero and states for accuracy that the correct location is at the northeast corner of the Project Site.<sup>370</sup>

f) Critique of the ERM Report

395. The ERM report identifies the existence of three depressional areas near the northeast corner of the property that have hydric conditions, confirming the existence of the three

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<sup>364</sup> Second KECE Report, para. 166.

<sup>365</sup> Claimants' Reply Memorial, para. 167.

<sup>366</sup> Ibid.

<sup>367</sup> Second KECE Report, para. 139.

<sup>368</sup> Second KECE Report, paras. 140-141.

<sup>369</sup> ERM Report, para. 16.

<sup>370</sup> Second KECE Report, para. 144.

wetlands on the Las Olas site. The fact that Drs Calvo and Langstroth admit this shows that Claimants provided inaccurate information to SETENA in 2007.

396. Among many other mistakes, the ERM Report:

- Did not consider the pre-project condition of Wetland No. 1 – thus only looked at current condition and did not evaluate if a wetland was present or impacted;
- Make the incorrect position that sensitive areas are considered and protected by the site plan;
- Acknowledges that they did not conduct any assessments related to documenting forest conditions onsite or review assessments conducted by others. Further, they acknowledge that their opinion did not specify the criterion on the definition of a forest pursuant to Costa Rican law. They also do not address the issue of tree cutting documented onsite or the legality of these acts, or the likely effect of this cutting on the forest system.

g) Critique of the Baillie Report

i. *Baillie's incorrect reliance on the Classification of Land Methodology*

397. Respondent has already addressed why under Costa Rican law and from the perspective of wetlands science, the Classification of Land Methodology is not an instrument intended for hydric soils determination.

ii. *Baillie's conclusion of no hydric soils on Wetland No. 1*

398. Dr Baillie found no hydric soils on Wetland No. 1. Dr Baillie confirms the INTA Report findings that the soil classification belongs to Class V and therefore, cannot be deemed hydric soils. In reaching this conclusion, Dr Baillie committed two critical mistakes: (i) he relied on the Land Classification Methodology to identify hydric soils and (ii) he assumed wrong fill depths, conducted shallow soil sample depth and failed to differentiate fill horizons and natural (pre-impact) soil horizons.

399. First, as explained above,<sup>371</sup> the Land Classification Methodology is not an instrument to determine hydric soils. KECE, Drs Perret and B. K. Singh and Mr Cubero, in his testimony at criminal trial, have each confirmed this. Notwithstanding, Drs Perret and B. K. Singh also conducted a soil survey under the Land Classification Methodology and have concluded that below the refill mat or layer that Claimants' placed on top of Wetland No. 1

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<sup>371</sup> See, section V.C.2.c)

since 2009 (the Green Roots report refers to it as "mantle"), the soils can be classified as belonging to Class VII, which falls under the "hydric soils" category of the Land Classification Methodology's:

"The limiting factors of this Class V soil management unit are: soil effective depth, poor drainage and risk of flooding. **This classification takes into account the mantle; if the mantle is not considered for the classification, the land use capacity shifts to Class VII due to soil effective depth less than 30cm.**"<sup>372</sup> (emphasis added)

400. Second, the Second KECE Report explains that Dr Bailie *"greatly downplays the amount of development impacts upon this area and significantly underestimates the amount of fill."*<sup>373</sup> Dr Bailie assumed a fill depth of only 40-50 centimeters.<sup>374</sup> However, KECE concluded that, *"the fill within this area would need to average at least one meter to create a level/drained base to support site development."*<sup>375</sup> KECE reached this conclusion after analyzing:<sup>376</sup>

- Aerial photography from 2005 and 2009 that shows construction activities began during 2008-2009 dry season including *"scraping and grading the area and building road base for the two east-west access roads."*
- Costa Rican agencies' reports documenting that from April 2009 through June 2010 construction activities including *"clearing/land grading, construction of roads, establishment of a house pad, excavation of drainage ditches and installation of electrical utilities."*
- Claimants' construction logs documenting that *"earthwork within this area continued for at least three years beginning by March 2009 and continuing through 2011."*
- KECE's second site visit, where bore holes field documents revealed fill depths exceeding 100 centimeters.
- Green Roots' site visit results which confirmed that the recent fill depth exceeds one meter.

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<sup>372</sup> Green Roots Report, p. 52.

<sup>373</sup> Second KECE Report, para. 89.

<sup>374</sup> Baillie Report, para. 56.

<sup>375</sup> Second KECE Report, para. 92.

<sup>376</sup> Second KECE Report, paras. 91-92.

h) SINAC, the competent authority to identify wetlands in Costa Rica, determined the existence of Wetland No. 1 in 2011

401. Claimants' allege KECE's conclusions to be *"post-hoc explanations."*<sup>377</sup> As part of the instructions KECE had to follow during the preparation of the First KECE Report was the *"assessment of the existence and condition of the wetlands and forest on the Claimants' property,"*<sup>378</sup> KECE was never instructed to determine whether a wetland existed on the Project Site in 2011, this was already determined by the competent authority to identify wetlands in Costa Rica, the PNH, as a body specialized in wetlands from SINAC.

402. Claimants rely on the First and Second Barboza Reports to allege that SINAC *"failed to provide evidence of the existence of hydric soil and hydrology."*<sup>379</sup> This is false. As noted in paragraphs 113 to 115 of the First KECE Report and in the PNH Report on Wetlands, SINAC did undertake a study of the soils to prepare its report. Claimants' omit to mention that Mr Cubero from INTA accompanied Mr Gamboa, the Coordinator of the PNH, during the site that originated the PNH Report on Wetlands. Just like Mr Cubero identified the *"presence of poorly drained soils with hydromorphic properties"* in the INTA Report,<sup>380</sup> the PNH Report embraced those findings and concluded that there were hydric soils on Wetland No. 1. Thus, it is not true, as Claimants point out, that SINAC did not provide *"evidence of the existence of hydric soil."* The PNH Report on Wetlands clearly mentions that it relied on the findings of INTA when the soil sampling was conducted on their joint site visit on March 16, 2011:

**"As part of soil sampling conducted by officials of [INTA], the presence of fills was detected in different sectors of the Palustrine Wetland, as well as the presence of hydromorphic soils characteristic of these ecosystems"**<sup>381</sup> (emphasis added)

403. Also, Claimants' allegation that SINAC *"failed to present any argument or evidence refuting INTA's findings,"*<sup>382</sup> is absurd. Mr Gamboa and Mr Cubero undertook a joint site visit on March 16, 2011. Mr Cubero undertook soil sampling and *"detected the presence of hydromorphic soils"* (as reported on the PNH Report on Wetlands). On March 18, 2011, after this site visit and when SINAC had undertaken a complete assessment of the conditions in Wetland No. 1, including the determination of hydric soils, Mr Gamboa issued the PNH Report on Wetlands that determined the existence of Wetland No. 1 on the Project Site. The INTA Report was issued almost two months later, on May 11 2011, and

<sup>377</sup> Claimants' Reply Memorial, para. 114.

<sup>378</sup> First KECE Report, para. 6.

<sup>379</sup> Claimants' Reply Memorial, para. 127.

<sup>380</sup> C-124.

<sup>381</sup> R-76, PNH Report on Wetlands (ACOPAC GASP-093-11), 18 March 2011.

<sup>382</sup> Claimants' Reply Memorial, para. 127.

reported the findings of a second site visit undertaken by Mr Cubero in April 2011. Then how could SINAC refute INTA's *ex post* findings?

404. Further, Claimants allege that KECE "*does not explain the failure of SINAC to apply its own law in determining a wetland in 2011.*"<sup>383</sup> In the First KECE Report, KECE explained how the PNH had identified the correct criteria to conclude the existence of Wetland No. 1 on the Project Site.

405. The PNH Report looked into hydric condition, hydric vegetation and hydric soils to conclude the existence of a palustrine wetland on the Project Site:

"[O]n the west side of the construction area for the model homes, there is a temporary non-tidal Palustrine Wetland, **with a shallow water table due to hydromorphic soil present in the area, with the dominance of grasses, palms and some bushes.**

[...]

As part of soil sampling conducted by officials of [INTA], the presence of fills was detected in different sectors of the Palustrine Wetland, as well as **the presence of hydromorphic soils characteristic of these ecosystems**"<sup>384</sup> (emphasis added)

406. KECE also explained that the INTA Report identified "anaerobic evidence" and "described the sampled area as having wetland characteristics such as location, surface water inputs, poor drainage, anaerobic soil process and having severe limitations for agriculture and development use due to climatic and drainage limitations."<sup>385</sup> According to KECE, these findings supported SINAC's determination on the existence of a wetland under the PNH Report on Wetlands.

407. Notwithstanding, those findings indicating the existence of a wetland, in its second site visit in April 2011, INTA also undertook a soil survey using the USDA Methodology and the Land Classification Methodology. INTA reached the conclusion that the soil on Wetland No. 1 was not hydric because the soil appeared to be classified as Class V and not Class VII or VIII under the Land Classification Methodology. Respondent has already explained that scientifically, the Land Classification Methodology is not an instrument intended to identify hydric soils, so INTA's conclusion could not be regarded as definitive for the existence of wetlands. Moreover, SINAC had already concluded the existence of wetlands after the determination of hydric soils on the joint site visit undertaken by SINAC and INTA on March 18, 2011.

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<sup>383</sup> Id., para. 120.

<sup>384</sup> R-76, PNH Report on Wetlands (ACOPAC GASP-093-11), 18 March 2011.

<sup>385</sup> First KECE Report, paras. 114-115.

i) Claimants, not Costa Rica, refilled and drained Wetland No. 1

408. In an attempt to escape liability for the impact sustained on Wetland No. 1, Claimants criticize KECE's findings on the impact to Wetland No. 1 for not taking into account "*the impact on public roads on the Project Site*" such as the installation of culverts by public authorities and drainage lines maintained by the town.<sup>386</sup>

409. Both SINAC and INTA Reports on wetlands documented **Claimants' refilling of Wetland No. 1.**

410. The PNH Report on Wetlands describes Claimants' employees conducting construction and on the site when the visit took place:

The Palustrine Wetland...**is being directly affected by the construction of a drainage canal and sewerage, which will be connected to a sewage system outside of the inspection area**, in a public zone, and which drains in the edges of the Estero Aserradero wetland around 450 meters away from the inspection site.  
**During the time of the inspection, machinery was undertaking moving earthworks and placement of the sewage system on the drainage canal to the wetland was found ongoing. The drainage works, constructions of access ways and fillers have affected the natural dynamics of the wetland.**<sup>387</sup> (emphasis added)

411. Mr Cubero himself testified as to the existence of **draining** on the site when he visited it on March 2011:

"Well, there were drainage works, they were doing drainage works in the previous visit."<sup>388</sup>

412. Claimants rely on Dr Baillie's conclusions that "*floor fill may predate the site*" and possible impact of public roads.<sup>389</sup> As KECE explain, Dr Baillie does not exclude that wetland soils existed on this area prior to Claimants' construction works.<sup>390</sup> Dr Baillie himself admits that works have been conducted within "Bajo B1" / Wetland No. 1:

"Earthmoving works in the valley include: the construction of the road by the municipality; excavation of a drain; construction of a house; and slight raising of the valley floor with shallow fill from adjacent hills."

413. Claimants and their experts further rely on INTA's conclusion that the filling of the wetland occurred over a period of time due to land use.<sup>391</sup> As explained in the First KECE Report,

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<sup>386</sup> Claimants' Reply Memorial, para. 150.

<sup>387</sup> R-76, PNH Report on Wetlands (ACOPAC GASP-093-11), 18 March 2011.

<sup>388</sup> C-272.

<sup>389</sup> Claimants' Reply Memorial, paras. 149-150.

<sup>390</sup> Second KECE Report, para. 85.

<sup>391</sup> C-124.

INTA reached this conclusion without analyzing topographic information and Costa Rican agencies' reports which documented Claimants' impacts since March 2009.<sup>392</sup>

### 3. Claimants' alleged "maintenance works" impacted a forest

414. In 2007, when Claimants applied for the EV for the Condominium site, Claimants were under the obligation to inform SETENA of the physical conditions of the Project Site, amongst them, the existence of a forest. Claimants never engaged a forestry engineer to determine whether there was a forest that needed protection from the intended development. By concealing this valuable information from SETENA, Claimants obtained the EV for the Condominium site on June 2, 2008.<sup>393</sup>
415. As early as March 2009, and without having any permits to cut any trees, Claimants engaged in the clearing of the forest (and refilling of a wetland) as shown in the aerial photography 2005-2009 provided by KECE.<sup>394</sup>
416. In December 2010, SINAC officers inspected the Project Site on various occasions. The officials reported, in addition to the refilling of a wetland, impacts to what seemed to be a forest. As a result of those visits, SINAC filed a criminal complaint against Claimants for environmental damage to wetlands and forests.<sup>395</sup> Based on this complaint, Mr Martínez requested SINAC to undertake a technical survey to determine whether a forest existed on the Project Site. On a report dated July 7, 2010, SINAC reported selective tree clearing within 7.5 hectares of a forested area.<sup>396</sup>
417. Claimants engaged in illegal felling activities lasting until October 2011, when a neighbor of the community called SINAC's office in Parrita to complain about the clearing of trees taking place at the Project Site. SINAC officers immediately visited the site and prepared a report which concluded that the area of forest affected was of 2.06 hectares.<sup>397</sup> Claimants repeat in their Reply Memorial how any works related to the clearing of vegetation were just related to "*maintenance work in order to keep the land manageable.*"<sup>398</sup> However, the October 2011 SINAC Report clearly showed the illegal cutting, burning and covering up of the trees:

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<sup>392</sup> First KECE Report, para. 117.

<sup>393</sup> C-52.

<sup>394</sup> Second KECE Report, Appendix F.

<sup>395</sup> R-66, Criminal complaint filed by SINAC (ACOPAC-CP-015-11-DEN), 28 January 2011.

<sup>396</sup> C-134.

<sup>397</sup> R-264, October 2011 SINAC Report (ACOPAC-CP-129-2011-DEN), 3 October 2011.

<sup>398</sup> Claimants' Reply Memorial, para. 180.



418. It comes to as no surprise, then, that Claimants' wrongdoing ended in the filing of criminal charges against Mr Damjanac for illegal exploitation of a forest. Claimants had the opportunity to challenge SINAC's findings at the criminal proceedings. A final judgment has not been reached on this matter.

419. In the end, all of the environmental enforcement proceedings that took place, including the cessation of works, could have been avoided from the beginning if Claimants:

- conducted a technical survey to identify the forest present on the site;
- identified the existence of a forest on their EV application in 2007;
- proposed measures to protect those areas from the intended development; and
- obtained the adequate permits from SINAC to cut trees, to the extent it was legally possible.

420. In particular, the Siel Siel Report explains that if Claimants would have undertaken their good faith duties as developers under Costa Rican law and acted in accordance with the precautionary principle, the impact to the forest would have been avoided:

"The whole discussion regarding the existence of a forest and especially the damage caused to that ecosystem could have been avoided with the proper characterization of the different vegetative associations and a design respectful of the ecosystems on the site, particularly of those with special conservation value, such as forests and wetlands."<sup>399</sup>

421. In effect, Claimants had the obligation to evidence the non-existence of a forest in the Project Site. One of the effects of the application of the precautionary principle is the

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<sup>399</sup> Siel Siel Report, para. 64.

shifting of the burden of proof.<sup>400</sup> The shift of the burden of proof is expressly recognized in Article 109 of the Biodiversity Law:

"The burden of proving the absence of contamination, degradation or non-allowed affectation is on the applicant requesting an approval, permit or access to biodiversity, or on the person who is accused of having caused environmental damage."<sup>401</sup>

422. Accordingly, it is neither SINAC's nor SETENA's responsibility to attest to the non-existence of a forest in the first place; rather it is an obligation of the developers under Costa Rican law to provide evidence in this regard when they request approval of the environmental impact assessment before SETENA.
423. Claimants rely on to Mr Arce's witness statements to undermine the credibility of (i) the DeGA reports that documented Claimants' clearing of trees on the Project Site since March 2009 and (ii) the SINAC reports that found a forest on the Project Site and further illegal tree-clearing activities in 2011. Mr Arce's personal opinions, in no way, can be a basis to challenge the findings of Costa Rican official reports.
- a) *Mr Arce's "critiques" of Ms Vargas' reports documenting Claimants' impacts to a forest since 2009*

424. Mr Arce's critiques against Ms Vargas' reports are twofold: (i) they relied on the neighbors' observations, who had no scientific or technical background and (ii) based on Ms Vargas' observations who has "no expertise in forestry topics."
425. As to the first, under the precautionary principle, Ms Vargas had a legal duty to carry out an internal proceeding and involve the competent authorities, regardless of whom the complainant was or their technical qualifications. As Ms Vargas herself explains:

**"The neighbors are in their full right to denounce those acts that they consider to be contrary to environmental regulation and that could lead to environmental damage.** It is the role of DeGA to follow suite to these complaints and direct them to the competent authorities to verify their merit. This is the reason why the DeGa solicited reports from the competent authorities such as the MINAE and the TAA to be able to pronounce itself about the complaints of there being wetlands and forests at the site of the project.

**"Furthermore, in Costa Rica, every person has the right to present a complaint and public institutions have *the* obligation to follow suite. In the case of DeGA, any complaint implying the possibility of an environmental impact has to be dealt with, regardless of who the claimant is, and if he does or does not have any scientific or technical competence. The contrary would be a breach of the right of the people of Costa Rica to live in a healthy environment, as**

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<sup>400</sup> See, section III.C.3.b)

<sup>401</sup> C-207, Article 109.

**established in Article 50 of the Political Constitution of Costa Rica.**"<sup>402</sup> (emphasis added)

426. As to the second point, regarding Ms Vargas' "lack of expertise in technical forestry issues," it is clear from Ms Vargas' witness statement that she never categorized any area as a wetland or a forest. Her lack of technical or scientific expertise is exactly the reason why she contacted SINAC and the TAA to initiate the corresponding investigations regarding the existence and impacts to wetlands and forest on the Project Site:

"My report is not, and I never intended for it to be, a technical categorization of the area. It was simply a report about what was taking place at the project site. A declaration from MINAE, as the body responsible for undertaking technical assessments – and so often mentioned by Mr Arce – was requested. Furthermore, I repeat that neighbors do not have to present technical or scientific facts for DeGA to investigate circumstances that, *prima facie*, are possibly in violation of environmental regulations. The investigation that looks to technical and scientific criteria relating to the breach of environmental regulations is carried out later by the competent authority, which in this case was SINAC-MINAE."<sup>403</sup>

427. In the end, the competent authority to determine the existence of forests in Costa Rica, SINAC, confirmed not only Ms Vargas' observations but also the "non-technical complaints" from the neighbors. KECE has also confirmed that the facts documented on the reports prepared by Ms Vargas were accurate:

"We feel that the reports provided by Ms. Vargas are extremely valuable in identifying the time frame and types of construction activities occurring on the Las Olas Ecosystem, which we have independently confirmed through a review of aerial photography from 2009, 2010, and 2011."<sup>404</sup>

428. Mr Arce's biased critique of the April 2009 DeGA Report is evident from the following statement:

"In this context, regarding Ms. Vargas's report, in particular figure 4, which is accompanied by the legend "Forest in the background," it is not technically correct to state that the area in question is a forest, since there is no evidence whatsoever to determine that the legal requirements are met for such a conclusion, and from an examination of figure 4 no forest can be observed, and there are no signs of burning."<sup>405</sup>

429. As Ms Vargas explains, it seems like Mr Arce just looked at the black and white photographs submitted by Claimants and not to the color photographs submitted by Respondent to arrive to such ridiculous conclusion:

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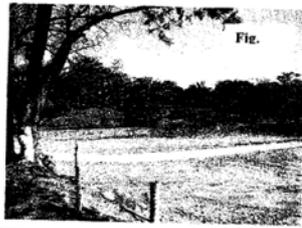
<sup>402</sup> Second Witness Statement of Mónica Vargas, paras. 16-17.

<sup>403</sup> Id., para. 88.

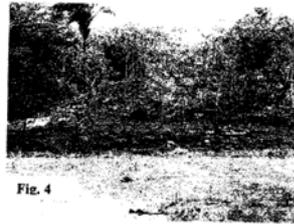
<sup>404</sup> Second KECE Report, para. 163.

<sup>405</sup> Second Witness Statement of Minor Arce, para. 18.

Images submitted by Claimants:



Figuras 3. Zona de relleno, Esterillos Oeste, 2009.



Figuras 4. Obsérvese la quema de bosque al fondo, Esterillos Oeste, 2009

Images submitted by Respondent:



Figuras 3. Zona de relleno, Esterillos Oeste, 2009.



Figuras 4. Obsérvese la quema de bosque al fondo, Esterillos Oeste, 2009

"Clearly any lay person without any scientific or technical competence, that Mr Arce so insists upon applying, would be able to acknowledge that the dark soil cover corresponds to the burnt area and that the grey areas correspond to the ashes, by product of the burning. If Mr Arce were to be interested in the truth about the events, he would allow for the possibility that there is proof of the burning and the forest, and would rather look for its causes, instead of justifying against all odds a defense without sustenance, turning his back to the precautionary principle and the principles of his profession that he so defends."<sup>406</sup>

430. Mr Arce further alleges not seeing any of the tree-clearing or burning that DeGA's reports documented. The Second KECE Report explains why, Mr Arce "did not see the same conditions" of the Project Site in his post-hoc September 2010 visit:

"The fact that Mr. Arce did not see the same conditions in September 2010 as Ms. Vargas saw in April of 2009 is clearly based on the period of more than a year between these inspections in which time most of the area had been cleared, graded, and drained prior to Mr. Arce's first visit."<sup>407</sup>

<sup>406</sup> Second Witness Statement of Mónica Vargas, para. 91.

<sup>407</sup> Second KECE Report, para. 165.

b) Minor Arce's forestry conclusions

431. Claimants allege that they relied on the "sound" advice of Mr Minor Arce to engage in the felling of trees. In their Memorial, Claimants referred to the "*multiple site visits*" that Mr Arce conducted before concluding in a September 2010 report that the Las Olas Project did not contain a forest.<sup>408</sup> However, Mr Arce in his first witness statement only refers to **one visit** conducted prior to this September 2010 report.<sup>409</sup>

432. Claimants also rely on Mr Arce's opinion to discredit SINAC's findings of a forest on the site in July 2011.<sup>410</sup> The Second KECE Report explains that Mr Arce's statements questioning the validity of the measurements "*aside from being solely augmentative, are irrelevant.*"<sup>411</sup> KECE explains:

"Based on the type and time of the inspection, the observation of any active tree cutting, regardless of size, would be valid evidence of illegal activity on the site. The land owner had no permits for tree clearing, the area had previously been determined to be a forest by SINAC, and works at the Las Olas site had been paralyzed pursuant to injunctions."<sup>412</sup>

433. In conclusion, Claimants are not correct to argue what SINAC (the specialized and competent entity to determine forests in Costa Rica), determined in its July 7, 2011 report was mistaken.

c) Claimants' critique of KECE's forestry conclusions

434. The main allegation Claimants make against KECE's forestry conclusions in the First KECE Report is based on a mischaracterization of paragraph 182 in his report. Claimants state that KECE "*acknowledges that 'in 2007-2008...the property was identified as an abandoned agricultural area with scattered trees'*" and that KECE acknowledged that "*in 2008 the site was not forested.*"<sup>413</sup> This is false. KECE has never acknowledged that that was the condition of the property in 2007 or 2008. Mr Erwin explains what that paragraph was intended to mean:

"[W]e never found that the land was not forested at the time of the EV application. The statement they used to make this assertion was our identification of statements by the Claimants of their assessment of the property which identified the land as abandoned agricultural lands. The application of the EV had insufficient information to support the finding of no forest may have existed."<sup>414</sup>

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<sup>408</sup> Claimants' Memorial, para. 184.

<sup>409</sup> First Witness Statement of Minor Arce, paras. 13-15.

<sup>410</sup> Second Witness Statement of Minor Arce, para. 39-42.

<sup>411</sup> Second KECE Report, para. 177.

<sup>412</sup> Ibid.

<sup>413</sup> Claimants' Reply Memorial, paras. 155, 161.

<sup>414</sup> Second KECE Report, para. 36(a).

435. Also, Claimants allege that KECE's findings of no forests in Claimants' EV submission are "disingenuous" given that *"the site's natural tendency is to revert to a forested area if left untouched."*<sup>415</sup>
436. Further, Claimants criticise KECE's conclusion that the Project Site *"may be considered forested"* without having undertaken a qualitative assessment of tree density and "dhb" is *"hyperbolic."*<sup>416</sup> In the Second KECE Report, Mr Erwin clarifies that KECE did not collect data to verify the condition of the forest at the Las Olas site in 2016 because it would be invalid to use to challenge or support the data collected by SINAC officials in 2011, which was one of the purposes of their assessment in the first place.<sup>417</sup>
437. Finally, Claimants rely on Mr Arce's photointerpretation, which allegedly shows *"absence of even a secondary forest at the material time."*<sup>418</sup> KECE has reviewed such assessment and found that:<sup>419</sup>
- For his conclusion that from 2002 to 2009 the property is pasture with isolated trees and trees grouped together, Mr Arce does not provide an idea of the progression and size of those groups of trees and does not discuss the reduction in trees and clearing works illegally undertaken by Claimants starting March 2009.
  - For his conclusion of the presence of natural regeneration in 2012, Mr Arce (i) does not provide any evidence of the size of these denser blocks of natural regeneration or if any are approaching 2 hectares; (ii) does not consider SINAC's determination in 2011 SINAC that a 7.5-hectare area was identified as a forest in the eastern portion of the site; (iii) does not consider the effects of construction works of internal roads.
  - For his conclusion that from 2013 and 2016, the vegetation growth is not sufficiently consolidated to be considered a forest, does not consider the presence of squatters and the apparent reduction in tree density from 2013 to 2016 and areas of dense vegetation are not assessed as to area and if they are at or above 2 hectares.
438. KECE also undertook a similar analysis based on aerial photography of different dates and reaches different conclusions regarding the likelihood of forest areas at the Las Olas site.

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<sup>415</sup> Claimants' Reply Memorial, para. 157.

<sup>416</sup> Id., para. 160.

<sup>417</sup> Second KECE Report, para. 34.

<sup>418</sup> Ibid.

<sup>419</sup> Second KECE Report, paras. 182-184.

4. **Claimants kept performing works in spite of the multiple injunctions issued by Costa Rican agencies**

a) Claimants admit not complying with the SINAC Injunction

439. In their Memorial, Claimants admitted that they did not comply with the SINAC Injunction because they were "advised" by their legal advisors that it had "no legal effect."<sup>420</sup> As will be explained below,<sup>421</sup> Claimants received no legal advice whatsoever.

440. In order to divert the Tribunal's attention from this fact, Claimants argue that the injunctions did not follow "applicable procedures in breach of Costa Rican law."<sup>422</sup> First, Dr Jurado has confirmed that the SINAC Injunction was completely legal and issued according to law:

"In cases where there is a risk of serious and irreversible damage to the environment, **SINAC has an obligation to act preventively and to present the complaint to the Environmental Prosecutor's Office or the Environmental Administrative Tribunal**, based on the scope of activity and the damage. The power of SINAC to impose interim measures flows from environmental law and the guiding and universal precautionary principle. Therefore, **it should be clarified that the deadline of 15 days between the filing of interim measures and a main process that would implicate Mr Ortiz does not apply in the case of SINAC, as its application is flexible in light of the objectives and public interest protected under environmental law.**"<sup>423</sup> (emphasis added)

441. Second, Claimants' arguments lack any relevance to the simple fact that they performed works knowing that they were doing so in complete disregard of the mandatory effects of the SINAC Injunction.

442. Claimants also try to hide their wrongful conduct by relying on Mr Bermúdez, who states that:

"As my bi-monthly reports **between April and November show, there were no construction works on the site at that time – only minor maintenance works on the already constructed roads and access routes to prevent adverse environmental effects, such as planting of vegetation and sedimentation control works.**"<sup>424</sup> (emphasis added)

443. This is completely false and can be disproved by Claimants' construction logs as well as for Mr Bermúdez own bi-monthly reports. Minute # 2 of the Construction Log reports that by April 4, 2011, the following works were taking place on the Project Site:<sup>425</sup>

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<sup>420</sup> Claimants' Memorial, para. 139.

<sup>421</sup> See Section VIII.A.3.

<sup>422</sup> Claimants' Reply Memorial, para. 292.

<sup>423</sup> Second Witness Statement of Julio Jurado, para. 106.

<sup>424</sup> Second Witness Statement of Esteban Bermúdez, para. 19.

<sup>425</sup> R-509, Minute of inspection # 2, April 4, 2011.

- Earthworks movements continue in Street No. 1;
- Works on the slopes of lots in Street No. 1; and
- Works on the channelization of water in Easement No. 7.

444. Minute # 3 of the Construction Log reports that by April 12, 2011 works continued in Street No. 1 and Easement No. 7 plus the installation of a valve cover for the cobblestoned street:<sup>426</sup>

OBRAS EN SERVIDUMBRE N° 7.



DETALLE DE TAPA DE VALVULAS EN CALLE DE ADQUINES.



445. These types of works cannot qualify at all as "maintenance works" as Mr Bermúdez affirms.

446. Minute # 4 of the Construction Log reports that by April 18, 2011 works continued in the water easements of Street No. 7 and Easement No. 7:<sup>427</sup>



447. Minute # 6 of the Construction Log dated May 2, 2011, reports that during that week ditching works will start in the upper part of the slopes and reports earthworks on Street No. 5:<sup>428</sup>

<sup>426</sup> **R-510**, Minute of Inspection # 3, April 12, 2011.

<sup>427</sup> **R-511**, Minute of Inspection # 4, April 18, 2011.

<sup>428</sup> **R-512**, Minute of Inspection # 6, May 2, 2011.



448. In the same way, DEPPAT's bi-monthly report for April – May 2011, reported earthworks from the site visit conducted on May 13, 2011:<sup>429</sup>

7. Las actividades de movimientos de tierra en el proyecto consisten la realización de corte y relleno del terreno, es decir el material excavado para realizar los cortes del camino, se utiliza en el mismo sitio o en otros sectores de la propiedad como material para la conformación de rellenos y taludes. De esta forma, no se requiere el traslado ni movilización de material de corte hacia sectores externos.

b) *Claimants did not comply with the SETENA Injunction*

449. Contrary to what Costa Rican agencies' reports documented, Claimants rely on the self-serving witness statement of Mr Damjanac to deny that after they were notified of the SETENA Injunction, they "*immediately ceased all construction at the project site.*"<sup>430</sup>

450. The truth is, once again, Costa Rican agencies' reports documented that the illegal works kept being performed in spite of the notification of the SETENA Injunction to Claimants:

451. First, on May 11, 2011, Municipality officers went to the Project Site to notify Claimants of the SETENA Injunction. The report clearly recounts that at 9:30am, Mr Damjanac refused to receive the notification so that around 11:50am the Public Force came to the site to enforce the service of process:<sup>431</sup>

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<sup>429</sup> C-120.

<sup>430</sup> Claimants' Reply Memorial, para. 291.

<sup>431</sup> C-125.

El proyecto fue notificado en primera instancia al señor Jovan Damjanac quien se presentó ante los notificadores como Jovan, esta es la persona que atiende en la oficina del proyecto ubicada en Esterillos Oeste y es la misma persona que ha atendido siempre las visitas de los representantes de la municipalidad, también es la misma persona que se ha presentado ante la Municipalidad a realizar trámites de permisos de construcción. Esta persona fue el único representante del proyecto presente en el momento de la notificación y SE NEGÓ RECIBIR LA NOTIFICACIÓN.

Los notificadores Municipales Gerardo Godínez Chinchilla y Alexander Elizondo, solicitaron la presencia policial y en presencia de los oficiales de la Fuerza Pública Mauricio Quesada Mora y Mario Vargas Álvarez le entregaron al señor Jovan Damjanac quien se identificó solamente como Jovan la notificación Municipal.

El proceso de notificación arrancó a las 9:30 del día 11 de Mayo de 2011 cuando los notificadores se presentaron en la oficina del PROYECTO CONDOMINIO HORIZONTAL LAS OLAS y culminó a las 11:50 am del mismo cuando en presencia policial se hizo entrega al señor Damjanac de la resolución de SETENA y la disposición Municipal.

452. Mr Damjanac has denied these facts calling them "*an absurd allegation*" and stating that he has "*never refused to sign [his] acknowledgement of reports*" that he actually received.<sup>432</sup> As Ms Vargas states in her witness statement, Mr Damjanac is not only accusing the Municipality officers of lying but also the Police of Parrita.<sup>433</sup>
453. The facts show Mr Damjanac not only refused to receive the SETENA Injunction on May 11, 2011 but on other occasions, he argued with local officers because he denied signing his acknowledgment of Costa Rican agencies' reports. For instance:
- On July 8, 2011, the Municipality notified Claimants of the problems caused by Claimants' construction of its draining system (which was actually draining Wetland No. 1), a handwritten note by the officers on the notification states that Mr Jovan Damjanac told them that "he could receive the document but could not sign it";<sup>434</sup>
  - On August 10, 2011, Municipality officers came to the Las Olas offices to deliver some documents and Mr Damjanac told them that, under instructions of Mr Sebastián Roldán Vargas, he could not sign any acknowledgement;<sup>435</sup> and
  - On December 12, 2011, as a SINAC report recounts, Mr Damjanac refused to receive the notification and it was only after several discussions with him that SINAC officers were able to serve Claimants with the document.<sup>436</sup>
454. Clearly, Mr Damjanac's allegations lack any credibility in that "*he never refused to acknowledge any document.*"

<sup>432</sup> Witness Statement of Jovan Damjanac, para. 21.

<sup>433</sup> Second Witness Statement of Mónica Vargas, para. 117-120.

<sup>434</sup> R-110, Municipality notifies Claimants of complaints of neighbors and requests documentation (OIM 244-2011), 8 July 2011.

<sup>435</sup> R-396, Mr Damjanac's refusal to acknowledge receipt of Municipality report, 11 August 2011.

<sup>436</sup> R-395, Mr Damjanac's refusal to acknowledge receipt of SINAC report, 13 December 2011.

455. Second, on May 12, 2011, one day after being notified of the SETENA Injunction, the Municipality reported that Claimants were still performing works on the Project Site.<sup>437</sup> In paragraph 346 of the Counter Memorial, Respondent inserted a picture of the backhoe as documented in the Municipality record. Claimants, argue that those pictures do not show any evidence of ongoing works because *"the [machines] were not active"*:

"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.**"<sup>438</sup> (emphasis added)

456. Again, Claimants rely on Mr Damjanac's (now discredited) testimony, which contradicts further contemporaneous written reports which also documented Claimants non-compliance with the SETENA Injunction:

- On May 18, 2011, seven days after the notification, SETENA officers reported once again that works were still being conducted;<sup>439</sup> and
- On June 9, 2011, almost one month after the notification, the Municipality reported that works were being performed on the Easements and other lots site.<sup>440</sup>

457. Third, if Costa Rican agencies' reports were not "sufficient evidence" of Claimants disregard for the SETENA and SINAC Injunction, it is instructive that Claimants' own advisor, Mr Bermúdez, also reported in his bi-monthly report for April – May 2011 the presence of heavy machinery on the Project Site:<sup>441</sup>

10. El equipo que se utiliza actualmente en el sitio está constituido por maquinaria pesada, como tractores tipo retroexcavadora y herramientas manuales típicas de un proceso constructivo. No se observaron en el sitio evidencias de fallas mecánicas o fugas de aceite provenientes de estos equipos, los cuales cabe señalar se mantienen en el sitio únicamente cuando están realizando alguna obras, es decir no se cuenta en el sitio con un área para estacionamiento o mucho menos reparaciones de este tipo de equipo, ya que eso se realiza en sectores externos al proyecto.

458. Claimants' desperate attempts to deny their wrongdoing by challenging official reports from Costa Rican agencies are baseless, and instead, bring into question the credibility and veracity of Claimants' witness testimony.

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<sup>437</sup> R-270, Inspection Report of works being on the Project site, 12 May 2011.

<sup>438</sup> Claimants' Reply Memorial, para. 103(d).

<sup>439</sup> R-97, SETENA Inspection Report, 18 May 2011.

<sup>440</sup> R-103, Inspection Report by the Department of Inspectors to the Social and Urban Development Manager, 10 June 2011.

<sup>441</sup> C-120.

**D. Claimants' illegalities during the operation of the Concession**

459. Claimants' acquisition and operation of the Concession infringed Costa Rican law and, as a result, Claimants are barred from seeking any protection under DR-CAFTA.
460. However, in the event that the Tribunal considers that Claimants possess any rights over the Concession, Claimants' illegalities committed during the Concession bar them from pursuing any claims over the Concession or the Concession site.
461. Claimants dedicate only three paragraphs of their Reply Memorial to address the illegalities they committed during the operation of the Concession.<sup>442</sup> Further, Claimants have not submitted any evidence of compliance, except for a report that shows some payments made to the Municipality in 2013.
462. In the next sections, Respondent addresses each of the illegalities Claimants committed during their operation of the Concession.

**1. Claimants' constant violations of the 51% ownership rule**

463. Not only Claimants' acquisition of the Concession violated the 51% ownership rule, but during their ownership Claimants have breached the provisions of articles 31, 47 and 53 of the ZMT Law because during several periods of time, Mr Aven, a foreigner, owned the totality of the shares in La Canícula.
464. First, the Trust was not created by Esquivel & Asociados S.A. as Mr Aven affirms in his Second Witness Statement,<sup>443</sup> the Trust was created by Mr Aven, in his sole name, as trustor, to transfer the totality of shares he held in La Canícula, to a trust which was to be administered by Banco Cuscatlán de Costa Rica S.A., acting as trustee.<sup>444</sup>
465. Banco Cuscatlán de Costa Rica S.A. was never the owner of the shares of La Canícula. As a mere trustee, Banco Cuscatlán de Costa Rica S.A. only acted as a manager for the trust but did not exercise any property rights over the subject matter of the trust: the shares in La Canícula. According to articles of the Commerce Code, a trustee has fiduciary duties that he owes to the trustor and beneficiaries, but does not hold any property rights over the subject matter of the escrow.<sup>445</sup>

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<sup>442</sup> Claimants' Reply Memorial, paras. 296-298.

<sup>443</sup> Second Witness Statement of David Aven, para. 37

<sup>444</sup> C-237, First Recital and Clause 1.

<sup>445</sup> **R-393**, Commercial Code's provisions on trusts, Article 644, 27 July 1964.

466. Mr Aven further asserts that "[he] was one of the Trust Beneficiaries under the agreement."<sup>446</sup> A simple reading of Clause No. 1 of the Trust Agreement reveals that the actual beneficiaries of the trust were Mr Carlos Monge and Pacific Condo Park S.A., the original sellers of the properties under the Option Agreement. As beneficiaries of the trust, Mr Monge and Pacific Condo Park S.A. were entitled to payment for the sale of the properties.
467. Second, during the period between the termination of the Trust Agreement, April 30, 2003 and the alleged agreement with Ms Murillo, on March 8, 2005, Mr Aven was the owner of the totality of the shares in La Canícula in violation of the ZMT Law. Claimants have conveniently omitted to explain who the owner of La Canícula was during this period. Claimants vaguely express that "*the Claimants ensured that at all times, a Costa Rican national held the requisite 51% of the shares in La Canícula.*"<sup>447</sup> To support that allegation, Claimants submit an "agreement," dated March 8, 2005, which allegedly proves that since that date, Ms Murillo has owned 51% of the Concession (the "**2005 Agreement**").<sup>448</sup>
468. The authenticity of this "agreement" is questionable for the following reasons. First, in their first submission, Claimants submitted as proof of ownership of the Concession another "agreement" between Mr Aven and Ms Murillo dated May 10, 2010 under which the parties agreed to make Ms Murillo the owner of 51% of the shares in La Canícula (the "**2010 Agreement**").<sup>449</sup>
469. Second, the 2010 Agreement does not make any reference to the 2005 Agreement and neither does it explain why this agreement was entered into in 2010, if the parties had already agreed with Ms Murillo that she would act as the shareholder of 51% of La Canícula back in 2005. It makes no sense why Claimants had to enter into a second agreement in 2010, if since March 8, 2005, it was understood that Ms Murillo was going to hold the agreed percentage in the Concession. Moreover, no explanation has been provided why Claimants disclose the 2005 Agreement in their Reply Memorial and not in their November 27, 2015 submission.
470. Third, Claimants not only refused to disclose the 2005 Agreement with the Claimants' Memorial on November 27, 2015 but also during the document production stage that took place from April 2016 through July 2016. It was only because Claimants were ordered by the Tribunal to produce "*proof of the date of the transfer of shares in La Canícula to Ms*

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<sup>446</sup> Second Witness Statement of David Aven, para. 37.

<sup>447</sup> Claimants' Reply Memorial, para. 337.

<sup>448</sup> C-242.

<sup>449</sup> C-65.

*Paula Murillo*<sup>450</sup> that Claimants suddenly produced the 2005 Agreement and disclosed it to Respondent.

471. Finally, the 2005 Agreement does not even show the actual date when Ms Murillo signed the document and agreed to its terms.
472. All of these inconsistencies in Claimants' explanation of their ownership of the Concession show that Claimants were actually trying to cover up their non-compliance with the rules applicable to the Concession under the ZMT Law. In short, Mr Aven held 100% of the shares in La Canícula (i) when he acquired from Mr Monge (as Claimants admit); and (ii) after the extinction of the Trust Agreement and the date when they were transferred to the other Claimants and Ms Murillo. Such a holding violates Costa Rican law.

## 2. Claimants' failure to pay the Concession's fees

473. While Claimants submit proof of some payments made to the Municipality in 2013,<sup>451</sup> Claimants conveniently fail to show the outstanding payments owed to the Municipality since 2009. A report from the Municipality dated August 31, 2016 shows that, to date, Claimants owe the Municipality 133,202,335 colones, being approximately US\$ 241,228.<sup>452</sup>

474. First, Mr Aven blatantly denies having ever received a complaint from the Municipality regarding Claimants non-compliance with the Concession's rules:

"The Respondent similarly accuses me and the other Investors of failing to comply with the rules that apply to the Concession. This is the first time that Costa Rica or its governmental authorities have lodged such scurrilous allegations that have no basis in the truth, regarding compliance with the Concession terms I suspect that this is one of the smoke screens that the Respondent is using to distract attention away from its illegal conduct and treaty breaches. [...]"

Prior to reading Costa Rica's Counter Memorial, I never received any notice in regards to any issue with Las Olas' compliance with the Concession's terms"<sup>453</sup> (emphasis added)

475. The facts reveal a different story. Claimants were notified by the Department for the Terrestrial Maritime Zone of the Municipality (the "**ZMT Department**") of their constant non-payments on at least 11 occasions during the last 12 years:

- On February 2, 2004, the ZMT Department notified Claimants of an outstanding payment of 839,100 colones and advised Claimants that "failure to pay the fee of a concession is a ground to initiate a process to cancel it,"<sup>454</sup>

<sup>450</sup> Tribunal's decision to Respondent's Request No. 2.

<sup>451</sup> C-269.

<sup>452</sup> **R-303**, La Canícula's outstanding payments to the Municipality, 12 September 2016.

<sup>453</sup> Second Witness Statement of David Aven, paras. 33-34.

- On May 26, 2009, the ZMT Department notified Claimants of outstanding payments for the fee on the Concession of 16,459,680 colones;<sup>455</sup>
- On January 12, 2010, the ZMT Department notified Claimants of outstanding payments for the fee on the Concession of 32,919,360 colones;<sup>456</sup>
- On June 18, 2010, the ZMT Department notified Claimants of outstanding payments for the fee on the Concession of 32,919,360 colones;<sup>457</sup>
- On November 18, 2010, the ZMT Department notified Claimants of outstanding payments for the fee on the Concession of 31,241,080 colones;<sup>458</sup>
- On April 10, 2012, the ZMT Department notified Claimants of outstanding payments for the fee on the Concession of 209,775 colones;<sup>459</sup>
- On May 30, 2012, the ZMT Department notified Claimants of outstanding payments for the fee on the Concession of 59,878,890 colones;<sup>460</sup>
- On July 30, 2012, the ZMT Department notified Claimants of outstanding payments for the fee on the Concession of 63,784,035 colones;<sup>461</sup>
- On April 28, 2014, the ZMT Department notified Claimants of outstanding payments for the fees for the Concession for the years 2009, 2010, 2011, 2012, 2013, 2014, a total sum of 88,060,510 colones;<sup>462</sup>
- On October 22, 2014, the ZMT Department notified Claimants, at Mr Ventura's email, of Claimants' outstanding debt with the Municipality which to that date was of 97,691,315 colones;<sup>463</sup> and
- On August 17, 2015, the ZMT Department notified Mr Ventura of Claimants' outstanding payments that, to that date, totaled **80 months**, and requested that Claimants made payment immediately.<sup>464</sup>

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<sup>454</sup> **R-280**, First notice of non-payment of fee for the Concession, 2 February 2004.  
<sup>455</sup> **R-283**, Second notice of non-payment of fee for the Concession, 26 May 2009.  
<sup>456</sup> **R-285**, Third notice of non-payment of fee for the Concession, 12 January 2010.  
<sup>457</sup> **R-290**, Fourth notice of non-payment of fee for the Concession, 18 June 2010.  
<sup>458</sup> **R-302**, Fifth notice of non-payment of fee for the Concession, 18 November 2010.  
<sup>459</sup> **R-306**, Sixth notice of non-payment of fee for the Concession, 10 April 2012.  
<sup>460</sup> **R-307**, Seventh notice of non-payment of fee for the Concession, 30 May 2012.  
<sup>461</sup> **R-308**, Eighth notice of non-payment of fee for the Concession, 30 July 2012.  
<sup>462</sup> **R-316**, Ninth notice of non-payment of fee for the Concession, 28 April 2014.  
<sup>463</sup> **R-317**, Tenth notice of non-payment of fee for the Concession, 22 October 2014.  
<sup>464</sup> **R-389**, Eleventh notice of non-payment for fee for the Concession, 17 August 2015.

476. Second, Claimants admit that they only paid the required fees for the Concession site from 2002 until 2008.<sup>465</sup> After 2008, Claimants admit ceasing payments due to an increase in the fee that was challenged before the local courts. After the judicial proceedings concluded, Claimants allege having paid fees for the years 2009, 2010 and 2011. Claimants allege that the last year that they paid fees was 2011 because that was the year when the project was allegedly expropriated by Respondent.<sup>466</sup>
477. Respondent will now unravel Claimants' explanation.
478. On September 4, 2002, a few months after La Canícula was granted the Concession, the ZMT Department communicated to Claimants the fee they had to pay for the year 2002.<sup>467</sup> Claimants did pay fees for 2002 and 2003. However, on February 2, 2004, the ZMT Department notified Claimants of an outstanding payment of 839,100 colones.<sup>468</sup>
479. On May 13, 2008, the ZMT Department informed Claimants of an appraisal on the value of the Concession site undertaken by the Tax General Direction of the Municipality to a total of 411,492,510 colones (the "**Appraisal Valuation Report**"). Therefore, the annual fee for the Concession would now be 16,459,700 colones.<sup>469</sup> One year later, on July 21, 2009, and after not receiving payment for the annual fees, the ZMT Department re-sent the May 13, 2008 notice to Claimants.<sup>470</sup>
480. On May 31, 2010, in circumstances where Claimants owed annual fees for 2008 and 2009, Claimants challenged the increase in the appraisal of the property and requested that the Contentious Administrative Tribunal grant them interim relief against the Appraisal Valuation Report.<sup>471</sup> On July 26, 2010, the Tribunal granted Claimants the suspension of the Appraisal Valuation Report but ordered Claimants to pay the annual fee on the applicable rate prior to the Appraisal Valuation Report.<sup>472</sup>
481. On September 21, 2010, the Tribunal dismissed Claimants' challenge because the Appraisal Valuation Report was a preliminary administrative act that could not be challenged.<sup>473</sup> Consequently, on October 27, 2010, the Tribunal lifted the suspension against Claimants' legal obligation to pay fees under the new rate.<sup>474</sup> Therefore, since

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<sup>465</sup> Second Witness Statement of David Aven, paras. 39-40.

<sup>466</sup> Ibid., paras. 39-40.

<sup>467</sup> **R-279**, Letter from the ZMT Department on fee amount, 4 September 2002.

<sup>468</sup> **R-280**, First notice of non-payment of fee for the Concession, 2 February 2004.

<sup>469</sup> **R-281**, Letter from the ZMT Department informing La Canícula of the increase of the appraisal of the Concession site, 13 May 2008.

<sup>470</sup> **R-284**, Letter from the ZMT Department informing La Canícula of fee amount, 21 July 2009.

<sup>471</sup> **R-286**, Complaint against increase of appraisal filed with the Administrative Tribunal, 8 April 2010.

<sup>472</sup> **R-287**, Contentious Administrative Tribunal's injunction, 26 July 2010.

<sup>473</sup> **R-288**, Contentious Administrative Tribunal rejects complaint as inadmissible, 21 September 2010.

<sup>474</sup> **R-289**, Contentious Administrative Tribunal's lifting of injunction, 27 October 2010.

October 2010, Claimants were legally bound to comply with full payment of the annual fees for 2008, 2009 and 2010.

482. Claimants appealed the Tribunal's decision.<sup>475</sup> On September 30, 2010, the Court of Appeals rejected Claimants' appeal against the Contentious Administrative Tribunal's decision because the appropriate legal means to appeal the decision was through an *appeal* before the Supreme Court of Justice and not before the Court of Appeals.<sup>476</sup>
483. On October 6, 2010, Claimants filed an *appeal* with the Supreme Court of Justice against the Contentious Administrative Tribunal's dismissal of their challenge against the Appraisal Valuation Report.<sup>477</sup> On September 21, 2011, the Court admitted Claimants' petition to hear the appeal.<sup>478</sup> On March 22, 2012, the Supreme Court of Justice dismissed Claimants petition confirming that the Appraisal Valuation Report was indeed a preliminary administrative act that could not be challenged but had to be challenged together with the final act: the order from the Municipality ordering Claimants to pay the annual fee. The Court also ordered that Claimants pay the legal costs of the proceedings.<sup>479</sup>
484. On May 23, 2012, the ZMT Department requested that Claimants pay the amounts owed to the Municipality in light of the Supreme Court's judgment dismissing Claimants' challenge permanently. Claimants did not make any payments in 2012.<sup>480</sup>
485. On August 7, 2012, Ms Murillo sent a letter to the Municipality, on behalf of La Canícula, admitting its current non-compliance with the Concession's fee obligations and acknowledging that the corresponding sanction for it was the cancellation of the Concession. In addition, curiously, Ms Murillo stated that La Canícula "had no objection with having Mr Sebastián Vargas Roldán start proceedings to request the granting of a new concession over the same property belonging to [Claimants]."<sup>481</sup>
486. Therefore, on October 19, 2012, the ZMT Department requested from the Collection Department an updated report on the sums owed by Claimants so that the Department could recommend to the Municipal Council to cancel the Concession.<sup>482</sup>
487. Mr Aven alleges that Claimants stopped paying the annual fees for the Concession in 2011 because that was the year the project was allegedly expropriated by Respondent.

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<sup>475</sup> **R-291**, Contentious Administrative Tribunal's dismissal of appeal filed by La Canícula, 30 September 2010.

<sup>476</sup> Ibid.

<sup>477</sup> **R-300**, *Appeal* petition, 6 October 2010.

<sup>478</sup> **R-301**, Supreme Court of Justice's admission of *casación* petition, 21 September 2011.

<sup>479</sup> C-255.

<sup>480</sup> C-268.

<sup>481</sup> **R-309**, Letter from La Canícula acknowledging non-payment of fees for the Concession, 1 August 2012.

<sup>482</sup> **R-305**, ZMT Department demands information from Collection Department, 19 October 2012.

However, the record for the Concession that rests at the Municipality reveals that Claimants were in the process of obtaining construction permits for the Concession site in May 2011:

- On May 23, 2011, the Urban and Social Development Department asked the ZMT Department what was the permitted use of land for the Concession site because Claimants had requested a "Resolution on Municipal Location" for the construction of cabins, storage and dormitories on the Concession site;<sup>483</sup> and
- On May 25, 2011, the ZMT Department replied to the Urban and Social Development Department explaining that the use of land permitted for the Concession site allowed the development of Hotel Cabins and emphasized that:<sup>484</sup>  
"As a conclusion, I inform you that the development of this property should comply with the implementation plan submitted with this Municipality without departing from the agreed, **and not according to the current needs of the interested party [the Claimants].**"  
(emphasis added)

488. If by 2011, the Project had already been expropriated as Mr Aven asserts, it would make no sense why Claimants were undertaking the first steps to obtain construction permits for the Concession site before the Municipality.

489. The record reveals that Claimants had very different plans to keep the Concession without paying the outstanding fees that La Canícula owed. Claimants planned to willfully obtain the cancellation of the Concession, to later have it granted to their counsel Mr Sebastián Vargas Roldán, and operate it through him without paying any of the outstanding fees to the Municipality.

490. On October 22, 2013, Mr Fernando Morales, under the instructions of Claimants and Mr Sebastián Vargas Roldán, submitted a complaint against La Canícula with the Costa Rican Institute of Tourism requesting the cancellation of the Concession for La Canícula's failure to pay annual fees in the past four years.<sup>485</sup> On that same day, Mr Sebastián Roldán Vargas requested the Municipality award the Concession to himself.<sup>486</sup>

491. A week later, on October 30, 2013, Mr Morales, showing an unusual hurry, requested information from the Municipal Council on the process of cancellation of the Concession.<sup>487</sup>

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<sup>483</sup> **R-298**, Letter from the Urban and Social Department to the ZMT Department inquiring on use of land in the Concession site (OIM 141-2011), 23 May 2011.

<sup>484</sup> **R-299**, Reply from ZMT Department to the Urban and Social Department on Claimants' intended construction (DZMT-101-2011), 25 May 2011.

<sup>485</sup> **R-310**, Mr Morales' complaint requesting the cancellation of the Concession, 15 October 2013.

<sup>486</sup> **R-382**, Mr Sebastian Vargas Roldan's request to be awarded the Concession, 10 October 2013.

<sup>487</sup> **R-311**, Letter from Mr Morales to the Municipal Council requesting information on the cancellation of the Concession, 30 October 2013.

A week later, on November 6, 2013, Mr Morales wrote another letter to the Municipality urging the agency to undertake an inspection of the Concession site and requesting information on whether any third parties have filed a request for the granting of the Concession currently held by La Canícula.<sup>488</sup> A day later, on November 7, 2013, Mr Morales sent a new letter to the Municipality insisting once again that the Municipality cancels the Concession.<sup>489</sup>

492. We urge the Tribunal to compare the letters submitted by Mr Morales with all of the other letters submitted by Claimants or Mr Sebastián Vargas Roldán on behalf of Claimants, which are part of the record for this arbitration, to verify that the format, style, font and presentation are the same.<sup>490</sup> In any case, the November 6 and November 7, 2013 letters allegedly sent by Mr Morales to the Municipality are accompanied by the mailing information of its real petitioner, Mr Sebastián Vargas, Claimants' counsel:<sup>491</sup>

PAQUETERIA NACIONAL		REMITENTE		DESTINATARIO	
Oficina de origen - Office of origin	1250	Nombre y Direccion - Address	Sebastian Vargas Roldan Mr K K & Escazu 400 a.c.r.k.		
Fecha Destino - Mailbox	05/11/13	Nombre y Direccion - Address	Municipalidad de Parrita Departamento de Zona Mantivo terrestre.		
Telefono - Telephone	25831670	Provincia	Escazú	Provincia	Puntarenas
Sex		Canton	Escazú	Canton	Parrita
Telefono - Telephone		Districto	Escazú	Districto	
Fax		Código Postal	10201		

493. As Claimants' fraudulent scheme to keep the Concession for free was taking place in the late months of 2013, Claimants were also considering and preparing for the initiation of this arbitration against Respondent. In fact, Claimants submitted their Notice of Intent to submit a claim to arbitration on September 17, 2013. Therefore, Claimants had to change their dubious strategy of developing the Concession site through Mr Vargas Roldán.

494. Thus, on August 30, 2013, 17 days prior to Claimants' submission, Claimants rushed to pay the outstanding fees for 2008.<sup>492</sup> A month after such submission, on October 24, 2013, Claimants also paid the outstanding fees for 2009.<sup>493</sup>

<sup>488</sup> R-312, Mr Morales' request for inspection and information from the Municipality, 4 November 2013.  
<sup>489</sup> R-313, Mr Morales' insistence on the cancellation of the Concession, 7 November 2013.  
<sup>490</sup> See, for example C-103, C-111,  
<sup>491</sup> R-312, Mr Morales' request for inspection and information from the Municipality, 4 November 2013, 3; R-313, Mr Morales' insistence on the cancellation of the Concession, 4 November 2013, 2.  
<sup>492</sup> C-268.  
<sup>493</sup> Ibid.

495. On November 20, 2013, the Municipal Council rejected Mr Morales's complaint explaining that in the past recent months Claimants had paid several millions of colones for the Concession's fees.<sup>494</sup> In the same way, on November 26, 2013, the Municipal Council decided to reject Mr Vargas's October 22, 2013 request based on legal impossibility given that the Concession currently had La Canícula as titleholder.<sup>495</sup>

### **3. Claimants' failure to start works within one year**

496. Claimants do not even make the effort to deny their failure to comply with this provision. In fact, Claimants admit to having failed to comply with Clause Nine of the Concession Agreement, affirmatively calling it "*a breach of the Concession Agreement's terms*"<sup>496</sup>

497. On September 1, 2008, Claimants sent a letter to the Mayor of Parrita recognizing their breach and acknowledging that this failure could be a ground for the cancellation of the Concession.<sup>497</sup>

498. Claimants allege that because the Municipality granted two construction permits in 2007 and 2008 for the Concession site while aware of the breach, Respondent cannot rely on that fact as a basis to deny Claimants protections under the DR-CAFTA.<sup>498</sup>

### **4. Claimants' other illegalities during their operation of the Concession**

499. As it occurred in all of the fragmented pieces of the development of the Las Olas Project, the neighbors of Esterillos Oeste also raised their concerns over Claimants' operation of the Concession. On February 7, 2011, several neighbors filed a complaint with the Municipality stating their concerns:<sup>499</sup>

- Claimants were supposed to start construction work on the site a year after the granting of the Concession, nine years had passed and no works had been started;
- The developers had not made any changes to the community as they had promised the neighbors of Esterillos Oeste;
- Claimants were undertaking earthworks on the site; and

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<sup>494</sup> **R-315**, Municipal Council's resolution upholding the Concession, 20 November 2013.

<sup>495</sup> **R-324**, Municipal Council rejects Mr Sebastián Vargas' request to be awarded the Concession, 26 November 2013.

<sup>496</sup> Claimants' Reply Memorial, para. 297.

<sup>497</sup> **R-282**, Letter from David Aven to the Mayor of Parrita recognizing not initiating construction works on the Concession site, 1 September 2008.

<sup>498</sup> Claimants' Reply Memorial, para. 297.

<sup>499</sup> **R-292**, Neighbors' complaint regarding illegalities on the Concession site, 7 February 2011.

- Claimants were operating an office on the site without any permits.
500. On February 22, 2011, the Municipal Council initiated an internal investigation, informing the relevant Municipality's departments of the neighbors' complaints and requesting information on Claimants' operation of the Concession.<sup>500</sup>
501. On February 23, 2011, officers from the Municipal Engineering Department went to the Concession site and closed down the construction on the Concession site because Claimants had been using the abandoned constructions to store materials without obtaining any permits from the Municipality.<sup>501</sup>
502. On March 7, 2011, the ZMT Department notified the Municipal Council of an inspection to the Concession site where the municipal inspectors saw:<sup>502</sup>
- A large quantity of horses grazing on the property;
  - Constructions which were initiated, but abandoned more than a year earlier; and
  - An office had been installed in the area.
503. The report further explained that since the Concession was registered on March 23, 2002, by March 23, 2003, Claimants should have initiated construction works and that, "clearly nine years after, [Claimants] have not built anything similar to the preliminary design [of the hotel] submitted with the Municipal Council at the time."<sup>503</sup>
504. On March 21, 2011, the *Hacienda* Department confirmed to the Municipal Council that La Canícula did not hold any permit (*patente comercial*) to engage in commercial activities on the Concession site.<sup>504</sup>
505. On May 10, 2011, the ZMT Department informed the Urban and Social Development Department that Claimants continued to engage in illegal works despite the closing of construction works back in February 2011.<sup>505</sup> The ZMT Department further requested that the Urban and Social Development Department send its inspectors to the Concession site to close down Claimants' ongoing illegal activities. The ZMT also noted that the Municipality could initiate criminal proceedings with the Prosecutor's Office for illegal construction in the maritime terrestrial zone in detriment of the State.

<sup>500</sup> **R-293**, Municipal Council resolution approving investigations against La Canícula, 22 February 2011.

<sup>501</sup> **R-296**, Letter notifying closing of construction work on the Concession site, 9 May 2011.

<sup>502</sup> **R-294**, Letter from ZMT Department to Municipal Council confirming La Canícula's illegalities, 7 March 2011.

<sup>503</sup> Ibid.

<sup>504</sup> **R-295**, Letter from the *Hacienda* Department to Municipal Council, 21 March 2011.

<sup>505</sup> **R-297**, Letter from the ZMT Department to the Urban and Social Department (DZMT-092-2011), 10 May 2011.

506. Finally, the Siel Siel Report points to another illegality committed by Claimants during their operation of the Concession. Claimants undertook construction works for easements on the Concession site without obtaining an EV for that purpose:

"Claimants not only violated the law by performing works on the Easements site, but also by the works undertaken on the easements on the Concession site. Mr. Mussio admits that Mussio Madrigal obtained construction permits to build two easements adjacent to the Concession site [...]

The EV for the Concession site limited its scope to the construction of a hotel, not easements or cabins. SETENA requires that any works performed at the Maritime Terrestrial Zone have an EV, yet another obligation the Claimants failed to meet."<sup>506</sup>

507. In sum, as with the Condominium site and the Easements and other lots site, Claimants engaged in illegal works, without obtaining the required permits and in disregard of the authorities' warnings.

**E. Claimants obtained their construction permits illegally**

508. In its Counter Memorial, Respondent has already pointed the irregularities surrounding their obtaining of the construction permits. Claimants admit not knowing "*whether there is any truth to this allegation*" because Claimants did not handle the minutiae of the application process themselves.<sup>507</sup>

509. Respondent would just simply that the illegality in the obtaining of the permits does not refer to the Municipality's denial in June 2010 of the Claimants' application for the construction permit for the Condominium site, but refers to *ex post* notices that the Municipality sent to Claimants requesting missing documents.<sup>508</sup>

510. Claimants nonetheless argue that this "minor breach" has no bearing on the legality or qualifying status under the DR-CAFTA.<sup>509</sup> The cumulative effect of the series of illegalities is what is important in this arbitration.

**F. Respondent is not estopped from raising Claimants' illegalities as a bar to the protections afforded by DR-CAFTA**

511. Claimants allege that they never heard of illegality complaints from Respondent prior to this arbitration. However, Claimants have never properly advanced an argument that suggests that Respondent is precluded from raising Claimants' misconduct as a bar to the protections afforded by the Treaty, as a matter of international law. Claimants instead

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<sup>506</sup> Siel Siel Report, paras. 96-97.

<sup>507</sup> Claimants' Reply Memorial, para. 272.

<sup>508</sup> R-57, Municipality report on outstanding documents (ADU No. 013-10), 13 September, 2010.

<sup>509</sup> Claimants' Reply Memorial, para. 272.

frame their claims through an alleged violation of legitimate expectations under Costa Rican law.

512. Under international law, a state is only estopped from raising the illegality of the investment that leads to the denial of protection when it had **knowingly** ratified the behavior it later sought to challenge.

513. That the host state knew of the illegality of the investment is an indispensable requirement for an estoppel argument to succeed. The knowledge requirement was emphasized by a number of tribunals considering the issue of a state's estoppel from raising the illegality of an investment.

514. As held by the tribunal in *Fraport v Philippines*:

"Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it **knowingly** overlooked them and endorsed an investment which was not in compliance with its law."<sup>510</sup> (emphasis added)

515. The *Fraport* tribunal's test was cited favorably in *Railroad Development v Guatemala*, which followed the same approach:

"Even if FEGUA's actions with respect to Contract 41/143 and in its allowance to FVG to use the rail equipment were ultra vires (not "pursuant to domestic law"), "principles of fairness" should prevent the government from raising "violations of its own law as a jurisdictional defense when [in this case, operating in the guise of FEGUA, it] **knowingly** overlooked them and [effectively] endorsed an investment which was not in compliance with its law."<sup>511</sup>

516. Tribunals that found in favor of estoppel distinguished their case from *Fraport* (where the estoppel argument had failed) precisely by noting that the host state had known of the illegality of the investment at the time it was made. Thus, in *Inmaris v Ukraine*, the tribunal noted:

"[T]his is not a case [...] in which the facts that rendered the investment illegal under the host state's law were **hidden** from the state. [...] Whatever Respondent might say about its lack of knowledge of the intra-Inmaris contracts, **it cannot say that its**

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<sup>510</sup> **RLA-118**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 346; See also **RLA-119**, *Anderson v. Costa Rica*, ICSID ARB(AF)/07/3, Award, 19 May 2010, para. 55.

<sup>511</sup> **RLA-120**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, para. 146 (citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para 346).

**representatives were unaware** of the other contracts that established the payment scheme."<sup>512</sup> (emphasis added)

517. The host state's knowledge of the investor's illegal conduct is therefore the *sine qua non* of an estoppel argument.

518. In contrast, when an investor conceals the illegality of the investment *from* the State, it cannot then raise estoppel as a reason to receive protection notwithstanding its illegal behavior. As the tribunal in *Fraport* noted:

"[A] covert arrangement, which by its nature is unknown to the government officials who may have given approbation to the project, cannot be any basis for estoppel: **the covert character of the arrangement would deprive any legal validity (assuming that informal and possibly contra legem endorsements would have legal validity under the relevant law) that an expression of approbation or an endorsement might otherwise have had.** There is no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law when Fraport first made its investment in 1999."<sup>513</sup> (emphasis added)

519. Thus, given that the information given on the permit applications was made in order to conceal the existence of protected ecosystems under Costa Rican law, Respondent is not estopped from raising all of Claimants' wrongdoings as a bar to abide by the protections of DR-CAFTA.

520. Although Claimants resort to the international protection of DR-CAFTA, Claimants smuggle in domestic law to assert alleged violations of their legitimate expectations *under* Costa Rican law. Claimants argue that SETENA and the Municipality should have undertaken a *levisidad* procedure to annul the permits. According to Claimants, the fact that the agencies have not done so constitutes a violation of Costa Rican law, which (they argue) cannot be raised in the context of these proceedings.

521. This is a dishonest contortion of the relevant test. The purpose of undertaking any *levisidad* proceedings would be to prevent an act that is causing environmental damage from continuing. Therefore, the aim would be to protect the environment. The injunctions issued by SINAC, the TAA and the criminal court of Quepos have comprehensively achieved that aim. Hence, the *facto* the environment is currently protected by those injunctions. Thus, Claimants' focus on the *levisidad* proceedings is entirely redundant.

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<sup>512</sup> **RLA-121**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 140.

<sup>513</sup> **RLA-118**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 347.

522. In summary, the illegalities outlined above are a fundamental bar to Claimants' case proceeding on the merits.

**G. Claimants' illegal conduct bars them from claiming under the Treaty**

523. Respondent explained in its Counter Memorial that, under international law, Claimants are barred from the substantive protection of the DR-CAFTA since they have operated their investment illegally in breach of Costa Rican law.<sup>514</sup> As shown above, Claimants deliberately misled the Costa Rican authorities by purposefully lessening the extent of the impact of their project on the Las Olas Ecosystem. Such misconduct precludes the availability of international remedies to Claimants. Accordingly, their claim should be dismissed on grounds of inadmissibility.<sup>515</sup>

524. Claimants misconstrue this position by alleging that Respondent raised the illegality doctrine to challenge the jurisdiction of the Tribunal.<sup>516</sup> In this regard, Claimants rely on Article 10.1 of the Treaty to argue that their investment is covered by the DR-CAFTA.<sup>517</sup> Furthermore, they refer to the decisions on which Respondent based its position, but they disregard their relevance and application to the case at hand.<sup>518</sup> None of Claimants' have substance.

525. Claimants allege that Respondent "*attempted to transform an unavailing defense on the merits into a credulous objection as to the Tribunal's jurisdiction.*"<sup>519</sup> But Respondent has never stated in its Counter Memorial that it was challenging the jurisdiction of the Tribunal based on the illegality of the investment. Rather, it asked the Tribunal to consider Claimants' claim as *inadmissible* based, on the seriousness of their misconduct in the operation of the investment.<sup>520</sup>

526. Claimants mislead the Tribunal on the nature of Respondent's position, in order to support their argument on "covered investments under the DR-CAFTA". In this sense, they resort to the provisions of the Treaty, which provide exceptions to what constitutes a "covered investment", with the purpose of demonstrating that Claimants' investment is under the DR-CAFTA.<sup>521</sup>

527. Such allegations might have worked in the context of a jurisdictional objection, where the discussion would focus on whether a claimant satisfies the necessary jurisdictional

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<sup>514</sup> Counter-Memorial, paras 426-432.

<sup>515</sup> Counter-Memorial, para 430-432.

<sup>516</sup> Counter-Memorial, para 39.

<sup>517</sup> Claimants' Reply Memorial, paras 40-41.

<sup>518</sup> Claimants' Reply Memorial, paras 42-46.

<sup>519</sup> Claimants' Reply Memorial, para 39.

<sup>520</sup> Counter-Memorial, paras 430-432.

<sup>521</sup> Claimants' Reply Memorial, para 40.

requirements for establishing the existence of adjudicative power. If there is illegal conduct in the *acquisition* of an investment, there might have been no property rights acquired under host State law in the first place. In this case, there might be no investment for the purposes of the investment treaty and a tribunal would lack jurisdiction *ratione materiae*.<sup>522</sup>

528. However, Respondent's position entails a completely different question: whether a claim based on serious misconduct by Claimants during the operation of the investment should be heard by this Tribunal and receive the (potentially) protection of the DR-CAFTA. Investment treaty tribunals, in the exercise of their jurisdiction, have the power to dismiss claims as inadmissible when there is serious investor misconduct in the operation of the investment. Professor Newcombe states in this regard that:

**"Using an admissibility approach appears to be particularly suited for egregious cases where the misconduct at issue should be explicitly denounced.** The tribunal in the exercise of its jurisdiction sends a very strong message when it says that, despite having jurisdiction, we are unwilling to allow the claim to proceed."<sup>523</sup> (emphasis added)

529. The tribunal in *Plama v Bulgaria*<sup>524</sup> endorsed this approach when dismissing the claimant's claim on the basis that an unlawful investment would not be protected by substantive obligations of the Energy Charter Treaty. Claimants tried to challenge the applicability of *Plama v Bulgaria* contending that it is limited to situations in which the establishment had been procured by fraud.<sup>525</sup> On the contrary, the illegality in this case happened to occur in the establishment of the investment, and the tribunal was supportive in finding a claim inadmissible on grounds of illegality, whether the latter emerges before or after the establishment phase of the investment:

"The Tribunal is of the view that granting the ECT's protections to **Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans*** invoked above. It would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."<sup>526</sup> (emphasis added)

530. Claimants in the present case are requesting the Tribunal to grant their investment the protections provided by the DR-CAFTA. However, since the operation of the investment is tainted by Claimants' illegal conduct, granting the DR-CAFTA protection would mean to assist investors who come with unclean hands.

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<sup>522</sup> RLA-16, p 198, fn 49.

<sup>523</sup> RLA-16, p199.

<sup>524</sup> RLA-12.

<sup>525</sup> Claimants' Reply Memorial, para 44.

<sup>526</sup> RLA-12, para 143.

531. The inadmissibility of claims based on investments which have been operated in an illegal manner is supported by the DR-CAFTA itself. One of the aims of the CAFTA-DR, as any agreement on promotion of a free market that fosters transparency in business transactions and operations, is to strengthen the rule of law among the State Parties. Accordingly, the Treaty should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. Thus, the substantive protections of the DR-CAFTA cannot apply to investments that are conducted contrary to law.
532. Even if the Tribunal considers that the Treaty does not encompass implicitly this view, the tribunal in *Plama v Bulgaria* was ready to prevent the protection of the treaty, facing an illegality, the absence of an express provision requiring the investment to be in accordance to the host State laws. As in the case of the Energy Charter Treaty, DR-CAFTA does not contain such clause.
533. The same line of reasoning was considered as an *obiter dicta* in *Fraport v Philippines*:
- "...even absent the sort of explicit legality requirement...it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to the illegal investments..."<sup>527</sup>
534. The tribunal quoted in a footnote a passage from *EDF International S.A., SAUR International S.A. and Léon Participaciones S.A. v Argentina*, affirming that the condition of not committing a grave violation of the legal order is a tacit condition of any investment treaty, because in any event it is incomprehensible that a State would offer the benefit of protection through investment arbitration if the investor, in order to obtain such protection, has acted contrary to the law.<sup>528</sup>
535. In *Inceysa Vallisoletana v El Salvador*, although the case was determined in the context of an express "in accordance with law" clause in the BIT, the Tribunal asserted that "[n]o legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them."<sup>529</sup>
536. The acknowledgment by investment tribunals of the principle preventing the protection of investors whose claims are based on illegal investments cannot be disregarded by Claimants' attempts to assert that the factual background in each case is different. Even less, by the meritless argument that Respondent would be trying to rely on "*case law to substantiate some of its more extravagant doctrinal claims.*"<sup>530</sup> The case law does nothing

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<sup>527</sup> RLA-14, para 332.

<sup>528</sup> Id., fn 391.

<sup>529</sup> RLA-11, paras 244, 249.

<sup>530</sup> Claimants' Reply Memorial, para 47.

but prove the consensus among tribunals of the existence of a principle in the international investment law arena.

537. In sum, Claimants should not have their claim heard by this Tribunal when their investment is riddled with illegalities. Otherwise it would mean that the defaulting Claimants would be rewarded with the protection of the DR-CAFTA.

## VI. THE REAL FACTUAL BACKGROUND

### A. Who are the "investors" behind the Las Olas Project

538. After Respondent uncovered all of the illegalities Claimants undertook when "investing" in Costa Rica, Claimants have tried to change that rooted image alleging that:

"[T]his 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."<sup>531</sup> (emphasis added)

"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.**"<sup>532</sup> (emphasis added)

539. The documentary record shows quite a different situation and no matter how poetic the narrative Claimants put forward, the objective facts reveal a reality that should lead the Tribunal to reject their baseless claims in their entirety.

540. The reality is that Claimants lacked experience developing and selling real estate outside of the United States and they had no experience in resort development, which are both major deficiencies in their management of the property from the very beginning of the investment period.<sup>533</sup>

541. Not only that, Dr Hart has also detected indicia of fraud in the investment considering the following:<sup>534</sup>

- Mr Aven's assertions that he wanted to make the Las Olas Project a "family investment";
- the lack of financial documentation and support provided in this arbitration;
- the proceeds from the sales are undocumented;

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<sup>531</sup> Claimants' Reply Memorial, para. 354.

<sup>532</sup> Id., para. 7.

<sup>533</sup> Second Hart Report, paras. 61-64.

<sup>534</sup> Ibid.

- Claimants' willful concealment from the Tribunal of the sales they conducted since the submission of Claimants' Memorial, and
- Claimants' setting up of multiple entities in Costa Rica through which to channel the alleged investment.

542. These red flags raise significant concerns that the transaction or business activity at issue was performed under questionable circumstances.<sup>535</sup> Further, Claimants' backgrounds also attest on their own to Claimants' business competence and integrity. Take for example, Mr Jeffrey Shiolen who on May 20, 2015, six months prior to signing his first witness statement, filed for debt reorganization protection from bankruptcy.<sup>536</sup> Not the conduct of a "*sophisticated and prudent*" investor.

543. According to the Las Olas website, Mr Janney was a member of management and in charge of "*land development, home build[ing], [and] marketing.*"<sup>537</sup> In his first witness statement, Mr Janney speaks to his success as a "real estate developer" and also discussed how his experience as a pastor would benefit the marketing aspects of his position.<sup>538</sup>

544. The truth is that Mr Janney has been involved in multiple investment failures that have led him to declare bankruptcy. Just nine days after his first witness statement was filed, Mr Janney filed for personal bankruptcy in a 56-page filing dated December 3, 2015 where he admitted to having approximately US\$ 17 million in liabilities and only around US\$1 million in assets.<sup>539</sup> In his Second Witness Statement, nine months from his filing of bankruptcy, Mr Janney omitted to mention anything about that recent event.<sup>540</sup>

545. As Dr Hart notes:

"It would be highly unusual to have \$16 million in net debt and just decide within nine days the debts cannot be paid back, nor does the preparation of a 56-page bankruptcy filing happen overnight. Thus, Mr Janney clearly knew of his numerous failed development projects at the time he signed his first witness statement. As a fraud examiner, I find his profession of success in real estate and his failure to disclose his obvious net failure to be a clear and troubling financial misrepresentation."<sup>541</sup>

<sup>535</sup> Second Hart Report, para. 61.

<sup>536</sup> **R-385**, Jeffrey Shiolen's Voluntary Petition, 20 May 2015.

<sup>537</sup> **R-383**, Las olas beach community, "About Us: Las Olas Beach Community" (*Las Olas Beach Community*, 2009-2010) <<http://www.lasolascr.com/index.php?page=about-las-olas-community>> accessed 19 October 2016.

<sup>538</sup> First Witness Statement of David Janney, paras. 25-27.

<sup>539</sup> **R-384**, David Janney's Initial Bankruptcy Petition, 3 December 2015, 9.

<sup>540</sup> **R-384**, David Janney's Initial Bankruptcy Petition, 3 December 2015, 22-24.

<sup>541</sup> Second Hart Report, para. 67.

546. Further, in his second witness statement, Mr Janney lists projects that he was involved in as a developer such as: Lake Hart, Villa City 1, Villa City 2, Villa City 3, and Lake Jackson Ridge.<sup>542</sup> In his bankruptcy filing, Mr Janney requested bankruptcy relief for US\$ 6.1 million from the Lake Jackson Ridge project, US\$ 5.5 million from the Villa City 1, 2 and 3 projects and US\$ 200,000 for the Lake Hart project.
547. Interestingly, when Mr Janney was required to list where he had been an "*officer, director, or managing executive of a corporation*" within the four years prior to bankruptcy, he did not mention his position with the Las Olas Project.<sup>543</sup> In fact, Mr Janney's bankruptcy filing does not mention the Las Olas Project as an asset or liability at all. Nevertheless, in this arbitration, Claimants contend that Mr Janney invested US\$ 250,000 in the project.<sup>544</sup>
548. But it is not only Mr Janney who has dubious business acumen in the real estate market, he also appears to have abused his position as a pastor, as he used that position to arrange some questionable investments. The East Orlando Post reports:

**"Orlando Baptist Leader Getting Big Payday, More Fraudulent Activity Found**

[...]

According to records obtained by the East Orlando Post of David Janney's deposition, it is uncovered that Mr Janney is technically "resigned" from Orlando Baptist Church, but still collects \$110,000.00 a year.

[...]

Personal financial statements from Janney submitted to the First City Bank in Georgia claimed his net worth at \$50million one year and \$36million another year. How does a Pastor of a middle class church in Central Florida become worth that much money?

[...]

Some have suggested that Janney has been siphoning church funds to personal accounts and family members for years. He was even sued by businessman Craig Mateer, a lead donor to Orlando Baptist Church for misuse of funds.

[...]

Even worse for Janney's flock... is the fact that he completed several of these suspect financial dealings through World Hope, the church's SUPPOSED charitable enterprise."<sup>545</sup>

549. The article also reports that Mr Janney received a large amount of cash out of a purported development loan related to Pinecrest.<sup>546</sup> In his witness statement, Mr Janney complains

<sup>542</sup> Second Witness Statement of David Janney, para. 10.

<sup>543</sup> **R-384**, David Janney's Initial Bankruptcy Petition, 12 December 2015, 39.

<sup>544</sup> First Witness Statement of David Aven, para. 32.

<sup>545</sup> **R-388**, "Orlando Baptist Leader Getting Big Payday, More Fraudulent Activity Found," East Orlando Post, 31 March 2016.

<sup>546</sup> Ibid.

that he is no longer welcome in the Pinecrest community because he convinced its members to purchase parcels at Las Olas,<sup>547</sup> however it seems that the "shutdown" of the Las Olas Project had nothing to do with his exclusion from the Pinecrest community.

550. In his first witness statement, Mr Janney mentioned his role as a pastor at an Orlando church and organizer of World Hope charity and how it led people to trust him and invest with him.<sup>548</sup> What Mr Janney did not mention was that he was being suspected of using charity funds for personal use. On another post, the East Orlando Post reports that:

"The East Orlando Post has also learned that Janney utilized church funds to pay for several aspects of his two daughter's weddings. We have also learned that Janney regularly transferred church funds from the "Worship Fund" to bank accounts linked to himself and family members."<sup>549</sup>

551. Another news media reports that, Mr Mateer, one of the donors of World Hope has filed a lawsuit against the organization and Mr Janney seeking the return of more than US\$ 117,000 he donated to the organization several years ago. The Orlando Sentinel reports:

**"Mateer alleges that World Hope, a nonprofit ministry run by the Orlando Baptist Church pastor, diverted some of the money donated for the creation of two chicken farms in Kenya into Janney's personal bank account."**

The lawsuit contends the money for the farms paid Janney's phone bills, credit cards, life insurance and Internal Revenue Service obligations."<sup>550</sup> (emphasis added)

552. Finally, Mr Janney did not state in his second witness statement that he is no longer a church member. He was fired just a few days after making his first witness statement for having an extramarital affair with a church member:

"[T]he East Orlando Post was the first to report on an official statement by a former parishioner who was pressured into a sexual liaison with Janney. The woman, Arlene Miranda, was targeted by Janney's repeated and frequent lewd text messages, before being called into the pastor's office and pressured into sexual congress."<sup>551</sup>

"The "happily married" Janney is now being sued by Arlene Miranda, the victim of his sexual advances."<sup>552</sup>

553. Any portrayals of Claimants as "prudent and sophisticated investors" is far from the truth.

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<sup>547</sup> First Witness Statement of David Janney, paras. 26, 44.

<sup>548</sup> Id., paras. 8-9, 25-26, 43-44

<sup>549</sup> **R-386**, "Before Resigning, Orlando Baptist Pastor Blamed Satan For Lewd Behavior," East Orlando Post, 14 February, 2016.

<sup>550</sup> **R-387**, "Orlando businessman sues pastor, wants \$117K in donations back", Orlando Sentinel, 3 November 2013.

<sup>551</sup> **R-386**, "Before Resigning, Orlando Baptist Pastor Blamed Satan For Lewd Behavior," East Orlando Post, 14 February 2016.

<sup>552</sup> **R-388**, "Orlando Baptist Leader Getting Big Payday, More Fraudulent Activity Found," East Orlando Post, 31 March 2016.

**B. The story behind Claimants' advisors**

554. Claimants pride themselves of the "*sound advice from local experts*" they received from the local professionals and experts they hired to support them with the environmental clearance process for the Las Olas Project.<sup>553</sup> However, the record shows that those professionals were **not** qualified at all to assure that the development of Las Olas was compliant with the "*highest standards of quality and sustainability*" under Costa Rican environmental law.<sup>554</sup>
555. Claimants commissioned **DEPPAT** to prepare the EV application for the First Concession site and to act as Environmental Regent for the First Condominium site, the Concession site and the Condominium site. Claimants engaged **Mussio Madrigal Arquitectos** to prepare the EV application for the Condominium site in 2007-2008. Mr Madrigal engaged **Geoambiente S.A.** to undertake some of the surveys submitted to SETENA for the Condominium site, among them, the D-1 Form which was prepared by **Mr Eduardo Hernández** and that Claimants used to conceal the Protti Report.
556. Mr Mussio, one of the partners of Mussio Madrigal Arquitectos, states in his witness statement that he and his firm had a "problem" with the Costa Montaña Project. However, he does not explain what the problem was and says that the context of the problem was a "*campaign of investigation and verification of real estate development permits*" initiated by the TAA in 2008.<sup>555</sup>
557. What Claimants conveniently but materially omit is that in 2009 the TAA shut down the Costa Montaña Project when it was discovered that the developer impacted protected areas, such as a forest.<sup>556</sup> Just like with the EV submission to SETENA for the Condominium site, in this case, Mr Mussio told SETENA that the area for the development comprised "*cow pasture land*" when in reality it contained secondary forests and important bodies of water.<sup>557</sup>
558. In short, the Claimants' advisors engaged in the same illegal practices for the Costa Montaña Project as they did for the Las Olas Project:
- Initiation of works with no permits: Under the direction of **Mussio Madrigal Arquitectos**, the developer started works on the project site without applying for an EV with SETENA. Just like in the Las Olas's Easements and other lots site, those works related to the "carving of internal roads." SETENA and the TAA

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<sup>553</sup> Claimants' Reply Memorial, para. 95(a)

<sup>554</sup> Id., para. 6.

<sup>555</sup> Witness Statement of Mauricio Mussio, para.12.

<sup>556</sup> **R-354**, "TAA shuts down 360 condominiums," 19 March 2008.

<sup>557</sup> Ibid.

issued an injunction against the works performed, and SETENA ordered the developer to submit a restoration plan for the land.<sup>558</sup>

- Misleading SETENA on the nature of the proposed project: The developer, through **Mussio Madrigal Arquitectos** and **Geoambiente S.A.**, applied for an EV from SETENA for a project consisting of "160 agricultural parcels."<sup>559</sup> In reality, the project was actually intended to be a real estate urban development.<sup>560</sup> This is exactly what Claimants did with the Easements and other lots site presenting them as a "mere segregation of lots" when they intended to be a housing development of 72 lots. The TAA condemned such conduct from the developer holding that:

"[T]he division into parcels is undertaken when one has a large property that one wants to fragment and, additionally, when the resulting parcels would not have direct access to a public way, such that internal streets must be created to allow the parcels an exit. In the case of the Costa Montaña Project, **the developers themselves recognized that the aims of the project were not agricultural or livestock related, but rather to urbanize, with real estate aims, for the construction of dwellings.**

[...]

**[T]he present case does not reflect reality, so it is misleading to the country to declare under oath the objective of a project and then go ahead and develop a different project,** for which SETENA should consider the global context of the project and proceed to a comprehensive evaluation of the project."<sup>561</sup> (emphasis added)

- Concealment of information from SETENA: In the EV application, Mussio Madrigal concealed the existence of a forest on the project site from SETENA. Indeed, Mr Mauricio Bermúdez, a biologist from **DEPPAT** submitted a one-page certification confirming that the vegetation coverage of the project site contained "*fallow land*" and a "*dense shrub*";<sup>562</sup> with no mention of a forest, a protected ecosystem under Costa Rican law. The TAA nonetheless found that damage was caused to a forest:

"[The developer] has caused environmental damage arising out of the construction of slopes, roads and terraces, and impacts to the soil and forestry resources."<sup>563</sup>

- Fragmentation of the EIA: The developer intended to "carve out internal roads to fragment the lots" as a first stage of the development; the TAA held that this implied a fragmentation of the EIA because the entire development of the project

<sup>558</sup> R-375, EV for the Costa Montaña Project, 14 June 2006.

<sup>559</sup> R-417, Costa Montaña Project's EV application, 16 March 2006.

<sup>560</sup> R-419, TAA sanctioning resolution for Costa Montaña Project, 1 December 2009.

<sup>561</sup> R-416, Geoambiente S.A.'s appointment as Environmental Regent for the Costa Montana Project, 22 June 2006, p. 21, 23.

<sup>562</sup> R-414, DEPPAT's certification of no forest on the Costa Montana Project, March 2006; R-415, Mr. Mauricio Bermúdez Mendez involvement with DEPPAT, July 2005.

<sup>563</sup> R-419, p. 32.

was not submitted to SETENA in the EV application prepared by **Mussio Madrigal Arquitectos**.<sup>564</sup> Just like Claimants in this arbitration, the developer relied on the National Control Fragmentation Rules and Regulations of INVU to argue that there was nothing illegal with the "mere carving out of internal roads." The TAA disagreed:

"The [Regulations] clearly specify that this parceling is permitted only for agrarian, livestock, and forestry objectives, and nothing else. Even the plans reflect this limitation, as opposed to urban projects that will reflect another objective.

**This criterium set forth in Article 94 of the Biodiversity law (viz. that the biodiversity environmental impact assessment must be conducted globally, even if the project is intended to be realized in stages) can be extrapolated to the scope of the environmental impact assessment and applied to all of environmental law. It follows that the criteria that institutions with environmental responsibilities put out must attend to what each project involves as a whole, regardless of the form (stages) in which the project is submitted, or the piecemeal manner in which it is intended to be carried out.**

That is to say, when a parceling project is presented under the scope of the [Regulations] of INVU and the real object of the parceling is to produce a result prohibited by law, such as undertaking an agricultural parceling with urbanization objectives, **then the project will be considered fraudulently presented, the authorization of the project will be considered null, and the authorization will not impede the application of the rule that the project was attempting to avoid, i.e. the rejection of the judicial order to the realization of agricultural parcels with urbanization objectives.**"<sup>565</sup> (emphasis added)

- Failure to report environmental damages to SETENA: Geoambiente S.A. acted as Environmental Regent for the project and never reported to SETENA the environmental damage caused to the ecosystems on the project site (forest and water cauces).<sup>566</sup>

559. Moreover, the Federate College of Engineers and Architects of Costa Rica (the "**CFIA**") also started disciplinary proceedings against Mr Mauricio Mussio and Edgardo Madrigal for initiating works on the project site without obtaining an EV from SETENA.<sup>567</sup> In these proceedings, Mr Mussio kept insisting that the project was comprised of 168 agricole parcels and *not* an urban development.<sup>568</sup> Nonetheless, CFIA's Board unanimously

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<sup>564</sup> **R-419**, TAA sanctioning resolution for Costa Montaña Project, 1 December 2009.

<sup>565</sup> **R-419**, p. 22.

<sup>566</sup> **R-416**; R-118, Letter from the Municipality to Jovan Damjanac (OIM 456-2011), 2 December 2011.

<sup>567</sup> **R-410**, CFIA initiation of administrative proceedings against Mr. Mussio Madrigal, 20 May 2008.

<sup>568</sup> **R-411**, Mussio Madrigal's letter insisting that the Costa Montaña Project is an agricultural parcel, 7 July 2008.

decided to sanction Mr Mussio and his firm for initiating illegal works prior to the obtaining of an EV from SETENA.<sup>569</sup>

560. It seems that, by following the "sound advice" of their advisors, Claimants landed themselves in the same situation as the Costa Montaña developers, given that injunctions were issued against the development, the developer was sanctioned economically and even criminal charges were brought against the developer, who was a foreigner just like Claimants.<sup>570</sup>

561. The shutting down of the Costa Montaña Project is a good example of an agencies' authority to order the immediate cessation of works in order to protect the environment, even when the developer had obtained environmental and municipal permits. Therefore, it is striking how Claimants can pretend that enforcement of environmental law was targeted against them because of their status as American investors:

"I have no doubt that the Costa Rican Governmental agencies that have taken action against me and the Las Olas project, have done so because of my status as a foreign investor and because I refused to pay bribes to local authorities."<sup>571</sup>

"Project Malaga, to my knowledge, has not received any of the arbitrary treatment from local Municipal authorities in relation to suspending development or prosecuting its developers."<sup>572</sup>

562. These insinuations are baseless. Many projects in the Pacific Ocean coast have been investigated by environmental authorities and have been shut down due to damages to the environment. For instance, the TAA initiated an investigation against the "Cabo Caletas Project" located in Parrita. As with the Las Olas case:<sup>573</sup>

- The project included a hotel, 800 condominium units, various luxury houses, a golf court and two artificial lagoons;
- The developer of the project was an American investor; and
- The developers were accused of draining a palustrine wetland and impacting a forest.

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<sup>569</sup> **R-412**, CFIA sanctions Mussio Madrigal for starting works without an EV, 22 February 2016.

<sup>570</sup> **R-423**, DGT-488-2014, General Tax Direction, May 27, 2014, 27 May 2014.

<sup>571</sup> Second Witness Statement of David Aven, para. 12.

<sup>572</sup> Second Witness Statement of Jovan Damjanac, para. 66.

<sup>573</sup> **R-355**, "TAA investigates Cabo Caletas Project," February 18, 2012.

563. Also, the project "Hills of Esterillos" which proposed the development of 100 condominium units in Parrita was shut down by the TAA in 2008 for failure to obtain adequate environmental and construction permits.<sup>574</sup>

564. In summary, the advisors of Claimants were committing the same wrongs, and yet – ironically – such repetitive failures are fatal to the Claimants in terms of their expectations – and what they could reasonably expect from Costa Rican authorities.

### **C. Facts**

565. Claimants' portrayal of the facts is thoroughly misleading. Claimants planned their fragmented development in several pieces and stages. On November 23, 2004, SETENA granted an EV to Claimants to develop "Villas La Canícula" in the Condominium site.<sup>575</sup> Claimants never started the development of this project.

566. On March 17, 2006, SETENA granted an EV to Claimants to develop "Hotel Colinas del Mar" on the Concession site.<sup>576</sup> Claimants obtained two construction permits for easements but never actually engaged in the development of this hotel.<sup>577</sup>

567. One year later, on November 8, 2007, Claimants submitted their EV application with SETENA. This application:

- Concealed the existence of wetlands and forests on the Project Site;
- Omitted proposing measures to protect the species that lived in those ecosystems;
- Affirmed that the Project would have "no impact" on flora or fauna; and
- Intentionally excluded the Protti Report.

568. On June 2, 2008, SETENA granted the EV for the Condominium for a period of two years.<sup>578</sup> Claimants proclaim the granting of the EV as a momentous event. However, as is apparent, it is fruit from the poisoned tree. The EV provided, among others, that:

- In the event that the cutting of any tree was required, a permit shall to be requested from the MINAE;

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<sup>574</sup> **R-356**, "TAA shuts down Hills of Esterillos Project," March 19, 2008.

<sup>575</sup> R-9, SETENA's EV for Villas La Canícula, November 23, 2004.

<sup>576</sup> C-36.

<sup>577</sup> C-40.

<sup>578</sup> C-52.

- Claimants had to notify with one month in advance from the start of works, the beginning of construction at the property;
- Claimants should abide by the Sworn Statement or Affidavit on Environmental Commitments submitted in their EV application.

569. Claimants did not comply with any of those obligations: Claimants cut down trees, impacting a forest, all with no permits whatsoever. Claimants notified SETENA of the start of works 14 days after their alleged commencement. Claimants breached their duty to provide truthful information and abide by the terms and conditions stipulated in the regulations derived from the Environmental Impact Assessment process.

570. In March 2009, neighbors of Parrita understandably filed a complaint with the Municipality, alleging that wetlands had been refilled and, as a result, streets, houses and the local football pitch were flooded.<sup>579</sup> Therefore, Ms Vargas, on behalf of DeGA, issued the April 2009 DeGA Report where she reported that trees had been cut down, burnt to the ground and two roads had been built.<sup>580</sup>

571. On January 20 and May 21, 2010, Ms Vargas visited the Project Site again and reported that the cutting and burning of trees had continued.<sup>581</sup> Ms Vargas requested information from the Municipality on whether the Claimants had any permits to be performing those works and also transmitted the relevant information to the competent authorities (SINAC and the TAA) to take their respective measures.

572. After several complaints of refilling wetlands and felling trees, SINAC visited the Project Site and prepared the July 2010 SINAC Report which mentioned that the site was not located in an area of wetlands.<sup>582</sup> The report also indicated that vegetation had been burnt and the burning was occurring at the time of the inspection.

573. Around the same time, in August 2010, Mr Bucelato filed a complaint for environmental damage at the Las Olas Project with the *Defensoría*, body that requested information from SINAC, the Municipality and SETENA.<sup>583</sup> Arising out of a request for information from the Defensoría, a SETENA official visited the site on August 18, 2010 and concluded that there were no "bodies of water" (lakes) on the site.<sup>584</sup> Again, Claimants pounce on this as some endorsement of their view of the world, when clearly SETENA was misled by the draining

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<sup>579</sup> R-23, Complaints by neighbors of Parrita with the Municipality, 2009; R-37, Complaints by members of Esterillos Oeste, July 5, 2010.

<sup>580</sup> C-55.

<sup>581</sup> C-67.

<sup>582</sup> C-72.

<sup>583</sup> Counter-Memorial, paras. 221-230.

<sup>584</sup> C-78.

and refilling works that had been taking place on the site since March 2009. The inquiry made by SETENA at that point had no basis to announce it had been denied critical information that would in fact have indicated the existence of wetlands.

574. Notwithstanding those findings, SINAC, the competent authority to determine the existence of wetlands and forests in Costa Rica, continued its investigations and in December 2010 commissioned Mr Luis Picado to inspect the Project Site.

575. In the January 2011 SINAC Report, Mr Picado reported the illegal felling of approximately 400 trees and the draining of a wetland.<sup>585</sup> Consequently, SINAC filed the SINAC Injunction (ordering the cessation of works on the Project Site) and filed a criminal complaint against Claimants for deforestation and a potential refilling of a wetland.<sup>586</sup> In short, the game was up for the Claimants, and having built their "house" on foundation of sand, it should have come as no surprise that it was now beginning to crumble and fall.

576. The TAA also initiated an investigation against the Las Olas Project and issued an injunction. Claimants have refused to appear before the TAA to defend their misconduct. These proceedings are currently pending a decision on the environmental damage committed against the ecosystems on the Project Site.

577. Criminal proceedings were initiated against the developers. On October 21, 2011, Mr Martínez filed criminal charges against Mr Aven and Mr Damjanac for the refilling of wetlands and illegal felling of trees.<sup>587</sup> In the middle of the proceedings, Mr Aven decided to flee the country, triggering the issuance of an international arrest warrant against him and consequently, the issuance of a Red Notice alert by INTERPOL. To date, Mr Aven has absconded and avoided the Costa Rican judicial system.

**D. Claimants knew since the beginning of the investigations conducted by Costa Rican agencies**

578. Claimants go to great lengths in the Memorial and Reply Memorial to show they were never informed of the "secret investigations" conducted by the *Defensoría*, SINAC and the Municipality:

"The Claimants were not kept informed of the investigations as they occurred"<sup>588</sup>

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<sup>585</sup> R-262, January 2011 SINAC Report (ACOPAC-CP-003-11), January 3, 2011.

<sup>586</sup> R-66, Criminal Complaint filed by SINAC (ACOPAC-CP-015-11-DEN), January 28, 2011.

<sup>587</sup> C-142.

<sup>588</sup> Claimants' Reply Memorial, para. 95(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 [...]."<sup>589</sup>

"Just to be absolutely clear about **what occurred between May and December 2010, apart from Mr Bogantes's most unwelcome entreaties at the end of August, the Investors received no notification whatsoever from these other government officials with alleged concerns about the development of the Las Olas Project. [...] It would not be until well into 2011, however, that the Investors would finally receive notice that an entirely different relationship was also underway.**"<sup>590</sup> (emphasis added)

579. These allegations are false. On September 2010, 6 months before the SINAC Injunction was notified to Claimants, Claimants knew of the investigations being conducted against their project.

580. Mr Aven recounts how he filed a defamation law suit against Mr Bucelato on November 20, 2010:

"At one point I was forced to file a slander and defamation lawsuit against him. As also explained in my First Witness Statement, Mr Bucelato filed numerous baseless complaints, which ultimately formed the basis of the environmental charges filed against me. He also attempted to accuse us of draining the wetlands before it was a law."<sup>591</sup>

581. What neither Mr Aven nor Claimants have disclosed is that, on September 29, 2010, Claimants filed a prior defamation law suit against Mr Bucelato on behalf of Las Olas Luxury Resort S.A., another of Claimants' local enterprises (File No. 10-201648-0457-PE) (the "**First defamation action**"). Claimants' second lawsuit against Mr Bucelato was filed a month after on November 20, 2010 (File No. 10-000008-588-PE) (the "**Second defamation action**").

582. In the criminal complaint for the First defamation action, Claimants reveal that they were fully aware of the investigations being undertaken against the Las Olas Project by the *Defensoría*, SINAC and the Municipality. In the complaint, Claimants asserted that:

"[Mr Bucelato] had filed complaints for illegal constructions, cutting down of trees, destruction of wetlands, cutting down of protected forestry species and irreparable environmental damage **with agencies like MINAE, SETENA and the Municipality of Parrita**. Copy of these complaints is being requested before these institutions by the Prosecutor assigned to this investigation." (emphasis added)

583. First, as to SINAC, Claimants allege that the first time they heard of the SINAC investigations was on February 14, 2011, when they received the SINAC Injunction.<sup>592</sup> Claimants maintain "*they were extremely shocked by this development,*" and that "*they had*

<sup>589</sup> Id., para. 95(l).

<sup>590</sup> Claimants' Memorial, para. 353.

<sup>591</sup> Second Witness Statement of David Aven, para. 61.

<sup>592</sup> Claimants' Memorial, para. 133.

heard rumors in December 2010 or January 2011...that someone was claiming there were wetlands on the project site but had no idea why or what the source of those rumors was."<sup>593</sup>

584. This is false. Claimants were fully aware of the investigation conducted by SINAC officers on July 8, 2010. Claimants admit that Mr Bogantes told them of the complaints regarding wetlands and cutting of trees.<sup>594</sup> Second, Claimants' own admission in the September 29, 2010 criminal complaint shows that they were fully aware of the investigations being conducted by SINAC.
585. Therefore, it is not true that the only moment that Claimants heard about the SINAC investigations was February 14, 2011. Claimants knew of the investigations since July 8, 2010, when Mr Bogantes told them of the purpose of the site inspection. The fact that it took Claimants more than 8 months to go to SINAC and request the inspection report prepared after the July 8, 2010 visit only shows their lack of interest in complying with Costa Rican regulations.<sup>595</sup>
586. Second, as to the *Defensoría*, Claimants allege that the first time they knew about the procedures undertaken by the *Defensoría* was March 2011.<sup>596</sup> However, the criminal complaint shows that Claimants were well aware of the procedures that were taking place at the *Defensoría* because they requested that the court ordered the *Defensoría* to produce the complaint filed by Mr Bucelato on July 20, 2010.<sup>597</sup>
587. Third, as to DeGA, Claimants allege that they were never notified of the "investigations" conducted by Ms Vargas until March 2011.<sup>598</sup> The truth is that Claimants knew of the investigations being conducted by the Municipality because (i) Ms Vargas told Claimants' counsel, Mr Sebastián Roldán Vargas, in September 7, 2010, of the problems that the Las Olas Project was facing;<sup>599</sup> and (ii) on their September 29, 2010, criminal complaint, Claimants not only mention the investigations being conducted by the "environmental department" of the Municipality<sup>600</sup> but also request that "*Ms Mónica Vargas from the area of Environmental Management of the Municipality*" be summoned to testify.<sup>601</sup> If Claimants knew nothing of Ms Vargas's interventions until 2011, how is it that in September 29, 2010,

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<sup>593</sup> Id., para. 134.

<sup>594</sup> First Witness Statement of David Aven, para. 130.

<sup>595</sup> Mr Aven obtained a copy of the 2010 SINAC Report on March 2011. See R-260, Notification to the Claimants of the July 2010 SINAC Report (ACOPAC-OSRAP-171-11), 18 March 2011.

<sup>596</sup> Claimants' Memorial, paras. 363-364.

<sup>597</sup> **R-372**, First Defamation law suit, 8 October 2010, 12. (*Prueba documental*)

<sup>598</sup> Claimants' Memorial, paras. 363-364.

<sup>599</sup> First Witness Statement of Mónica Vargas, para. 25.

<sup>600</sup> **R-372**, First Defamation law suit, 8 October 2010, 12. (*Prueba documental*)

<sup>601</sup> Ibid.

just 22 days after Mr Sebastián Vargas Roldán's encounter with Ms Vargas at the Municipality, they decided to offer her as a witness in their First Defamation action?

588. Finally, Claimants also knew about the TAA proceedings. On the criminal complaint they also requested that the court orders the production of a copy of the complaint filed with the TAA. Claimants have denied "ever" being notified with the TAA Injunction on April 13, 2011 and therefore, never knowing of the existence of the initiation of these proceedings.<sup>602</sup> However, the record shows that they were well aware of the initiation of the TAA proceedings and could have visited the agency at any time to request information of the case. Instead, Claimants decided to ignore any signals they had of the TAA investigations.

589. In light of the above, any claims regarding the "lack of notification" of the investigations conducted by SINAC, the *Defensoría*, DeGA and the TAA should be dismissed.

**E. Claimants' illegalities raised a well-grounded concern in the Esterillos Oeste community**

590. Claimants have tried to make this case about an "overzealous neighbor" who had a personal vendetta against Claimants and conspired with Costa Rican agencies to "shut down" Claimants' project. Claimants' relations with their neighbors are of no importance to Respondent and are equally irrelevant to the issues the Tribunal has to decide. Certainly, if Claimants' proposition is that a dispute with neighbours should become the focus of a public international law claim, then the appropriateness of these proceedings is truly in doubt.

591. What this case is really about is how Costa Rican environmental enforcement apparatus reacted to Claimants' damaging works on the Las Olas Ecosystem. The fact that the Esterillos Oeste neighbors were the ones who triggered the enforcement measures applied by Costa Rican authorities has no bearing on Claimants wrongdoing and consequent liability towards Costa Rica.

592. In any event, Mr Bucelato was not the only neighbor concerned by the Las Olas Project's illegalities. As Ms Vargas explains, Rosemary Chamberlain, was another neighbor of Esterillos Oeste who repeatedly complained about the environmental damages committed by Claimants:

"Furthermore, I remember that Mrs Rosemary Chamberlain, neighbor of Esterillos Oeste, constantly called me by phone to complain about the cutting and burning of tress on the site of the project. Mrs

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<sup>602</sup> Claimants' Memorial, paras. 153-155.

Chamberlain also appears as a signatory in the complaints that were presented against the project in 2010."<sup>603</sup>

593. Rosemary Chamberlain also appears as one of the many neighbors who subscribed the complaints against the Project, such as:

- The complaint filed with the Municipality for damages to wetlands dated July 5, 2010,<sup>604</sup>
- The complaint filed with SINAC regarding the existence of the Forged Document in the SETENA record for the Project dated November 18, 2010;<sup>605</sup> and
- The complaint filed with the Municipality regarding illegalities in Claimants' operation of the Concession site dated February 7, 2011.<sup>606</sup>

594. Further, Claimants were never able to prove any "personal vendetta" or "complot" engaged by Mr Bucelato against them or their project. In fact, the record shows that Mr Bucelato succeeded in all the legal actions brought by Claimants against him. That is to say, Costa Rican courts have never issued an adverse judgment against Mr Bucelato.

595. All of the actions Claimants initiated against Mr Bucelato bore similar allegations to the ones Claimants are making in their Reply Memorial.

596. First, the First defamation action brought by Claimants against Mr Bucelato was dismissed because both of the parties failed to attend the merits hearing.<sup>607</sup>

597. Second, the Second defamation action brought by Mr Aven against Mr Bucelato was also dismissed. However, this time, the dismissal was only attributable to Mr Aven, because he did not attend the hearing scheduled for March 7, 2011, and therefore the complaint against Mr Bucelato was dismissed.<sup>608</sup>

598. Third, Mr Damjanac also filed a criminal complaint against Mr Bucelato on June 27, 2011.<sup>609</sup> In referring to that complaint, Mr Damjanac states that:

"Mr Bucelato accused us that the project was illegal, said he would "shut down" the project, and lodged personal physical threats against me and others. For instance, Mr Bucelato told me: "watch your back" and "I know some guys that will take care of you." We filed numerous complaints with the police regarding Mr Bucelato's violent threats, and David eventually filed a defamation lawsuit against Mr Bucelato for his

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<sup>603</sup> Second Witness Statement of Mónica Vargas, para. 28.

<sup>604</sup> R-37, Complaints by members of Esterillos Oeste, 5 July 2010.

<sup>605</sup> R-59, Complaint of neighbors re Forged Document, 18 November 2010.

<sup>606</sup> **R-292**, Neighbors' complaint regarding illegalities on the Concession site, 7 February 2011.

<sup>607</sup> **R-275**, Termination of First defamation action proceedings, 13 January 2012.

<sup>608</sup> **R-325**, Court's acknowledgement of Mr Aven's absence to scheduled hearing, 7 March 2011.

<sup>609</sup> C-108.

campaign against Las Olas. **Nothing has ever come of these complaints.**<sup>610</sup> (emphasis added)

599. Indeed, the criminal complaint was dismissed and the court closed the file on this case, dismissing any charges against Mr Bucelato.<sup>611</sup>

600. Claimants repeatedly assert that any inaction against those who they pretend to be adverse to them is evidence of a grand conspiracy by the apparatus of the Costa Rican state. There is no evidence of this. Thus, if the Tribunal is being asked to see shadows where none exist, and overlook the conclusions reached by the Costa Rican courts that have dismissed Claimants' personal claims, then Respondent respectfully submits that it is Claimants who are asking the impossible.

**F. The Forged Document was submitted to SETENA to benefit the Las Olas Project**

601. When Claimants contend that the Forged Document is not of "*great significance to their dispute with the Respondent*,"<sup>612</sup> they forget to consider that this document was submitted to SETENA with the sole purpose of benefiting the Las Olas Project and hiding the adverse impacts it would have against the ecosystems on the Project Site by falsely asserting that "the project was not a threat to the biodiversity in the area."<sup>613</sup> Therefore, if the Forged Document asserted that the Las Olas Project *would* be adverse to biodiversity of the area, which indeed it was, probably Claimants would not have been able to mislead SETENA and subsequent agencies into moving forward with the Las Olas Project.

602. In their Reply Memorial, Claimants refer to the Forged Document in a useless attempt to revive its already drowned "conspiracy theory" alleging that Mr Bogantes was the first person to discover it and record its existence.<sup>614</sup> Further, Claimants accuse Mr Bucelato of introducing the Forged Document to SETENA relying on a dubious hand-written note allegedly found by Claimants during the last months. Claimants have notably not sought to present details of this note and how the handwriting has miraculously found its way onto the record at this stage in the episode.

603. All in all, the Forged Document solely benefited Claimants, not the Costa Rican agencies. At all times, Claimants benefited from exculpatory decisions that relied on the contents of

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<sup>610</sup> Second Witness Statement of Jovan Damjanac, para. 11.

<sup>611</sup> **R-370**, Status of Mr Damjanac's criminal complaint against Mr Bucelato (EXP. 11-500379-0443-FC-7).29 September, 2016. Respondent has not been able to produce a complete copy of this criminal file. Since the case was dismissed and filed more than 5 years ago, the physical file for this case was destroyed. Respondent submits a certification of the Prosecutor's Office that indicates under Status, "Filed" (*Ult. Estado: ARCHIVADO*) and "Resolution: Not guilty" (*RESOLUCION: ABSOLUT CON JUICIO, resolución absoluta*).

<sup>612</sup> Claimants' Reply Memorial, para. 303.

<sup>613</sup> C-47.

<sup>614</sup> Claimants' Reply Memorial, para. 302.

the Forged Document. Claimants have defended its validity to the end, even in this arbitration, Claimants insist on calling it the "Allegedly Forged Document."

604. Respondent will now address each of Claimants arguments regarding the existence and use of the Forged Document.

**1. Mr Bucelato did not know about the Forged Document until Claimants brought it to his attention**

605. Claimants state that they always were troubled by a number of unanswered questions surrounding the Forged Document like: how did the neighbors come to know of the Forged Document's existence? How did the neighbors make a complaint about its existence in 2010? How did the neighbors require an investigation into its provenance in 2011?<sup>615</sup>

606. Claimants always knew these answers because they gave Mr Bucelato access to the Forged Document back in 2010. Mr Bucelato only knew about the existence of the Forged Document through the defamation lawsuit initiated by Claimants against him on October 6, 2010. As it will be proved, all of the neighbors' complaints that related to the Forged Document that triggered investigations within the agencies follow October 6, 2010.

607. In the criminal complaint for the First defamation action, Claimants accused Mr Bucelato of the following facts:<sup>616</sup>

- On August 5, 2010, Mr Bucelato approached the Sales Manager of the project and told some clients that were with him that the project was illegal;
- On September 4, 2010, Mr Bucelato went to the Las Olas office and accused the representatives of the project of being criminals;
- On September 17, 2010, Mr Bucelato went to the Las Olas office and said the project was illegal, did not have the required permits and was causing damage to the environment;
- On the morning of October 18, 2010, Mr Bucelato came to the Las Olas office and said that the project was illegal and that Claimants had paid bribes to obtain their permits; and

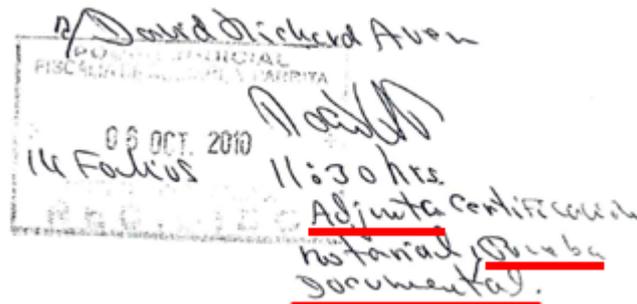
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<sup>615</sup> Id., para. 304.

<sup>616</sup> R-372, First Defamation law suit, 6 October 2010.

- On the afternoon of October 18, 2010, Mr Bucelato came again to the Las Olas office and said the developers were impacting wetlands and cutting down protected species;

608. None of the accusations against Mr Bucelato, at the time, refer to the existence of the Forged Document. The reason is because, at that time, Mr Bucelato had not yet seen the Forged Document. The first time Mr Bucelato had access to the Forged Document was when he was served with process of Claimants' complaint. With their October 6, 2010 complaint, Claimants stated that they were submitting as evidence accompanying their complaint a copy of the SETENA record for the Condominium site (File No. 1362-2007-SETENA),<sup>617</sup> which included the Forged Document. In fact, the stamp on the front page of the complaint acknowledges that documentary evidence was attached to it:



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609. On November 12, 2010, after being served with process, Mr Bucelato filed his statement of defense against the First defamation action. After having had access to the SETENA file produced by Claimants and therefore, to the Forged Document, Mr Bucelato pointed, for the first time ever, in his statement of defense, to the existence of the Forged Document.<sup>619</sup>

610. During the first conciliatory hearing for the First defamation action, that took place on December 14, 2010, the parties decided to take a time to negotiate and review "all of the documents" that had been submitted by the parties and were now on the public record.<sup>620</sup> Of course, by this time, Claimants knew that Mr Bucelato had seen the Forged Document and that this would trigger a whole new wave of complaints against them. Indeed, the complaints now would not only point to the impacts to the ecosystems on the Project Site but to the use of the Forged Document to obtain the EV for the Condominium site.

<sup>617</sup> Id., 12. (*Prueba documental*)

<sup>618</sup> **R-372**, First Defamation law suit, 6 October 2010, p. 14. This stamp shows that all of the documentary evidence that accompanied the law suit was submitted to the court.

<sup>619</sup> **R-373**, Mr Bucelato's Statement of Defense in First defamation action, 12 November 2010.

<sup>620</sup> **R-374**, Minute of first conciliatory hearing, 14 December 2010.

611. Only after Claimants gave Mr Bucelato access to the Forged Document, he went on to raise its illegality with the following agencies:

- On November 23, 2010, members of the Parrita community filed a complaint with SINAC, challenging SETENA's reliance on a forged document that was found within the SETENA record for the Condominium EV;<sup>621</sup> and
- On November 23, 2010, a copy of the complaint filed with SINAC was filed with the *Defensoría* requesting its participation in the investigations against Claimants.<sup>622</sup>

612. These complaints in fact triggered the investigations of agencies like SINAC, SETENA and the *Defensoría*, into the existence and forgery of the Forged Document. And, all of them occurred only after Claimants produced a copy of the SETENA file in the First defamation action.

613. The First defamation action was terminated by the court on January 13, 2012, after neither of the parties attended the hearing scheduled for the 11<sup>th</sup> and 12<sup>th</sup> of January.<sup>623</sup>

614. The Second defamation action brought by Mr Aven against Mr Bucelato was the only one disclosed by Claimants in this arbitration. On his statement of defence for the Second defamation action, Mr Bucelato requested the court to order that SETENA produced a complete copy of the SETENA record for the Condominium site and incorporate it as evidence *in his defense*.<sup>624</sup> After finding out about the existence of the Forged Document through the First defamation action, Mr Bucelato wanted the court to review the SETENA file for the Condominium site which contained the Forged Document. If Mr Bucelato submitted the Forged Document to SETENA in 2008, why would he request that evidence of his own culpability be produced by SETENA? Claimants intent to blame Mr Bucelato for the Forged Document lacks any logic.

615. Mr Damjanac recounts an alleged visit from Mr Bucelato, who allegedly showed him the Forged Document:

"As I explained in paragraphs 145 and 146 of my First Witness Statement, I recall one time in late 2010 or early 2011, Mr Bucelato came by our office at Las Olas and dropped off a document that I think I recall he said was forged, but I am not sure if it was the alleged forged document, because I just don't remember."<sup>625</sup>

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<sup>621</sup> R-59, Complaint of neighbors re Forged Document, 18 November 2010.

<sup>622</sup> First Witness Statement Hazel Díaz Meléndez, para. 40.

<sup>623</sup> R-275, Termination of First defamation action proceedings, 13 January 2012.

<sup>624</sup> **R-314**, Steve Bucelato's statement of defense against Mr Aven's defamation law suit, 20 December 2010.

<sup>625</sup> Second Witness Statement of David Aven, para. 84.

616. This visit was just after Mr Bucelato and his counsel had accessed the Forged Document through the First defamation action. At the time, none of Claimants' defamation lawsuits against Mr Bucelato referred to the Forged Document being flagged by Mr Bucelato against Claimants' Project.

617. Now, Claimants want the Tribunal to believe that it was Mr Bogantes who first "*discover it and record its existence.*"<sup>626</sup> To support this allegation, Claimants refer to a letter Mr Bogantes sent to Ms Díaz on August 27, 2010 responding to the *Defensoría's* request for information.<sup>627</sup> All that Mr Bogantes did was list all of the relevant documents in the record. In any way, did he "discover it" nor pointed to its forgery. Further, Respondent has already submitted evidence that the Forged Document was the subject of concerns within SINAC departments since 2008, so this allegation of Claimants in trying to bring Mr Bogantes to the "conspiracy plot" is absurd.<sup>628</sup>

## 2. Mr Martínez's investigated the authorship and use of the Forged Document

618. Mr Mussio accuses Mr Martínez of making "baseless statements" against his partner Edgardo Madrigal regarding the production of the Forged Document:

"I have read Luis Martínez's First Witness Statement and I note his statement at paragraph 36 that the Allegedly Forged Document was introduced into SETENA's records by my partner, Mr Madrigal. This is total nonsense and Mr Martínez has no basis on which to make such a statement. [...]

**It is important to note that Mr Martínez makes this claim without explaining the basis for his presumption, thus it is totally unfounded and even reckless you might say. [...]**

[T]here is not a single indication in Mr Martínez's Witness Statement that could serve as grounds for any suspicion that I or Mr Madrigal submitted this document to SETENA."<sup>629</sup> (emphasis added)

619. As described by Mr Martínez in his Second Witness Statement, he conducted a thorough investigation into the crime of forgery and misuse of a public document.<sup>630</sup> Mr Martínez basis to point Mr Edgardo Madrigal as a potential author of the Forged Document was not "unfounded," in fact, the internal investigation conducted by SETENA had previously pointed to Mr Madrigal as the person who submitted the Forged Document:

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<sup>626</sup> Claimants' Reply Memorial, para. 302.

<sup>627</sup> C-80.

<sup>628</sup> R-21, Letter to Ronald Vargas (ACOPAC-D-1063-08), 7 October 2008.

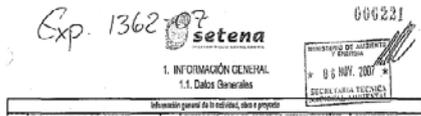
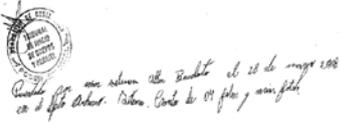
<sup>629</sup> Witness Statement of Mauricio Mussio, para 37.

<sup>630</sup> Second Witness Statement of Luis Martínez, para. 14

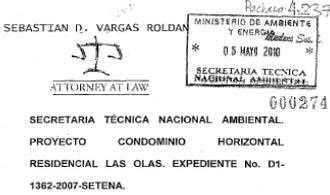
Por otro lado, este documento fue solicitado por el Departamento de (Gestión) Institucional mediante oficio S.G.P-D.G.I-098-2008 del día 13 de febrero del 2008, y presentado por el señor Edgardo Madrigal Mora arquitecto de la sociedad Inversiones Costco C&T S.A. el día 03 de abril del 2008, por lo que argumenta el señor David Aven, representante legal de Inversiones Costco S.A, no es cierto.

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620. It is still unclear in which date exactly the Forged Document was submitted to SETENA. Claimants point to an alleged note on the back of the Forged Document, according to which Mr Bucelato submitted the document on May 28, 2008.<sup>632</sup> This note lacks any authenticity because it does not comply with SETENA's legal practice of acknowledging the receipt of a document submitted by any user.
621. A simple review of the SETENA files for the Condominium site or the Concession site shows that the ordinary method for acknowledging receipt of any document submitted with SETENA involves: (i) the placing of an official stamp of the agency with the date of submission, (ii) on the front cover of the first page of the document that is being submitted, and (iii) a signature of the person at the agency who received the document. Indeed, the following submissions before and after the alleged introduction of the Forged Document to SETENA bore the required proof of receipt on the front page of the documents submitted:

<p>Claimants' submission of the D-1 Form on November 6, 2007:<sup>633</sup></p>		
<p>Claimants' second submission to SETENA with the information and documentation requested on April 3, 2008<sup>634</sup></p>		

631 R-77, Report from SETENA on Forged Document, 30 March 2011.  
 632 Claimants' Reply Memorial, paras. 302-205.  
 633 C-222.  
 634 Id., 242.

<p>Claimants' request for an extension to start construction works on the Condominium site on May 5, 2010<sup>635</sup></p>		
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622. Mr Martínez also agrees that the handwritten note which Claimants have just discovered does not meet the requirements to be properly received at SETENA:

"Moreover, as per the review of SETENA's file, all documents received by SETENA are stamped with a seal on the first page of the document as received. Surprisingly, the alleged note that the Claimants refer to was written by hand on the opposing side of the last page of the document, and without any official stamp or signature indicating its receipt."<sup>636</sup>

623. Thus, it is unclear that the alleged note cannot in itself, as Claimants try to paint it, be conclusive evidence of the origins of the Forged Document. Moreover, Mr Martínez has gone to extends on his second witness statement to recount the investigation he conducted of this crime:

"I really cannot understand how the Claimants can state that I did not investigate the forgery of the forged SINAC document. As I explained to the criminal law judge, the Prosecution: (a) requested for review the SETENA file on the Las Olas Project; (b) personally interviewed the supposed authors of the forged document at the SINAC offices; and (c) personally interviewed the SETENA receptionist responsible for the receipt of all incoming documents at the institution."<sup>637</sup>

"I reiterate that I personally interviewed the SETENA receptionist. The woman was unable to say who presented it, and thus it was not possible to accuse either the person who prepared or the person who used [the forged document]. Furthermore, the illegal activity investigated related the use of [the forged document] to favor the project. Thus, the question arises: what could have been Mr Bucelato's motive in favoring the Las Olas Project given that he has always been its detractor? If it is accepted that Mr Bucelato submitted it to SETENA, the only rational explanation that could ensue is that he presented it to uncover its falsity, as it was for this reason that he presented it to the Prosecutor and asked me to investigate it further. Or would it be then that the presentation of the [forged] document to the Prosecutor should also be considered an offence?"<sup>638</sup>

624. The circumstances under which Claimants "found" this shady hand-written note raise serious doubts regarding its authenticity. All the more so because as Claimants themselves admit, that SETENA officers nor the prosecution had seen it before.

<sup>635</sup> Id., 274.

<sup>636</sup> Second Witness Statement of Luis Martínez, para. 62.

<sup>637</sup> Second Witness Statement of Luis Martínez, para. 22.

<sup>638</sup> Id., para. 61.

### 3. Claimants contradict themselves on the importance of the Forged Document for the Las Olas Project

625. Respondent reiterates that irrespective of how this document originated, the Forged Document and its contents submitted to SETENA benefited solely Claimants. That is the reason why, Claimants along the investigations around the Las Olas Project always tried to benefit from its declarations in favor of their Project.

626. Not only the Forged Document was submitted to SETENA only after SETENA had raised Claimants' omission to address the existence of a protected forest on the site and required a certification from Claimants to that effect but afterwards, in the investigation chain, authorities kept relying on it to exculpate Claimants' wrongdoing.<sup>639</sup> Claimants allege that Respondent has not "supported" this allegation.<sup>640</sup> Well it just takes a simple review of the documents that lie on the record to see how authorities relied on the Forged Document in favor of Claimants and its project:

- The report prepared by Mr Pachecho Polanco from SETENA on August 18, 2010, concluding that there were no "bodies of water" (lakes) on the site;
- The SETENA Resolution of September 1, 2010, that dismissed the complaint filed with the *Defensoría*; and
- The July 2010 SINAC Report of July 16, 2010, that concluded that after a visual inspection, there was no wetland on the Project site.

627. Claimants also allege that because SETENA did not consider the Forged Document to issue the EV for the Condominium site, Claimants "*never saw [it] as being of any great significance*,"<sup>641</sup> implying that Claimants did not favor of its contents. This is false. If the Forged Document did not indicate what it did, probably SETENA would not have granted the EV and Claimants would not have benefited from any of the agencies' reports that relied on it.

628. Mr Aven now tries to disassociate himself from the existence of the Forged Document and diminishes its importance:

"Much is made of the allegedly forged document in the Respondent's submissions."<sup>642</sup>

"The alleged forged document, at the time it was written on March 27, 2008, was not an important document. It was not a document that

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<sup>639</sup> C-222.

<sup>640</sup> Claimants' Reply Memorial, para. 306.

<sup>641</sup> Claimants' Reply Memorial, para. 303.

<sup>642</sup> Second Witness Statement of David Aven, para. 80.

SETENA required, it was not a document that was necessary for any permission, and it did not cover any ground that the other submitted reports addressed."<sup>643</sup>

629. These assertions are quite unexpected given all of the occasions where Mr Aven relied on the Forged Document to assert that its contents disproved Claimants' wrongdoing:

- In August 2010, Mr Aven himself brought the document to the Municipality 2010 to support the legality of the works being carried out on the Project Site,<sup>644</sup>
- On May 6, 2011, during the inquest conducted by Mr Martínez, Mr Aven defended the validity of the Forged Document;<sup>645</sup>
- On his statement of defense in the criminal proceedings, Mr Aven submitted the Forged Document as part of its exculpatory evidence;<sup>646</sup> and
- During his criminal trial testimony, Mr Aven defended its validity.<sup>647</sup>

630. Claimants try to cover Mr Aven's contradictions by arguing that Mr Aven only defended the Forged Document's validity to "*illustrate the contradictions on Mr Martínez prosecution tactics*":

"one minute Mr Martínez 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 Martínez charged him with forgery."<sup>648</sup>

631. This is false. Mr Martínez never filed charges against Mr Aven for forgery. Mr Martínez refutes this false accusation from Mr Aven and Claimants in his second witness statement:

"I would like to emphasize that I never accused anyone of the forging or use of the forged SINAC document (SINAC '67289RNVS-2009'). Mr Aven insists that I '*filed criminal charges against him for forgery of this document*'. I would like to clarify that the Prosecution never filed criminal charges against Mr Aven for forgery."<sup>649</sup>

"On that same day [October 21, 2011], I also filed a criminal indictment against Mr Aven and Mr Damjanac on charges of infringement of the Wildlife Conservation Law in relation to the draining and filling of wetlands, and infringement of the Forestry Law in relation to the invasion of conservation areas and illegal exploitation of forestry products. The investigation stage concluded in this case with the presentation of the permanent dismissal of proceedings and the criminal accusation."<sup>650</sup>

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<sup>643</sup> Second Witness Statement of David Aven, para. 81.

<sup>644</sup> R-49, Municipality Report to the *Defensoría de los Habitantes* (DeGA No. 200-2010), 18 August 2010.

<sup>645</sup> R-90, Sworn Declaration of Mr David Aven, 6 May 2011.

<sup>646</sup> R-154, Undated Statement of Defence by David Aven in File No. 11-00009-611-PE.

<sup>647</sup> C-272.

<sup>648</sup> Claimants' Reply Memorial, para. 309.

<sup>649</sup> Second Witness Statement of Luis Martínez, para. 16.

<sup>650</sup> Second Witness Statement of Luis Martínez, para. 19.

632. Finally, Claimants allege that Respondent has not submitted any evidence to support its allegation that the document was forged. Apparently, Claimants have not looked at Respondent's Exhibit R-63 where Mr Ronald Vargas, the alleged author of the Forged Document, confirmed that the signature in the Forged Document was not his. Also, in paragraph 32 of his first witness statement, Mr Martínez recounted how he interviewed both SINAC officers whose signatures appeared on the Forged Document and both confirmed to Mr Martínez that they had not executed it.

**G. Costa Rican agencies applied its own laws and regulatory framework**

633. With the aim of diverting the Tribunal's attention from the illegalities committed by Claimants, Claimants now accuse Respondent of *"failing to apply its own laws and regulatory framework."*<sup>651</sup>

634. For making most of these allegations, Claimants rely on the expert report of Mr Luis Ortiz. While Mr Ortiz claims to be an expert in administrative law but he lacks expertise in field of environmental law. Mr Ortiz's lack of expertise in the environmental law field is patent from his own report which incurs in serious mistakes on how environmental protection is structured under Costa Rican law.<sup>652</sup>

635. These are just some examples of the inaccuracies found in the Expert Report of Mr Luis Ortiz. In his witness statement, Dr Jurado points to more serious and substantial errors which show Mr Ortiz's clear lack of expertise on the field of environmental law matters.<sup>653</sup> Most importantly, Dr Jurado explains why, when analyzing the legal issues of this case which are clearly not "core administrative law" issues, as Claimants have presented them,

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<sup>651</sup> Claimants' Reply Memorial, para. 227.

<sup>652</sup> In regards to the competence of environmental regulatory agencies, Mr Ortiz commits various mistakes. SINAC is not responsible for monitoring the granting usage permits in land-maritime areas, for all cases, SINAC is only to be involved when the permits correspond to protected areas. The license to discharge wastewater does not correspond to MINAE or to SENARA, but to the Ministry of Health. Further, the Executive Decree N° 31545 for the regulation on the approval and operation of wastewater treatment systems that Mr Ortiz cites has been repealed. There is inconsistency in the terminology Mr Ortiz employs. Ecosystems are confused with management categories. Mr Ortiz attempts to place a forest as a management category, when he compares it with wetlands. The wetlands ecosystem does have both categories as stipulated by legal mandate. The forest, as such, is an ecosystem that is protected separately, when its extension is more significant, incorporating it into one of the management categories, where its exploitation is only permitted in private properties, if done within forest management plans, but always taking into account the prohibition of the change in exploitation of the land. On the other hand, wetlands are always a protected ecosystem, regardless of their location, size or condition. Wetlands ecosystems are protected merely for being such, and they are by itself a management category. Mr Ortiz's report is not precise as it makes reference to protected wildlife areas, fragile environmental areas and certain aspects of the assessment of the environmental impact. Protection measures are social and environmental limitations that are imposed on private property, under criminal sanctions and are exclusively and exhaustively listed by the law. Restrictions of protected areas do not apply to wildlife-protected areas because due to their status as being property of the state, not only do limitations for protected areas apply, but many others do too. The conservation of protected areas is a mandate that applies to all the national territory, regardless of there being or not being any wild protected areas under the categories that have been established.

<sup>653</sup> Second Witness Statement of Julio Jurado, para. 228.

one has to consider the specific legal framework applicable to environmental law and its principles:

"Mr Luis Ortiz has a long and sound academic and professional career in administrative law. Nevertheless, for the purposes of this arbitration, it is important not to lose sight of the fact that we are dealing with proceedings of administrative law specifically correlated to environmental matters. As I mentioned above, when analyzing environmental administrative law, one must observe the special principles, substantive rules and particular formalities, keeping in mind our ultimate goal: the protection of the environment as a fundamental human right."<sup>654</sup>

636. With this in mind, Respondent will now address each of Claimants' allegations against the Costa Rican agencies' conduct.

**1. SETENA has never confirmed the EV for the Condominium site "three times"**

637. Claimants argue repeatedly as a central tenet of their case that SETENA confirmed and verified Claimants' EV for the Condominium site for three times.<sup>655</sup> Claimants give no further explanation as to this statement, other than listing the occasions they pretend to represent those three occasions. Therefore, for the avoidance of doubt, what SETENA did was:

- On November 24, 2004, SETENA issued an EV for the Condominium site for a project called "Villas La Canícula."<sup>656</sup> The project was never developed and on September 13, 2011, SETENA closed the file on the project;<sup>657</sup>
- On June 2, 2008, SETENA issued an EV for the Condominium site where none of the ecosystems on the Project Site were disclosed by Claimants.<sup>658</sup> Claimants allege that this is the first time SETENA "confirmed the EV;"
- On August 7, 2010, SETENA heard a complaint from the *Defensoría* regarding the existence of a wetland on the Project Site;<sup>659</sup>
- On August 18, 2010, SETENA sent Mr Pacheco Polanco to conduct a site visit, where he was misled by the change of land performed by Claimants as early as March 2009,<sup>660</sup>

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<sup>654</sup> Second Witness Statement of Julio Jurado, para. 228.

<sup>655</sup> Claimants' Reply Memorial, para. 233.

<sup>656</sup> R-9. SETENA's EV for Villas La Canícula, 23 November 2004.

<sup>657</sup> R-112, SETENA closes files to Villas La Canícula, 13 September 2011.

<sup>658</sup> C-52.

<sup>659</sup> R-45, Letter from the *Defensoría de los Habitantes* to SETENA (08949-2010-DHR), 7 August 2010.

<sup>660</sup> C-78.

- On September 1, 2010, SETENA dismissed the *Defensoría's* complaint based on Mr Pacheco Polanco's observations.<sup>661</sup> Claimants allege that this dismissal was a "second confirmation of the EV;"
- On December 3, 2010, SETENA heard a complaint from SINAC regarding the existence of the Forged Document in the SETENA file for the Condominium site;<sup>662</sup>
- On January 17, 2011, after SETENA investigated internally the origins of the Forged Document, it requested Claimants' to provide the original copy,<sup>663</sup> and
- On November 15, 2011, SETENA dismissed SINAC's complaint because there was insufficient evidence to blame Claimants for the fabrication of the Forged Document.<sup>664</sup> Claimants allege that this is the third time SETENA "confirmed the EV."

638. None of those actions can be understood as a "confirmation of the EV."

- The issuance of the EV for the Condominium site for the Las Olas Project cannot be a confirmation of any development for the Villas La Canícula;
- The dismissal of the *Defensoría's* complaint cannot be considered a confirmation of anything. SETENA was misled by Claimants works on the land since March 2009, which had changed completely the change of land on the site; and
- The dismissal of SINAC's complaint regarding the Forged Document cannot be considered a reconfirmation of any environmental damage caused to the site. This decision had nothing to do with the existence of ecosystems on the Project Site or impacts caused to them.

639. Claimants give tremendous importance to the SETENA's September 1, 2010 report, in which Mr Pacheco Polanco dismissed the complaint filed with the *Defensoría* on the existence of wetlands at the Project Site.<sup>665</sup> Claimants allege the following in response to paragraph 224 of the Counter Memorial:<sup>666</sup>

SETENA's reliance on the Forged Document should be underestimated because SETENA relied on many more documents including "*the DI form and physical site inspections.*"

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<sup>661</sup> C-83.

<sup>662</sup> C-93.

<sup>663</sup> R-65, SETENA's request to produce Forged Document (SG-ASA-041-2011) 17 January 2011.

<sup>664</sup> C-144.

<sup>665</sup> C-83.

<sup>666</sup> Claimants' Reply Memorial, para. 285(a).

640. The fact that SETENA relied on the D1 Form just proves that it was misled on its conclusions because Claimants willfully concealed the existence of wetlands and forests on the site. As to the *"physical site inspections,"* Mr Pacheco Polanco only conducted one summary visit where he could not identify "bodies of water" (lake). And as mentioned, the works already performed by Claimants since March 2009 seriously affected Mr Pacheco Polanco's judgment.

The decision was reached in full knowledge of the backfilling of wetlands allegations.

641. While this is true, Claimants distort the context in which the decision was taken. First, neither Mr Pacheco Polanco nor any other SETENA officer has any authority to determine the existence of wetlands in Costa Rica. Thus, he was not qualified to realize and identify how the filling and draining, that had been taking place since March 2009, had changed the soil conditions and the land's appearance.

Respondent has offered no evidence of Claimants' drainage of wetlands on the Project Site

642. This allegation is just absurd. The First and Second KECE Report have proven extensively how Claimants' works impacted Wetland No. 1.

Respondent relies on the fact that SETENA is not competent to make any wetlands determinations.

643. This is a correct statement of the law. SETENA is not the competent body to determine the existence of wetlands so Claimants cannot rely on its report which was clearly affected by Claimants' works on the site since March 2009.

644. Also, Claimants pretend to rely on SETENA's Resolution of November 2011, to justify the impacts they caused to wetlands and forests on the Las Olas Ecosystem:

"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 leveled 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.

This finding, alone, demolishes the Respondent's defense, 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 defense

hangs, were true, SETENA would not have reconfirmed the Environmental Viability in November 2011."<sup>667</sup>

645. This is simply unacceptable. The fact that SETENA dismissed SINAC's complaint regarding Claimants' fabrication and use of the Forged Document, in any way, relates to or can avoid any liability that Claimants had for impacting the ecosystems on the Project Site. And that is exactly why the criminal proceedings were initiated against Mr Aven notwithstanding the existence of the EV for the Condominium site.

## 2. The injunctions were lawful and followed the legal procedure

646. Claimants rely on Mr Ortiz to argue that all of the injunctions issued against Claimants are null and void. First, Claimants allege that SETENA has acted in a way that is *"unreasonable and in violation of the law"* for not initiating an administrative or judicial proceeding to review the SETENA Injunction.<sup>668</sup> Second, Claimants allege that once SINAC issues interim relief, *"SINAC is obligated to initiate an administrative proceeding to review all evidence within 15 days"* from its issuance.<sup>669</sup> Likewise, Claimants argue that Respondent has *"failed to abide by its own laws"* by not lifting the TAA Injunction or initiating an administrative proceeding to review it within 15 days from its issuance.<sup>670</sup>

647. First of all, to support the 15-day term, Mr Ortiz relies on Articles 14.2, 146 and 148 of the General Law of Public Administration. Neither of these rules deals with the issuance of injunctions by Costa Rican agencies.<sup>671</sup> Second, none of the case law that Mr Ortiz relies on to artificially impose the 15-day term refers to environmental matters.<sup>672</sup>

648. Third, Dr Jurado substantively explains in his second witness statement that:<sup>673</sup>

- When analyzing precautionary measures, it is necessary to contextualize its applicability and concept depending on the area of law where they are to be applied;
- In this case, the injunctions issued against the Las Olas Project need to be analyzed against the principles of environmental law in charge of protecting the constitutional right to a healthy and ecologically-balanced environment; and
- Being the environment a common good, categorized as of public interest, flexibility in granting of precautionary measures is necessary to comply with the

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<sup>667</sup> Claimants' Reply Memorial, paras. 252-253.

<sup>668</sup> Id., para. 209.

<sup>669</sup> Id., para. 219.

<sup>670</sup> Id., paras. 221-222.

<sup>671</sup> Second Witness Statement of Julio Jurado, para. 76.

<sup>672</sup> Second Witness Statement of Julio Jurado, para. 77.

<sup>673</sup> Second Witness Statement of Julio Jurado, paras. 78, 83.

precautionary principle which "permeates and impacts environmental law in a transversal fashion."

649. Against this background, Dr Jurado then concludes:

"Therefore, Mr Ortiz is incorrect in affirming that there is a peremptory term of 15 days, starting from the date of submission of the interim measure, to initiate the main process. **The term Mr Ortiz refers to is prescribed in section 26 of the Administrative Contentious Procedure Code, and applies solely to legal and not to administrative proceedings on environmental issues. Neither the regulation nor the jurisprudence supports the transposition of this term to administrative procedure.**"<sup>674</sup> (emphasis added)

650. Thus, the SETENA Injunction, the SINAC Injunction and the TAA Injunction were legally issued. Dr Jurado analyzes each of them in his second witness statement and confirms that, under Costa Rican environmental law, those were legally applied by the authorities.

651. Finally, Claimants argue that the TAA Injunction should have been reviewed by the TAA because "*TAA injunctions cannot be indefinite.*"<sup>675</sup> Claimants omit to mention TAA's own provisions according to which, an injunction can only be changed when the circumstances that originated it have changed. Dr Jurado explains the application of this rule to Claimants' case:

"Additionally, the durability of the interim measure does not impinge upon administrative law. The administrator can always solicit the TAA to modify the interim measure when it considers that there has been a change to the status quo. As a consequence, and to prevent environmental harm from occurring or persisting, environmental law shifts from a preventative scheme to a process that permits immediate and anticipatory protection. Therefore, if it can be demonstrated that the risk of damages has ceased, there would be no need to extend the interim measure.

[...]

Lastly, interim measures are utilized preventively to preserve the outcome of a final ruling favorable to the claimant and, as a specific characteristic of environmental law, to prevent irreversible damage to the environment. Thus, in the absence of a final ruling or any evidence of administrative acts undertaken to avoid any supposed environmental damage, it is necessary to permit the interim measures to continue. Anything to the contrary would be in breach of national legislation."<sup>676</sup>

652. The rigid and inappropriate interpretation of Mr Ortiz does not correspond to how the environmental enforcement state's apparatus is obliged to act under Costa Rican law when facing even the possibility of damage to the environment.

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<sup>674</sup> Second Witness Statement of Julio Jurado, para. 93.

<sup>675</sup> Claimants' Reply Memorial, para. 221.

<sup>676</sup> Second Witness Statement of Julio Jurado, paras. 113, 115.

### 3. The Municipality complied at all times with the injunctions the corresponding agencies issued against the Las Olas Project

653. The Municipality received orders to stop granting construction permits to Claimants and oversee the discontinuance of works at the Project Site from several agencies:

- On January 3, 2011, SINAC ordered the discontinuance of works at the Las Olas Project;<sup>677</sup>
- On February 4, 2011, the SINAC Injunction ordering the discontinuance of works was granted;<sup>678</sup>
- On April 26, 2011, SETENA ordered the discontinuance of works and requested to the Municipality to enforce its injunction (SETENA Injunction);<sup>679</sup>
- On January 26, 2012, the criminal court of Quepos ordered the Municipality to stop the granting of construction permits to Claimants,<sup>680</sup> and
- On July 17, 2012, the TAA ordered the discontinuance of works (TAA Injunction).<sup>681</sup>

654. On September 26, 2013, the criminal court of Quepos ordered that its injunction remain in effect until the issue is resolved by a final ruling of a court of law.<sup>682</sup>

655. Mr Ortiz testifies that the Municipality should have at least reviewed the injunctions when SETENA lifted the SETENA Injunction on November 15, 2011.<sup>683</sup> However, the Municipality did consider SETENA's lifting of its injunction on November 15, 2011. On December 1, 2011, Claimants requested that the order of stoppage of works to be lifted given the resolution of SETENA.<sup>684</sup>

656. On November 6, 2012, the Municipal Council heard Claimants' petition and agreed to lift the stoppage of works given that the SETENA Injunction had been lifted.<sup>685</sup> If the Municipality had a "personal rage" against Claimants, it would have probably not lifted the Injunction.

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<sup>677</sup> R-262, January 2011 SINAC Report (ACOPAC-CP-003-11), 3 January 2011.

<sup>678</sup> C-112.

<sup>679</sup> R-85, Receipt of SETENA Resolution No. 839-2011 by the Municipality, 26 April 2011.

<sup>680</sup> R-134, Order issued by the Criminal Court, 22 November 2012.

<sup>681</sup> C-121.

<sup>682</sup> R-134, Order issued by the Criminal Court, 22 November 2012.

<sup>683</sup> Expert Report of Luis Ortiz, para. 118.

<sup>684</sup> R-129, Municipal Council's approval of lifting of the injunction (SM\_2012-802), 6 November 2012.

<sup>685</sup> Ibid.

657. However, the Municipality was still bound by the injunctions issued by the TAA and the criminal court of Quepos. In fact, on October 1, 2013 and June 12, 2013, the Interdisciplinary Commission for the Las Olas Project recommended the Municipal Council to abide by the constant extensions to the Judicial Injunction and abstain from granting any permits to Claimants until the situation with the Project was resolved.<sup>686</sup>

#### 4. Claimants cannot rely on SETENA and SINAC's preliminary acts

658. Claimants do not contest that local agencies' reports, as preparatory acts, do not have any legal act effect on the user unless they are embodied in a final administrative act.<sup>687</sup> What Claimants instead allege is that such distinction "*does not vitiate the applicability of the Estoppel Rule or legitimate expectations principle under Costa Rican law.*"<sup>688</sup>

659. As will be discussed below, these allegations have no bearing on Costa Rica's responsibility under international law.<sup>689</sup>

#### H. Respondent has complied with the legal procedure to evict the trespassers from the Project Site

660. Claimants blame Respondent for the current situation at the Project Site.<sup>690</sup> The squatters invaded the Project Site approximately on October 4, 2015. On October 15, 2015, Mr Manuel Ventura sent a letter signed by Ms Murillo on behalf of Trio International Inc. S.A. authorizing the Municipality to take the necessary measures to stop any constructions works undertaken by the squatters on the Project Site.<sup>691</sup>

661. On October 16, 2015, the Municipality requested that the authorization letter be (i) dully accompanied by a power of attorney granted to Ms Murillo to act on behalf of Trio International Inc. S.A. and (ii) acknowledged by a notary.<sup>692</sup> Also, the Municipality explained to Mr Ventura that the Municipality could only take legal action against any illegal constructions on the Project Site.<sup>693</sup>

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<sup>686</sup> **R-390**, Interdisciplinary Commission's first advice to abide by Judicial Injunction, 12 June 2013; **R-391**, Interdisciplinary Commission's second advice to abide by Judicial Injunction, 1 October 2013.

<sup>687</sup> Claimants' Reply Memorial, para. 538.

<sup>688</sup> Ibid.

<sup>689</sup> See, section VII.

<sup>690</sup> Claimants' Reply Memorial, para. 186.

<sup>691</sup> **R-335**, Ms Murillo's request for closing of constructions to the Municipality, 15 October 2015.

<sup>692</sup> **R-336**, Request to Mr Ventura for proper authorization, 16 October 2015.

<sup>693</sup> Ibid.

662. On that same day, the Municipality inspected the surroundings of the property, since Claimants had not submitted the proper authorization yet to enter into private property, and reported clearing works, lot demarcation activities and the erection of shacks.<sup>694</sup>
663. On October 20, 2015, the Municipality communicated the public force of Parrita, the Ministry of Health and MINAET of the complaints from the neighbors of Esterillos Oeste relating to the presence of trespassers at the Project Site.<sup>695</sup> The Municipality requested that the agencies undertake any appropriate measures within their scope of action.<sup>696</sup>
664. On October 21, 2015, Mr Ventura submitted the requested power of attorney to the Municipality.<sup>697</sup> On that same day, the Municipality communicated Ms Murillo that:<sup>698</sup>
- the authorization sent to the Municipality on October 15, 2016 had not been duly notarized as requested to Mr Ventura on October 16, 2015;
  - the Municipality required a written authorization from Claimants to enter into the property and close down any illegal constructions being undertaken on the site;
  - the Municipality could not take action to evict the trespassers from the property; and
  - the Municipality has no legal authority to evict the trespassers and appropriate legal action must be initiated through the appropriate authorities.
665. On October 21, 2015, the Mayor of Parrita sent a letter to the Urban and Social Development Department requesting it to coordinate the notification and closing of the illegal constructions on the Project Site.<sup>699</sup>
666. On October 23, 2015, the Municipality visited the Project Site with the public force to close down the illegal constructions taking place.<sup>700</sup>
667. On October 26, 2015, the Municipality organized a meeting with representatives from the Municipal Council, the public force, neighbors of Esterillos Oeste and Claimants'

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<sup>694</sup> **R-337**, Inspection report from the Municipality (DIDU-027-2015), 16 October 2015.

<sup>695</sup> **R-343**, Municipality informs institutions of neighbors' concerns regarding trespassers at the Project Site, 20 October 2015.

<sup>696</sup> Ibid.

<sup>697</sup> **R-339**, Power of attorney submitted to the Municipality by Mr Ventura, 21 October 2015.

<sup>698</sup> **R-340**, Reply to Ms Murillo from the Municipality (OIM 0333-2015), 21 October 2015.

<sup>699</sup> **R-341**, Letter from the Mayor of Parrity (OAM-666-2016), 21 October 2015.

<sup>700</sup> R-155, Letter from the Department of Inspectors to the Department of Urban Development on visit to the site (DIDU-028-2015), 23 October 2015.

representative, Mr Damjanac.<sup>701</sup> The conclusion of the meeting was that Claimants were to submit a formal complaint with the Ministry of Public Security.

668. On October 27, 2015, the Ministry of Health replied to the Municipality's request for information of October 21, 2015, for the improper handling of solid waste and sewage arising out of the invasions at the Project Site. The Ministry reported the results of the October 26 meeting and, once again, recommended that Claimants initiated the corresponding legal actions to evict the trespassers from the property.<sup>702</sup>
669. On November 13, 2015 Claimants filed the so long expected formal complaint with the Ministry of Public Security.<sup>703</sup> On November 7, 2015, the Ministry of Security acknowledged Claimants' petition and requested that Claimants indicate the number of persons to be evicted within the next 10 days.<sup>704</sup>
670. On November 16, 2015, the Municipal Council enquired with the Ministry of Public Security whether Claimants had submitted a proper complaint with the agency to start the eviction process.<sup>705</sup> The Municipal Council explained to the Director of the Eviction Department at the Ministry the efforts it had undertaken but nonetheless Claimants had not shown up to inform them of any actions taken before the Ministry of Public Security.<sup>706</sup>
671. On November 18, 2015, representatives of the Municipality, the Ministry of Health and the public force visited the Project Site to evaluate the situation of the squatters. However, the inspection had to be suspended due to security reasons.<sup>707</sup>
672. On April 19, 2016, the Ministry of Public Security replied to the Municipality informing it that Claimants had initiated an eviction process on behalf of Mis Mejores Años Vividos S.A. and Trio International Inc. S.A.<sup>708</sup>
673. On April 20, 2016, the Ministry of Public Security requested the Parrita Police to conduct an investigation at the Las Olas Project to find out (i) the approximate date of the invasions and (ii) the number of persons living at the Project Site.<sup>709</sup>
674. On May 4, 2016, the Parrita Police informed the Ministry of Public Security that:<sup>710</sup>

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<sup>701</sup> R-156, Municipality report on work meeting by inter-institutional Commission (DeGA-0273-2015), 28 October 2015.

<sup>702</sup> **R-342**, Letter form the Ministry of Health to the Municipality, 27 October 2015.

<sup>703</sup> C-175; C-180.

<sup>704</sup> **R-328**, Request for information from Claimants, 7 November 2015.

<sup>705</sup> **R-327**, Request for information from the Municipality to the Ministry of Public Security, 16 November 2015.

<sup>706</sup> **R-327**, Request for information from the Municipality to the Ministry of Public Security, 16 November 2015.

<sup>707</sup> **R-338**, Inspection report from the Municipality (DIDU-030-2015), 18 November 2015.

<sup>708</sup> **R-329**, Reply from the Ministry of Public Security to the Municipality, 19 April 2016.

<sup>709</sup> **R-331**, Request for information from the Parrita Police, 20 April 2016.

- On October 26, 2015 the Parrita Police reported the situation of squatters at the Project Site;
  - By that date, there were 362 shacks and 6 of them had a total of 19 people living inside of them;
  - The rest of the shacks were inhabited and did not meet basic conditions to constitute dwellings; and
  - 95% of the squatters were not locals from the area.
675. On July 19, 2016, the Parrita Police informed the Ministry of Public Security of an inspection conducted on that day where the police observed that:<sup>711</sup>
- 5 shacks where inhabited;
  - the rest of the shacks were just abandoned plastic constructions; and
  - a total of 10 adults and 9 children are living in those 5 shacks.
676. In another report of July 19, 2016, the Police informed the Ministry that despite the police's efforts to locate the squatters to notify them with the eviction notice, they were unable to locate them.<sup>712</sup>
677. On July 22, 2016, 10 of the trespassers appealed Resolution 510-16 opposing to the eviction alleging being good faith possessors of the land, which was abandoned since March 2015.<sup>713</sup>
678. On August 8, 2016, the Minister of Public Security rejected the appeal filed by the trespassers, upheld Resolution 510-10 and granted three days to the trespassers to voluntarily leave the property.<sup>714</sup>
679. As of October 27, 2016, the squatters have been removed from the site. Thus, possession rights over the properties Claimants actually own have been restored to Claimants.<sup>715</sup>

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<sup>710</sup> **R-330**, Reply to the Ministry of Public Security from the Parrita Police, 4 May 2016.

<sup>711</sup> **R-332**, Report from the Parrita Police to the Ministry of Public Security, 19 July 2016.

<sup>712</sup> **R-334**, Report from the Parrita Police to the Ministry of Public Security regarding notice to squatters, 19 July 2016.

<sup>713</sup> **R-333**, Appeal against Resolution 510-16 filed by the trespassers, 22 July 2016.

<sup>714</sup> **R-346**, Ministry of Public Security rejects appeal filed by trespassers, 8 August 2016.

<sup>715</sup> **R-518**, Eviction report of Las Olas Project, October 27, 2016.

1. **Costa Rican agencies always explained to Claimants their legal authority and scope of action**

680. As Ms Vargas states in her Second Witness Statement:

"As was explained to the claimants in the October 26<sup>th</sup>, 2015 meeting, the physical eviction of the **squatters is not an action that corresponds to the Municipality, nor any institutions in the *canton* Parrita, but it is within the exclusive competence of the Public Force, and is carried out on the request of the Ministry of Public Security.**"<sup>716</sup> (emphasis added)

681. Indeed, Claimants were informed of the exact actions they needed to undertake and always knew that the Ministry of Public Security was the exclusive agency competent to evict the trespassers:

- On October 16, 2015, the Municipality explained to Mr Ventura that the Municipality was only able to take legal action against any illegal constructions on the Project Site;<sup>717</sup>
- On October 21, 2015, the Municipality communicated to Ms Murillo that the Municipality could not undertake actions to evict the trespassers from the property and that the Municipality has no legal authority to evict the trespassers and appropriate legal action must be initiated with the appropriate authorities; and
- On October 26, 2015, Mrs Jiménez from the Municipality explained that the entity competent to process the eviction process was the Ministry of Public Security.<sup>718</sup> The Mayor of Parrita and the commanding officer of the Public Force urged Mr Damjanac to file a formal complaint with the Ministry of Public Security so that the agencies could aid Claimants.<sup>719</sup>

682. In light of the above, it is surprising that Claimants would have opted to file a constitutional action against the Municipality, the Ministry of Public Security and the Public Forces of Parrita. On November 13, 2015, Mr Ventura on behalf of Claimants filed a writ of *Amparo* before the Constitutional Chamber of the Supreme Court of Justice requesting it to instruct the three agencies to take immediate action against the squatters at the Project Site.<sup>720</sup>

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<sup>716</sup> Second Witness Statement of Mónica Vargas, para. 107.

<sup>717</sup> Ibid.

<sup>718</sup> Second Witness Statement of Mónica Vargas, para. 104; **R-156**, Municipality report on work meeting by inter-institutional Commission (DeGA-0273-2015), 28 October 2015.

<sup>719</sup> **R-156**, Municipality report on work meeting by inter-institutional Commission (DeGA-0273-2015), 28 October 2015.

<sup>720</sup> C-181.

683. On November 18, 2015, the Constitutional Chamber declined admissibility to hear Claimants petition confirming what Claimants already knew: only the Ministry of Public Security is the competent body to conduct legal evictions in Costa Rica. The court held:

"This is a matter outside the scope of jurisdiction of this Chamber, as it does not involve direct injury to any fundamental right caused by an authority. Rather, what the petitioner claims is the alleged refusal of officials from the Ministry [of Public Security] to mitigate or eliminate the social insecurity caused by various persons and their criminal conduct in the place where the protected person resides. This is not a matter for the *amparo*, but instead constitutes a grievance or complaint which should instead be filed with the higher authority within the same agency or before the Prosecutor's Office for dereliction of duty. One should note that it is not a function of this tribunal to substitute the [Public] Administration on its competencies, nor to decide what policies of measures or police techniques the authorities of public order should undertake to face the problem or how or when they should do it."<sup>721</sup>

684. The court clarified the recourse Claimants could take if they felt that the Ministry of Public Security was not performing its duties. However, Claimants have not taken any further actions in this respect.

**2. The ongoing eviction process has followed the applicable laws and it is moving forward to the actual eviction of the trespassers**

685. Mr Aven accuses Respondent of "doing nothing to stop" the situation at Las Olas:

"While this travesty is ongoing, the Government sits idly by and does nothing to stop this criminality, even though I and my attorneys have written them numerous times to request that they enforce the laws of Costa Rica and evict the criminal trespassers from the Las Olas property."<sup>722</sup>

686. The truth is that the Costa Rican authorities have followed the legal procedure to evict the squatters from the site. In Costa Rica, the Ministry of Public Security is the responsible body to conduct eviction procedures.<sup>723</sup>

687. Once the formal complaint is filed with the Ministry, the agency analyzes the request and proceeds to order the eviction. The applicable regulations prescribe the notification of this order and right to oppose to it to any parties affected by the eviction.<sup>724</sup> The obligation to notify the squatters and allow them a right to challenge the eviction procedure has been upheld by the Constitutional Chamber as a protection at their rights to due process.<sup>725</sup>

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<sup>721</sup> C-183.

<sup>722</sup> Second Witness Statement of David Aven, para. 12.

<sup>723</sup> **R-376**, Regulations for administrative eviction procedures filed with the Ministry of Public Security, 14 June 2012, Articles 2 and 6.

<sup>724</sup> Id., Article 3.

<sup>725</sup> **R-377**, Constitutional Chamber, Decision No. 4166 - 96, 14 August 1996.

688. Once the Ministry issues the eviction order, it is for the public force (the police) alone to conduct the actual eviction on site, ensuring at all times, the maintenance of the public order and the physical integrity of the persons involved.<sup>726</sup>
689. In this case, Costa Rican authorities acted in accordance with the proceedings because once Claimants filed their formal complaint with the Ministry on November 13, 2015, the Ministry processed its request and issued an eviction order. What delayed the procedure from continuing smoothly was Claimants' delay on providing information as to which lots actually belonged to them.
690. The eviction order was notified to the squatters to grant them their right of defense. Currently, the police of Parrita are in charge of conducting the actual eviction at the Project Site.
691. Finally, Claimants' actions before the Constitutional Chamber and the President of the Republic fell out of the scope of responsibility of those authorities. The administrative eviction procedure is clearly regulated at the legal and statutory level. Any legal action exercised before a body other than the established authorities is not binding as the entity is not competent to deal with the issue. That is, any application submitted to any institution other than the Ministry of Public Security demanding eviction would not be enforced and no legal consequences will ensue.
692. In this case, Claimants argue that they complaint before the Presidency of the Republic and the Constitutional Chamber, where it is clear that in accordance with applicable regulations only the Ministry of Security has the authority over eviction procedures in Costa Rica.
693. Even if Claimants consider that any formality has been omitted in the ongoing procedures that could have affected any of Claimants' rights; the appropriate way to pursue any remedy is before Costa Rican national agencies and not before this Tribunal.

**3. It is Claimants' who have not demonstrated any interest in evicting the trespassers**

694. Claimants allege that they have filed "repeated complaints" with local authorities during the past year, including the Ministry of Public Security, the Municipality, the local police of Parrita and the Constitutional Chamber of the Supreme Court of Justice.<sup>727</sup> However, it was Claimants' own conduct that has delayed the procedure.

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<sup>726</sup> **R-376**, Regulations for administrative eviction procedures filed with the Ministry of Public Security, 14 June 2012, Article 12.

<sup>727</sup> Claimants' Reply Memorial, para. 189.

695. For instance, Claimants unduly delayed filing a formal complaint with the Ministry of Public Security was unduly delayed by Claimants own conduct. The local police of Parrita could not support the actual eviction of the trespassers without an express order from the Ministry of Public Security, whose actions could only be triggered by a formal complaint, whose late submission is only attributable to Claimants.
696. Claimants also took a long time to identify all the properties that needed to be protected from the squatters. In addition, Claimants' application to the Constitutional Chamber was unnecessary because that body is not competent to hear any case regarding the eviction procedure and made that clear to Claimants in its order dismissing their Writ of *Amparo*.
697. Claimants further allege that Mr Ventura has "*delivered*," not sent, letters to Mr Martínez, Ms Vargas, MINAE and the President of Costa Rica.<sup>728</sup> None of these authorities have any legal responsibility to conduct eviction procedures in Costa Rica, therefore those letters could not have had any impact on the ongoing eviction procedures. Further, as Mr Martínez and Ms Vargas have confirmed, they never received any of the letters allegedly delivered by Mr Ventura.<sup>729</sup>
698. Indeed, Claimants have not submitted any proof of receipt of those letters by the authorities to which they were "delivered" to.
699. It is clear from the public record how Claimants have had to be chased by the authorities to initiate the corresponding legal actions against the squatters.
700. First, Ms Vargas explains in her second witness statement how the Mayor of Parrita had to contact Mr Ventura on several occasions to demand that Claimants filed the formal complaint with the Ministry of Public Security.<sup>730</sup>
701. Second, a letter sent from the Municipality to the Ministry of Public Security clearly shows that the institutions had to request communications from each other in absence of any information from Claimants who have allegedly undertaken "*substantial efforts*" to evict the trespassers.<sup>731</sup> In that request for information, the Municipal Council explained to the Ministry of Public Security that:

"[t]he Municipality has collaborated to the best of its ability, it has sent notes to the Ministry of Health, MINAE, the Public Force, in addition to conducting an inspection and issuing seals for the constructions without the corresponding construction permit, the situation has been communicated to Mrs Paula Murillo Alpizar, [representative] of Trio

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<sup>728</sup> Claimants' Reply Memorial, para. 189.

<sup>729</sup> Second Witness Statement of Luis Martínez, para. 77; Second Witness Statement of Mónica Vargas, para. 122.

<sup>730</sup> Second Witness Statement of Mónica Vargas, para. 113.

<sup>731</sup> Claimants' Reply Memorial, para. 188

International Inc. S.A., but she has not come to the Municipality and it is unknown to us what steps [the owners] have undertaken before the Ministry of Public Security [...]."<sup>732</sup>

702. Third, Ms Vargas explains that it is very odd that Claimants' own property caretaker is the person who provides water and most likely electricity to the squatters living on the Project Site.<sup>733</sup> This can certainly not be considered as a "substantial effort" to secure the property from the squatters.

703. Finally, Ms Vargas has been able to find the handwritten note she referred to in her First Witness Statement, which was filed by Claimants with the Parrita Police on October 2015. Mr Ventura blatantly denies the existence of this note or having ever shared it with the Mayor of Parrita:

"Ms Vargas's claims are totally false. [...] Absolutely no notes were exchanged and I have never communicated the Claimants' disinterest in having the squatters removed to anyone."<sup>734</sup>

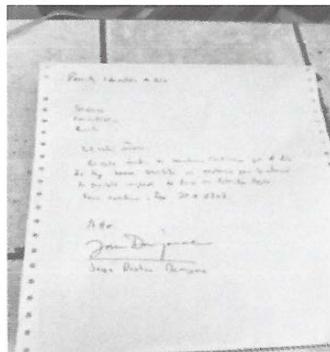
704. Yet, the evidence shows that Mr Ventura did send a picture of the note to the Mayor of Parrita:

Enviado desde mi iPhone

Inicio del mensaje reenviado:

**De:** "Manuel E. Ventura" <mventura@faciolegal.com>  
**Para:** "Freddy Garro" <freddygarro@hotmail.com>  
**Asunto:** Documento Policia

[cid:BA3489DE-C7ED-42DF-89C3-607CAEAA79C1@epvqi-config.loc]



735

705. The Mayor of Parrita has produced the image sent by Mr Ventura, which shows a handwritten note signed by Mr Damjanac,<sup>736</sup> both of which, without any doubt, prove Claimants' disinterest in initiating proper legal actions to evict the trespassers from the site.

<sup>732</sup> **R-327**, Request for information from the Municipality to the Ministry of Public Security, 16 November 2015.

<sup>733</sup> Second Witness Statement of Mónica Vargas, para. 114.

<sup>734</sup> Second Witness Statement of Manuel Ventura, para. 21.

<sup>735</sup> **R-367**, Mr Damjanac's handwritten note to the Public Force of Parrita, October 2015.

<sup>736</sup> Ibid.

**I. Claimants did not have "all the permits" to develop the Las Olas Project**

706. Claimants insist that they obtained all of the permits Costa Rican law required them to develop their project:

707. However, as Mr Martínez explains:

"This is completely false. The Claimants never obtained a single permit to cut down trees, even though they were clearly cautioned at the time that they were granted the Environmental Viability, that if one tree were to be cut the corresponding permit had to be processed at the MINAE office.

Furthermore, the Claimants never obtained any permit to affect wetlands protected under Articles 41 and 45 of the Organic Environmental Law."<sup>737</sup>

708. Furthermore, Mr Aven lists the permits issued to Claimants:

"Only after the various permitting agencies received all of that required information and after providing that the Government issued to us five (5) different SETENA EV resolutions for the condominium section and the Concession, and a total of 9 Construction permits, 7 for the easements, 1 for the condominium infrastructure, and 1 for the Concession."<sup>738</sup>

709. All of these permits are tainted and undermined by Claimants' illegalities. The EVs and construction permit issued for the Concession site did not consider that Claimants had no rights over the Concession's titleholder La Canícula, after Claimants had constantly breached the 51% ownership rule incurring in potential constructive fraud as explained above.<sup>739</sup> As to the EVs issued for the Condominium site, SETENA was misled by Claimants' concealment of material information on the land's ecosystems. The construction permit for the Condominium site was obtained fraudulently because Claimants had not complied with all of the legal requirements and were duly informed by the Municipality. Finally, the seven construction permits for the easements were tainted by the fact that Claimants intended to develop an urban development without obtaining an EV first and actually started works there without an EV.<sup>740</sup>

<b>Permit</b>	<b>Illegality</b>
EV for the Concession site	Claimants illegality acquired the shares in La Canícula
Construction permits for the easements on the Concession site	The EV did not cover the construction of easements on the Concession site. Any construction in the ZMT area requires an EV.
EVs for the Condominium site	Claimants misled SETENA and concealed the information on the real physical conditions of the site.
Construction permits for the Condominium site	Claimants' obtaining of this permit was surrounded by

<sup>737</sup> Second Witness Statement of Luis Martínez, paras. 11-12.

<sup>738</sup> Second Witness Statement of David Aven, para. 58.

<sup>739</sup> See, section IV.C.

<sup>740</sup> Siel Siel Report, Section VIII.

	irregularities in its issuance by the Municipality.
Construction permits for the misclassified easements	Claimants did not hold an EV to start developing the Easements and other lots site.

**J. Claimants' total ignorance of Costa Rican law**

710. Claimants have mischaracterized, misinterpreted and stretched the rules in Costa Rica to favor its interests in this case. Respondent will address the most relevant examples to show the Tribunal that Claimants not only disregarded the laws upon the establishment of their alleged investment in Costa Rica but, in this arbitration, have shown a complete ignorance of it. This is fatal both in terms of the admissibility of claims, and the legitimate expectations the Claimants clearly possessed – certainly ignore of the law is no defence.

a) Claimants' absurd demand regarding the neighbors' scientific and technical background to file complaints

711. Mr Aven says:

"Now, I turn to certain allegations made by Ms Vargas, the Environmental Manager of the Municipality of Parrita. As discussed in my First Witness Statement, and confirmed in Ms Vargas's own witness statement, **Ms Vargas based her reports and allegations solely upon hearsay opinions and observations of "neighbors" or from viewing the property from the borders of the project site, but never going onto the site.**"<sup>741</sup> (emphasis added)

"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.**"<sup>742</sup> (emphasis added)

712. Claimants also rely on Mr Arce:

"In that complaint, it is not stated that the residents who filed the complaint are not experts in forest matters or wildlife, let alone wetlands."<sup>743</sup>

713. Claimants' assertions entail a complete disregard of Costa Rican law on environmental protection, particularly, of the principle of citizen participation. The principle that *all* persons have the right to denounce acts that breach the right to a healthy and ecologically environment is embedded in the legal order of Costa Rica, and domestic courts have applied it in several cases.

<sup>741</sup> Second Witness Statement of David Aven, para. 60.

<sup>742</sup> Claimants' Reply Memorial, para. 197.

<sup>743</sup> Second Witness Statement of Minor Arce, para. 12(a).

714. Prior to the amendment in 1994 of the Political Constitution of Costa Rica, courts were ready to apply the citizen participation principle. This principle is so broad that even a minor can have legal standing to sue before the Constitutional Court:

"In environmental law, the concept of legal standing to sue expands in such a way that it becomes more than what was meant in the traditional understanding of *ius standi*. It must be understood, in general terms, that all persons can be parties in a proceeding and their right does not emanate from titles, or concrete actions that could be exercised with the traditional rules; their right emanates from what modern scholars call "diffuse interests." By "diffuse interest," the original standing of the "legitimate interested," or even the "simple interested," spreads among all members of a class of persons equally affected by illegal acts that violate their rights.

In the case of environmental protection, the diffuse interest which gives the person legal standing becomes a "reactionary right" and, as its name suggests, grants the holder the right to react to the violated originated by unlawful acts or omissions. That is why a violation of this fundamental right constitutes a breach of the Constitution."<sup>744</sup>

715. One year later, the principle was expressly recognized by Article 50 of the Political Constitution of Costa Rica, which sets forth that:

"The State will procure the greatest well-being to all the inhabitants of the country, organizing and simulating the production and the most adequate distribution of the wealth. **All persons have the right to a healthy and ecologically-balanced environment. For this purpose, [the people of Costa Rica] are empowered to denounce acts that infringe on this right and to claim reparation for the damage caused.** The State will guarantee, defend and preserve this right. The corresponding responsibilities and sanctions will be determined by the Law."<sup>745</sup> (emphasis added)

716. In addition, Section 6 of the Environmental Organic Law establishes that:

"The State and municipalities will promote the active and organized participation of the people of Costa Rica in the actions and decision-making undertaken to protect and improve the environment."<sup>746</sup>

717. Tribunals in Costa Rica have made an eloquent application of the principle of citizen participation. In effect:

"...citizen participation in environmental issues covers two essential points: the right to information on environmental projects, or projects that may cause harm to natural resources and the environment; and the right to effective participation in the decisions in these matters. **Therefore, the Costa Rican government should not only invite citizen participation, but must promote and respect it.**"<sup>747</sup> (emphasis added)

"Especial attention is needed in cases such as the present, where the ruling is related to the violation of the right to a healthy and ecologically

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<sup>744</sup> R-166, Decision 3705-93, Constitutional Chamber, Supreme Court of Justice, July 30, 1993, para IV.

<sup>745</sup> R-214, Constitution of Costa Rica, 1949, Article 50.

<sup>746</sup> C-184.

<sup>747</sup> R-166, Decision 3705-93, Constitutional Chamber, Supreme Court of Justice, May 2, 2012, para V.

balanced environment in terms of Article 50 of the Political Constitution [...] It must be noted that the right to a healthy environment is recognized in favor of everyone, and to the same extent, everyone has the legal standing to denounce its breach and then claim compensation [...] If this is the approach promoted and embodied in the Constitutional system, any interpretation on the proceedings to protect the environment should be based on such structure. Hence, **limiting the exercise of this right to individuals with specific characteristics in order to gain administrative or judicial protection involves an effort to circumscribe it to requirements that in no way are compatible with existing constitutional principles**, where as noted, the Article 50 above mentioned, provides "any person" has legal standing to submit an action to protect the environment and claim its reparation. Meanwhile, Principle 10 of the Rio Declaration, referring to the participation of all citizens in environmental issues, affirms: "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."<sup>748</sup> (emphasis added)

718. Indeed, Claimants' own expert, Luis Ortiz, expressly acknowledged the neighbors' *ius standi*:

"Anybody, as anything that has relation with the environment is deemed to be a diffuse interest, therefore anyone has legal standing to do so."<sup>749</sup>

719. In view of these decisions and provisions, Claimants' accusations to Ms Díaz and Ms Vargas of admitting complaints from "overzealous" neighbors are unfounded:

**"What is clear from Ms Díaz 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."**<sup>750</sup> (emphasis added)

720. The neighbors played a fundamental role in Costa Rica's response to the environmental damage produced by Claimants to Las Olas Ecosystem. Their immediacy to the Project Site turns them into the relevant players of this scenario: they could see every day how the works were affecting the wetlands and forests, and they suffered the consequences of Claimants' activities. They have an intimate awareness of the region, which makes them suitable to detect, better than anyone, any irregularity.

721. Costa Rican law recognizes this situation when it mandates that all persons have legal standing to denounce and claim for breaches to environmental law. Then, Respondent reaffirms that, contrary to Claimants' allegations, neighbors have the "authority" to

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<sup>748</sup> **RLA-132**, Resolution 675, First Chamber, Supreme Court of Justice, 21 September 2007, para IX.  
<sup>749</sup> Luis Ortiz Expert Report, para 137.  
<sup>750</sup> Claimants' Reply Memorial, para. 200.

denounce any activity they consider potentially damaging to the environment, and the authorities have the obligation to carry out procedures in this regard.

b) Mr Aven's personal and mistaken interpretations of the law are not binding on the Tribunal

722. Claimants have made up a self-serving interpretation of the rules applicable to SETENA by mischaracterizing paragraph 11 of the First Witness Statement of Dr Jurado, which referred to the provision in Article 19 of the Environmental Organic Act:

"The resolutions of the National Technical Environmental Secretariat shall be well founded and reasoned. [These] will be mandatory for both users and for public bodies and entities."<sup>751</sup>

723. Dr Jurado's complete paragraph states that:

"Moreover, the Environmental Organic Act assigns to SETENA responsibility for the approval of the environmental impact assessments prepared by the managed entities, as requirement essential to the initiation of any activity that might alter environmental factors. Specifically, Article 17 of this law provides that, "Human activities that alter or destroy environmental factors or create residue, toxic or hazardous material, require an environmental impact assessment by the National Technical Environmental Secretariat established in this law. The prior approval of the Secretariat shall be a necessary condition for the initiation of the activities, works or projects. The laws and regulations shall indicate which activities, works or projects require the environmental impact assessment." Similarly, the law clearly provides that both private and public institutions must comply with SETENA's resolution in relation to these environmental impact assessments. **Accordingly, SETENA is a technical body legally designated to analyze and resolve the environmental impact assessment as well as to monitor compliance, such that in the event of a breach of its resolutions, it may order the stoppage of works.**"<sup>752</sup> (emphasis added)

724. Mr Aven takes the last sentence from this paragraph of Dr Jurado's statement and goes on to create an interpretation, which is not supported by Costa Rican law. Mr Aven states:

"In all of the many thousands of words that the Respondent wrote, the most relevant 64 words for me were written by Dr Jurado, one of the Respondent's expert witnesses, where he said the following: '*SETENA is a technical body legally designated to analyze and resolve the environmental impact assessment as well as to monitor compliance, such that in the event of a breach of its resolutions, it may order the stoppage of works.*'"

Similarly, the law clearly provides that both private and public institutions must comply with SETENA's resolution in relation to these environmental impact assessments. Accordingly, SETENA is a technical body legally designated to analyze and resolve the environmental impact assessment as well as to monitor compliance, such that in the event of a breach of its resolutions, it may order the stoppage of works.

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<sup>751</sup> C-184.

<sup>752</sup> First Witness Statement of Julio Jurado, para. 11.

I am advised that the SETENA resolutions are Government orders that all must comply with, and that includes public institutions such as the Prosecutor's office, MINAE, the TAA, the Municipalities, the Defensoría and all others. The question is why did all of the above public institution heads refuse to follow the law and comply with the Resolutions? The Respondent's sole purpose in its Counter Memorial and witness statements is to try to make as many baseless accusations as possible, with no proof, in the hope that the Tribunal will believe they acted in good faith, did not treat us unfairly and that they lived up to the terms of the DR-CAFTA provisions. The purpose of my statement is to describe what really happened and to clearly show the Tribunal that the Respondent failed to act in good faith, treated us unfairly and failed to uphold the DR-CAFTA provisions."<sup>753</sup>

"My accusers, Mr Martínez, Ms Vargas, Mr Piccado. Ms Díaz and Mr Bogantes all failed to comply with legally issued Government orders, which were the five different SETENA resolutions that were issued, and then they accuse me for non-compliance."<sup>754</sup>

"The Respondent clearly knows that (sic) and absolutely cannot dispute that SETENA issued a lawful permit on June 2, 2008. At that point and in the words of the Respondent's own expert MINAE witness, Dr Jurado, once the SETENA resolution is issued it became a Government order that carried with it the force of law, and everyone was required to comply with it according to Dr Jurado: *"the law clearly provides that both private and public institutions must comply with SETENA's resolution in relation to these environmental impact assessments.* However, Mr Martínez and the other agency heads failed, and or refused, to comply and just ignored those Government orders."<sup>755</sup>

"They issue permits and then do not comply with SETENA resolutions, which are Government orders. They criminally charged me with environmental crimes when I relied upon and operated under the authority of those permits. SETENA issued an EV permit and the Municipality issued legal construction permits and the law clearly stated that all people, including Government functionaries, were required by law to comply with those SETENA findings. Over and over again these Government functionaries ignored those Government orders and refused to obey the law and comply with their own permits and the law."<sup>756</sup>

725. Claimants rely on Mr Aven's completely misleading interpretation of Costa Rican law to argue that Respondent *"attacks the findings of its own agency"* and that *"other bodies of the Costa Rican Public Administration must respect and execute."* Claimants state:

"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.

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

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<sup>753</sup> Second Witness Statement of David Aven, paras. 7-8.

<sup>754</sup> Id., para. 33.

<sup>755</sup> Id., para. 45.

<sup>756</sup> Id., para. 57.

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.*"<sup>757</sup>

726. Claimants state that to make this interpretation, they rely on Mr Ortiz but refer to no paragraph of his statement. The truth is Claimants solely rely on Mr Aven's misinterpretation of the law. Therefore, it is fundamental to address what is clearly the cornerstone of Claimants' case – this mischaracterization of Dr Jurado's testimony and the agencies' involvement in the Las Olas Project. Respondent bases its response in the objective laws, not a contorted narration.

727. Dr Jurado, in his second witness statement, states what is the correct interpretation of Article 19 and explains why Claimants' interpretation lacks in precision and logic:

"The Environmental Viability certainly binds public authorities; however, it cannot be understood to limit the power of public authorities to protect the environment where they observe that the Environmental Viability is causing environmental harm. To interpret otherwise would be to imply negative implications about the obligatory nature given to an Environmental Viability through the Regulation.

[A]n environmental viability is not granted as a guarantee for the execution of the project or construction work, given that is only one of the requirements of the authorization procedure. It should not be forgotten that an environmental viability is strictly linked to environmental law, and thus operates under the precautionary principle and compels the administration to take action in this direction.

Therefore, the Administration can carry out an audit to follow up on mitigation measures to which the developer agreed in the environmental impact assessment, thus ensuring a healthy and ecologically-balanced environment as enshrined in Article 50 of the Constitution, and may act in any instance of risk of environmental damage."<sup>758</sup>

c) Claimants' mistaken interpretation of the Municipality's legal competence

728. Even if Mr Ventura claims to be a lawyer specialized in administrative law, he confuses the legal duties of the Municipality trying to make it the entity responsible for the eviction of trespassers on the Project Site:

"Then, only recently, on June 16, 2016, I received on behalf of Mr Aven and the other investors at Las Olas a communication from the Ministry of Security asking for clarification as to ownership of each of the lots before we decide how to proceed in relation to the squatters, although their letter is not very clear. In their communication, they note the existence of 362 shacks. **I followed up with a visit to the**

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<sup>757</sup> Claimants' Reply Memorial, paras. 248-249.

<sup>758</sup> Second Witness Statement of Julio Jurado, paras. 62-64.

**Municipality in order to press the authorities to pursue the eviction right away.**"<sup>759</sup> (emphasis added)

729. As Ms Vargas points out:

"It surprises me that Mr Ventura, a lawyer 'specialized in Administrative law,' continues to insist that the Municipality had to take action relating to the eviction [procedure]. It is known to Mr Ventura that the Municipality does not have municipal policemen but instead must always seek support from the Public Force for any situation calling for the use of public force."<sup>760</sup>

730. This is yet another example of how Claimants want to blame Costa Rican agencies for their own wrongdoing.

d) Claimants' wrongful attribution of responsibility to Mr Martínez to evict the trespassers

731. Claimants insinuate that Mr Martínez had a duty to undertake actions against the squatters on the Project Site. Mr Ventura alleges "delivering" two letters to him. Judge Chinchilla explains why this allegation from Claimants shows their complete ignorance of Costa Rican law:

"As for Mr Aven's implied claim that Mr Martínez should have acted with respect to the invasion by squatters of the property of *Project Las Olas*, **this reveals an ignorance of Costa Rican law.** The entry of individuals onto private property qualifies in Costa Rica as usurpation (Article 225 of the Penal Code) and is a crime of public action to a private party that requires an express and formal complaint by the interested party, holder or owner of the property (Article 18(c) of the Criminal Procedure Code) to the Prosecutor's Office. There is no record that Mr Aven, or any other holder or owner of the properties, took these formal steps. Instead, there are references to complaints made to the municipality, the Ministry of Public Security, and the Constitutional Chamber: entities that do not have competence in this respect. As things stand, without a formal criminal accusation before the proper body (the Prosecutor's Office), neither Mr Martínez nor any other prosecutor could act or investigate in any way in regard to the alleged entry of the squatters into the property building."<sup>761</sup> (emphasis added)

K. Claimants' improper challenge of Costa Rican agencies' findings

732. The applicable arbitral rules stipulate that Claimants are under an obligation to discharge their burden of proof. In particular, Article 27(1) of the UNCITRAL Rules 2010 provides that:

"Each party shall have the burden of proving the facts relied on to support its claim or defense."

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<sup>759</sup> Second Witness Statement of Manuel Ventura, para. 18.

<sup>760</sup> Second Witness Statement of Mónica Vargas, para. 112.

<sup>761</sup> Expert Report of Rosaura Chinchilla, para. 36.

733. The same provision is contained in Article 24(1) of the UNCITRAL Rules 1976. In respect of Article 24(1), in their leading commentary on the UNCITRAL Rules 1976, Caron *et al* indicate the following:

"[I]t is clear that this provision is simply a restatement of "the general principle that each party has the burden of proving the facts on which he relied in his claim or in his defense," else risk an adverse decision. Article 24(1) therefore scarcely represents a modification of pre-existing principles. Nor does the provision, though limited to the question of burden of proof as to the asserted facts, alter the standard rule that the claimant has the burden of demonstrating the legal obligation on which its claim is based."<sup>762</sup>

734. Put in its simplest form, Claimants are under an obligation to present in full their case. They have comprehensively failed to do this.

735. The UNCITRAL Rules do not provide specific guidance as to the standard of proof that an arbitral tribunal is to apply in a given case. However, they do provide for a relevant framework within which the Tribunal can operate. In respect of the assessment of the weight of the evidence put forward by a party, Article 27(4) of the UNCITRAL Rules (2010) provides as follows:

"The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

736. This provision is identical to Article 26(5) of the UNCITRAL Rules of 1976. Commenting on the equivalent provisions, Caron *et al* indicate:

"[The relevant UNCITRAL provision] does not address the standard of proof [...]. Moreover, Article 25(6) gives the arbitral tribunal wide discretion to determine freely, inter alia, the "weight of the evidence offered" in particular cases."<sup>763</sup>

737. Article 9(1) of the IBA Rules on the Taking of Evidence in International Arbitration, which the Tribunal may consider for guidance purposes pursuant to section 1.2 of the Procedural Rules provides – in very similar terms to those of the relevant provision in the UNCITRAL Rules – that:

"The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence."

738. The seat of the arbitration is London, England. Accordingly, it is relevant for the Tribunal to consider English law of evidence. English civil law requires the standard of proof to be the balance of probabilities. However, as explained in more detail below, where there are serious allegations of misconduct, stronger evidence is required in order to meet a flexible (i.e. more demanding) balance of probabilities test.

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<sup>762</sup> **RLA-133**, D. Caron et al., *The UNCITRAL Arbitration Rules, A Commentary* (Oxford University Press, 2006) p. 568.

<sup>763</sup> *Id.*, p. 569.

739. Tribunals tend to give greater weight to documentary evidence than testimonial evidence contradicting the former. Indeed, it has been held:

"[I]nternational arbitral tribunals have given greater weight to documentary evidence than to testimonial evidence [...]

Although oral evidence is now common in international procedure, **tribunals will generally treat documents which came into existence when the events giving rise to the dispute occurred as having more probative value than testimonial evidence. Witnesses are sometimes deliberately untruthful**, truthful witnesses are sometimes mistaken in their recollection of facts, and even truthful witnesses who accurately recall the facts are sometimes discredited by adroit cross-examination so as to obscure the truth."<sup>764</sup> (emphasis added)

740. After Respondent came forward with evidence of Claimants' wrongful conduct and illegalities committed during the operations of their alleged investment in Costa Rica, Claimants have engaged in an improper challenge of every single official report or administrative act that documented their wrongdoing.

741. Mainly, Claimants rely on the witness statements of Mr Aven, Mr Damjanac and Mr Arce to challenge the authenticity and veracity of the facts documented by Costa Rican agencies at the time, where they reported any sort of wrongdoing such as the felling of trees, impacts to wetlands, use of the public force to notify Claimants' representatives, among others.

742. Under Costa Rican law, administrative acts, which encompass inspection reports undertaken by public agencies, are deemed valid unless they are properly challenged before administrative agencies or courts.<sup>765</sup> Mr Ortiz, Claimants' own expert, recognizes that an act is presumed valid until the competent agency has declared it null and void:

"As long as an administrative act has not been declared null and void, either by the competent administrative body following the ordinary administrative proceeding, and with the authorization of the Attorney General, or else by a judge, such act is deemed valid and it must be enforced."<sup>766</sup>

743. Respondent will refer to some of Claimants' erroneous challenges to Costa Rican agencies reports and explain why those, on their own, cannot be considered as material evidence capable of supporting both their defenses against their wrongdoing and their claims against Respondent's conduct. Thereafter, the Tribunal is free to afford such weight as it deems fit to balance the witness testimony (of individuals who have been shown to misunderstand or intentionally distort the record) against the clear documentary record. Not least, if the authenticity of such documents is challenged there is no forensic approach to such

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<sup>764</sup> **RLA-70**, Robert Pietrowski, "Evidence in International Arbitration" (2006) 22(3) *Arbitration International* 373, 391-392.

<sup>765</sup> Second Witness Statement of Julio Jurado, para. 46.

<sup>766</sup> Expert Report of Luis Ortiz, para. 144.

challenges, and Claimants' have comprehensively failed to disclose their burden or standard of proof.

a) Mr Arce's impressions on DeGA's and SINAC's reports

744. Mr Arce challenges the veracity of the facts documented in the April 2009 DeGA Report, by for example, by questioning whether the photographs included on it actually belong to the Project Site:

"Fig. 1, 2 and 5 – There is no reference to where these beautiful photographs were taken; they could be from anywhere in Costa Rica or the world."<sup>767</sup>

745. Mr Arce also questions the October 2011 SINAC Report, which reported Claimants' felling of trees on the Project Site:

"The report in question states that interviews were conducted with people who allegedly worked at the site, but there is no audio evidence to support the veracity of what was stated, nor is there sufficient information to corroborate what is stated in the report regarding the alleged individuals who were interviewed."<sup>768</sup>

746. The report clearly states what Claimants' employees told to SINAC officers when they were caught *in fragante* impacting a forest.<sup>769</sup> However, Mr Arce's insinuations that the pictures do not belong to the Project Site or that audio recordings of the interviews were not annexed to the report and therefore the information cannot be corroborated has no bearing on the veracity and accuracy of findings of each of the reports. It is insufficient to simply allege a contrary position and consider that adequate proof of a lack of veracity. Effective rebuttal has to constitute more than simply an articulation of the protestation.

b) Claimants' construction of the Parrita's sewage system

747. After Respondent unveiled a notification from the Municipality where Claimants were demanded an explanation for the works performed to build the sewage system in Parrita and complaints from the neighbors,<sup>770</sup> Mr Aven now denies having anything to do with its construction or any damages caused to the neighbors:

"The irony is that the Municipality itself had been constructing the storm drain lines, and not the Claimants, so that would not appear on our plans. The town always knew about drainage issues because of flooding during heavy rains. However, there was also flooding in Parrita when it rained hard. **In 2010, the Municipality (not Las Olas) constructed a storm drain in the community along public roads. If the drain collapsed it was the responsibility of the Municipality to maintain it, not Las Olas.**

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<sup>767</sup> Second Witness Statement of Minor Arce, para. 12(d)(i).

<sup>768</sup> Id., para. 37.

<sup>769</sup> R-264, October 2011 SINAC Report (ACOPAC GASP-143-11), 3 October 2011.

<sup>770</sup> R-118, Letter from the Municipality to Jovan Damjanac (OIM 456-2011), 2 December 2011.

We worked with the Mayor and the Municipality regarding this issue of improving the storm drains in the community out of a desire to help the community in which our project was located and to improve community functionality. **We donated materials and storm drains that were necessary to help control the flooding during hard rains and the Municipality then carried out the work using their machinery and laborers in installing the storm drains.** We donated money to improve the water lines and pumps that brought water into the community. We wanted to help the community since this is where we were building our development."<sup>771</sup> (emphasis added)

748. Again, the record shows that on September 2, 2010, **Claimants**, not the Municipality, hired Constructora Totem S.A. to perform works for the sewage system of Esterillos Oeste.<sup>772</sup>

#### ANTECEDENTES

- EL CLIENTE requiere realizar trabajos de ingeniería civil para completar la instalación del servicio de alcantarillado pluvial en el Pueblo de Esterillos Oeste.
- LA CONSTRUCTORA, es una empresa dedicada a la construcción de obras civiles, con la experiencia respectiva, cuenta con el personal necesario, el equipo, maquinaria, herramientas, conocimiento y pericia para construir, completar a satisfacción las obras que este contrato pretende.
- Que ambas partes han revisado los planos constructivos para la realización del trabajo de instalación de tubería pluvial que pretende completar el alcantarillado pluvial en Esterillos Oeste.

749. The record shows that Claimants on their own engaged in the construction of this "sewage system" which probably was just a smoke curtain to cover the drainage and refilling of wetlands they were undertaking on the Project Site.

c) The dismissal of Mr Aven's criminal complaint against Mr Bogantes

750. Mr Aven denies being contacted by the Ethics Prosecutor even though the criminal record shows that those contacts were made:

"Recently, I learned that the investigation into the complaint I filed against Mr Bogantes in 2011 had been dismissed for lack of evidence. I also learned that the criminal prosecutor of Quepos put a hand written note into the file saying that he spoke to me and I told him I did not want to pursue my complaint against Mr Bogantes. This is total fabrication. I never spoke to the Quepos prosecutor or anyone else from the prosecutor's office and no one ever contacted me or my attorneys."<sup>773</sup>

751. The criminal file on its own proves that efforts were undertaken to reach Mr Aven. If Mr Aven is to be believed, he was the most interested party in continuing the investigation against Mr Bogantes – and yet he failed to answer Prosecutor's communications. Now Mr

<sup>771</sup> Second Witness Statement of David Aven, paras. 70-71.

<sup>772</sup> **R-360**, Claimants' construction contract for sewage system, 2 September 2010.

<sup>773</sup> Second Witness Statement of David Aven, para. 102.

Aven alleges that he was never contacted, improperly challenging what the documentary evidence shows.

d) The "non-existent" involvement of the OIJ in the criminal investigation

752. Mr Aven goes on to accuse Mr Martínez of making up the participation of a special criminal investigation body in the investigation conducted against him:

"There are no dates, no specifics, no names of who was there. How were they able to determine the findings of facts? Jovan was not the administrator. He was the director of sales and marketing. What evidence did they have that I ordered the drainage of a non-existent wetland? **No one appeared at my criminal trial and testified against me about any of the above, especially not an OIJ officer that Mr Martínez referred to above. These are just more of the same false accusations that Mr Martínez makes throughout his entire witness statement.**"<sup>774</sup> (emphasis added)

753. Not only Mr Martínez and the record proves that Mr Aven's accusations are false, but also Claimants' Reply Memorial in paragraph 332 refers to the participation of Mr Jorge Isaac Barrantes Villa in the criminal trial, as a witness for the Prosecution. Mr Martínez explains that:

"Nothing could be further from reality. I do not understand how the Claimants and Mr Aven devote so many pages to repeating and commenting on the testimony of each witness that serves their interests, and ignoring those that do not. The prosecutor's Office called upon the Judicial Investigation Department investigator who authored the report I refer to in my first witness statement.

Mr Jorge Issac Barrantes Villa was called to testify on behalf of the Prosecution on December 6, 2012 during the first hearing. His testimony is documented in Annex C-272 presented in this arbitration by the Claimants themselves, along with their Reply Memorial."<sup>775</sup>

e) The re-trial notification

754. Mr Aven goes on to state that he was never put on notice of his re-trial:

**"The re-trial of my criminal case was set for January 2014. I never received notice of the subsequent trial date** and had scheduled a necessary surgery in January 2014. When I learned that the second trial was scheduled for January 2014, I immediately got letters from my doctor and hospital and sent them to my attorney, Mr Ventura and he notified the Costa Rican court that I was unable to be present at trial for medical reasons."<sup>776</sup> (emphasis added)

755. This is false. As Mr Martínez explains and the record reflects,<sup>777</sup> Mr Aven and his counsel were duly notified on October 16, 2013:

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<sup>774</sup> Id., para. 135.

<sup>775</sup> Second Witness Statement of Luis Martínez, paras. 70, 72.

<sup>776</sup> Second Witness Statement of David Aven, para. 107.

<sup>777</sup> R-350, Notification of new trial to David Aven, October 16, 2013

"Second, Mr Aven denies having been notified about the January 2014 start date of the second trial.

This is completely false. The criminal file states that a notification was sent via email to Mr Aven and to his lawyer, Mr Morera, on October 16, 2013. Furthermore, if Mr Aven was 'never' notified by the courts, how is it that MR Morera later informed the judge in writing that Mr Aven would not be able to attend the new hearing?"<sup>778</sup>

f) The TAA notification

756. Mr Aven again denies having ever been served with process in the TAA investigation:

"Finally, regarding the Respondent's inclusion of Exhibit R-84, which allegedly shows that we were notified of the TAA injunction on the same day that it was issued (i.e. April 13, 2011), **I never received that notice and in fact did not know about the TAA shut down notice for many months after the date it was issued because they failed to properly deliver it to us as required by law.**"<sup>779</sup> (emphasis added)

757. As explained and proved by Respondent in its Counter Memorial, the record shows that Claimants were notified of the TAA Injunction on April 13, 2011, the very same day that such injunction was issued.<sup>780</sup> Contrary to any knowledge Mr Aven might have of Costa Rican law, this notification was effected in accordance to law: under Article 20 of the Judicial Notifications Law and Article 18.10 of the Commercial Code, corporations shall be served with process at their corporate domicile.<sup>781</sup> Both provisions were duly translated to English with Respondent's Counter Memorial, so Respondent sees no reason why Mr Aven would hold that the notification was not done "as required by law."

**VII. RESPONDENT'S ACTIONS DO NOT TRIGGER A VIOLATION UNDER CUSTOMARY INTERNATIONAL LAW OF STATE RESPONSIBILITY**

758. Claimants' alleged violations of the standards of protection set forth in DR-CAFTA encompass a complaint under Costa Rican domestic law, which certainly do not pertain to the international law arena. In effect, their claim entails appealable, domestic grievances which cannot trigger the jurisdiction of an international tribunal and consequently, should be dismissed in their entirety. Put simply, this is not a case that is either entitled or should (as a matter of judicia policy) find its way to inconvenience an international tribunal such as this Tribunal.

759. In their Memorial and Reply Memorial, Claimants raise arguments related to the administrative and criminal proceedings that took place in Costa Rica, questioning the decisions as well as the conduct of Costa Rican officials involved. This is done after fleeing

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<sup>778</sup> Second Witness Statement of Luis Martínez, para. 65.

<sup>779</sup> Second Witness Statement of David Aven, para. 75.

<sup>780</sup> R-84, Notification of TAA injunction to Claimants, 13 April 2011.

<sup>781</sup> R-277, Commerce Code, 1964; R-278, Judicial Notifications Law, 2009.

the country in the middle of ongoing proceedings and abandoning their property at the same time. Claimants abandoned all prospect of working with the authorities to find a reconcilable way of ensuring the environment was protected and some steps could have been taken towards developing the property. This binary view of, and drastic approach to, matters illustrates the *modus operandii* of Claimants as a whole.

760. To accept Claimants' grievances would undermine the basic principles of the international law on State responsibility. Therefore, their decision to leave unfinished the proceedings for which they now complain before this Tribunal cannot be rewarded by international law from any point of view.
761. Consequently, Claimants' grievances regarding the conduct and decisions of Costa Rican officials do not rise to the level of international State responsibility, and therefore, Claimants are barred from bringing the case before this Tribunal.
762. Under customary international law, an internationally wrongful act of State entails its international responsibility.<sup>782</sup> The internationally wrongful act exists when the conduct, consisting of an act or omission is attributable to a State, and constitutes a breach of an international obligation owed by that State.<sup>783</sup> In other words, when a tribunal is faced with allegations of State responsibility, it has to consider whether there is an act which is imputable to the respondent State, and whether said act is contrary to international law.
763. Notwithstanding the rules of attribution in cases of international State responsibility, the relevant issue in the case at hand is whether the conduct and decisions of Costa Rican lower-level officials can be considered an internationally wrongful act. It is well-established that a mistake on the part of a court (or administrative body) in a procedure is not in itself sufficient to amount to a violation of international law.<sup>784</sup> Particularly, when such decisions are issued by lower-level officials, and there is a reasonable possibility that they might be corrected by an appeal or other form of challenge, as in the present case.
764. It cannot be denied that there is no State in the world that can guarantee the correctness of every one of the thousands of administrative and judicial decisions that its authorities issue each day. For this very reason, States allow for the appeal or challenge of administrative acts and judicial decisions, providing a procedure for appellate bodies to review lower-level

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<sup>782</sup> **RLA-140**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]) UN Doc A/56/10, 43, UN Doc A/RES/56/83, Annex, UN Doc A/CN.4/L.602/Rev.1, GAOR 56th Session Supp 10, 43, Pt.1 The Internationally Wrongful Act of a State, Chapter I General Principles, Article 1.

<sup>783</sup> *Ibid.*, Article 2.

<sup>784</sup> **RLA-103**, Christopher Greenwood, "State Responsibility for the decisions of national courts" in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* (Hart Publishing, Oxford), 2004, pp. 55-74.

judicial and administrative decisions. That is what the rule of law is – but the rule of law has to be permitted to function in accordance with the applicable rules and applicable law:

"While legal systems strive for perfection at all levels, they also recognize that such a result is unlikely to be attainable. It is precisely for that reason that legal systems today make extensive provisions for appeal and that many also contain other provisions for challenging decisions of the lower courts for violations of constitutional safeguards which are frequently very similar to the standards of international law in all cases. That system includes the appellate and review procedures for which it provides."<sup>785</sup>

765. Thus, it would be unrealistic to interpret investment treaties as inextricably requiring that administrative decisions and lower judicial decisions always be procedurally and substantively correct. It is partly in recognition of this reality that international tribunals have interpreted that low-ranked administrative and judicial decisions raise an international delict only if an effective remedy is not available or if the aggrieved party's applications for remedy do not lead to redress.<sup>786</sup>

766. In other words, until available higher levels or domestic review have had the opportunity to correct a given miscarriage of justice (which does not exist here), it cannot be said that there has been a State act capable of triggering international liability.<sup>787</sup> In commenting the earlier Draft Articles on State Responsibility, the United Kingdom precisely observed that:

"[t]he duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court. In the case of such obligations, no breach occurs until the State has failed to take any of the opportunities available to it to produce the required result."<sup>788</sup>

767. In the same line of reasoning, the *Rapporteur* to the International Law Commission Professor James Crawford explained, after quoting the United Kingdom comments set out in the preceding paragraph, he observed that:

"an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act by a State."<sup>789</sup>

768. In other words, the elements which prevent to hold liability against a State for administrative acts or judicial decisions in international law are the existence of lower-officials making a decision, and remedies available to seek redress. In other words, a State

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<sup>785</sup> Ibid., 61.

<sup>786</sup> **RLA-64**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 154.

<sup>787</sup> RLA-18, Christopher Dugan and others, *Investor State-Arbitration* (OUP 2008), 361.

<sup>788</sup> **RLA-94**, James Crawford, Special Rapporteur, Second Report on State Responsibility, Int'l L. Comm'n, 51st Sess., U.N. Doc. A/CN.4/498, 17 March 1999, para. 74.

<sup>789</sup> Id. para 75.

should always be judged by its "final product," and its liability is only engaged if the overall process of its decision-making is flawed.<sup>790</sup>

769. The only exception where the administrative acts or judicial decisions issued by low-level officials could be challenged at an international level are cases in which the unfairness is such that:

"[A]s result of the court maneuverings substantial injustice has been done the claimant...these maneuverings really amount to an obstruction of the judicial process, and are extrinsic to the merits of the claim. Bad faith and not judicial error seems to be the heart of the matter [...]"<sup>791</sup>

770. But here there is no injustice. Wetlands have been identified, and it is right that the development by Claimants be checked, not least in circumstances where they always knew wetlands existed. Furthermore, the judicial decision or administrative decision does not engage the international responsibility of the State unless the systems of appeals and other challenges existing in that State either do not correct deficiencies of the lower court's decisions or is such that it does not afford a prospect of correcting those deficiencies.<sup>792</sup>

771. Numerous tribunals have held that cases of administrative or judicial misconduct that are not sufficiently serious, in terms of materiality of a breach, to cause damage or the lack of instant remedy, do not justify the operation of the heavy and costly investment arbitration process.

772. The distinction between the "grievances arising from an individual's interaction with the machinery of government" and the kind of acts that "justify the machinery of an international treaty" are emphasized in Thomas Wälde's separate opinion in *Thunderbird v Mexico*, which Claimants have favorably relied upon:

**"The disappointment of legitimate expectations must be sufficiently serious and material. Otherwise, any minor misconduct by a public official could go to the jurisdiction of a treaty tribunal.** Their function is not to act as a general-recourse administrative law tribunal. The introduction of direct investor-state arbitration ("arbitration without privity; "transnational arbitration") since the late 1980, resulted in a "discontinuity" which is not as yet fully appreciated and requires attention in cases such as this one. In former times, investment treaties provided for an intergovernmental arbitration process only; governments therefore had to "sponsor" private claims.

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<sup>790</sup> **RLA-104**, "Exhaustion of local remedies and denial of justice" in Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 108-112.

<sup>791</sup> **RLA-103**, See D O' Conell, *International Law* (Oxford 1970), p. 948 fn. 8, cited in Christopher Greenwood, "State Responsibility for the decisions of national courts" in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* (Hart Publishing, Oxford) 68.

<sup>792</sup> **RLA-103**, Christopher Greenwood, "State Responsibility for the decisions of national courts" in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* (Hart Publishing, Oxford) 58.

Such governmental sponsorship provided an important "filter" for screening claims and for avoiding that investment treaties were used for a multitude of claims that did not justify the machinery of an international treaty to come into play: The risk of opened "floodgates" and the spectre of treaty-based procedures for a single instance of misconduct of an individual official. Modern treaties with direct investor-state arbitration rights no longer have such in-built "filters." **The construction of key legal terms must therefore provide sufficient filtering so that the treaty is only available to material, substantive and serious breaches and not for the every-day grievances arising from an individual's interaction with the machinery of government. Cases of administrative misconduct which are not serious enough, in terms of materiality of a breach, amount of damage or lack of instant remedy, do not justify triggering the operation of the heavy and costly treaty machinery under [an investment treaty].**"<sup>793</sup> (emphasis added) (internal citations omitted)

773. To be clear, the disqualification of the claim from an international tribunal is not based on a requirement to exhaust local remedies. Rather, it is because minor acts by low-level officials do not expropriate the investment and affect the legitimate expectations of the investor when they are non-final, subject to an appeal or any other challenge, and therefore, do not raise State responsibility.

774. This principle is made clear by the tribunal in *Generation Ukraine v Ukraine*, which held:

"[It is not] sufficient for the disappointed investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune. Yet again, it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. **In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the investor to obtain correction.**"<sup>794</sup> (emphasis added)

775. Just as a decision by a lower court or administrative body does not amount to an internationally wrongful act so long as it may be appealed or challenged (in other words, so

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<sup>793</sup> CLA-67, *International Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion, UNCITRAL/NAFTA, 1 December 2005, para. 14.

<sup>794</sup> **RLA-65**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paras. 20.30.

long as it is not "final and binding"),<sup>795</sup> so a decision by a low-level administrative official is not an internationally wrongful act as long as it may be redressed.

776. As the tribunal in *Loewen v United States* noted:

"[I]t would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted."<sup>796</sup>

777. The *Loewen* tribunal further echoed the dangers of opening the "floodgates" and the spectre of treaty-based procedures for a single instance of misconduct of an individual official, warned against by Thomas Wälde in his separate opinion in *Thunderbird*:

"Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself."<sup>797</sup>

778. In the present case, all the elements which operate to prevent a holding of international liability against a State for administrative acts or judicial decisions are met. Low-level decisions in ongoing processes have occurred. The administrative and criminal proceedings remain ongoing and thus it is far too premature to assert that the decisions adopted by the agencies of Costa Rica could first have constituted international wrongs, and second, could also have been addressed within the confines of Costa Rica's judicial/administrative system.

779. In their submissions, Claimants have made serious accusations against Mr Bogantes, Ms Vargas, Ms Díaz and Mr Martínez:

"Mr Bogantes's conduct represented the epitome of high-handedness...Mr Bogantes display of selfishness and deceit"<sup>798</sup>

"The conduct of Mr Martínez typifies the very essence of arbitrariness in official decision-making."<sup>799</sup>

"But for the evident disposition, held by each of Bogantes, Díaz and Vargas – to remain wilfully blind as to the fact that Las Olas was being developed in accordance with all applicable laws and

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<sup>795</sup> **RLA-28**, Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 443 ("The State does not mistreat a foreign investor unfairly and inequitably by a denial of justice through an appealable decision of a first instance court, but only through the final product of its administration of justice which the investor cannot escape. The State is not responsible for the wrongdoings of an individual judge as long as it provides readily accessible mechanisms which are capable of neutralizing such judge.").

<sup>796</sup> **RLA-64**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 162.

<sup>797</sup> Id., para. 242.

<sup>798</sup> Claimants' Memorial, paras 392.

<sup>799</sup> Id., paras 369.

regulations, and to subvert SETENA's exercise of supervisory authority over the Project."<sup>800</sup>

"Mónica Vargas Quesada, an official working in the Municipality's Environmental Management Department, exemplifies the idea of a bureaucrat who had only peripheral involvement in the smooth-functioning approval process, but whose meddling constituted a gross violation of the Claimants' due process rights [...]"<sup>801</sup>

780. All of them are Costa Rican lower-ranked officials who are not in charge of reaching a final decision that could affect rights of investors, and who only performed internal investigations within the public agencies in charge of environmental law enforcement in Costa Rica. In effect:

- Ms Vargas, officer at the Environmental Department of the Municipality, conducted site visits in view of complaints from the communities and reported such complaints to the competent authorities (TAA and SINAC);
- Ms Díaz, an official from *Defensoría* conducted an administrative internal investigation into SINAC, SETENA and the Municipality, which ended up with the initiation of the criminal proceedings;
- Mr Bogantes, who was a SINAC official, also conducted internal investigations which gave rise to the SINAC Injunction and the judicial injunction; and
- Mr Martínez conducted the criminal investigations before the trial.

781. In addition, it is not that the administrative or judicial proceedings carried out have come to an end. On the contrary, Claimants abandoned the country and no remedy was sought in order to have a review of the administrative acts and judicial decisions. In this sense, there is no final and binding decision that cannot be challenged by Claimants:

- Claimants challenged the SINAC Injunction through administrative appeals and started an action before the Administrative Contentious Tribunal, they completely abandoned such action soon after filing it;<sup>802</sup>
- As for the injunction from the TAA, Claimants never even engaged in those proceedings not having appeared there once, even though they were duly served;<sup>803</sup> and

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<sup>800</sup> Id., paras 413(I).

<sup>801</sup> Id., para. 344.

<sup>802</sup> R-193, Administrative Tribunal rejects motion to revoke Architects Law, SINAC Injunction, 25 March 2011.

<sup>803</sup> R-84, Notification of TAA Injunction to Claimants, 13 April 2011.

- As to the criminal proceedings, as it will be further explained below, Mr Aven is now a fugitive from justice for having absconded from the proceedings against him, fleeing the country in the middle of a trial.

782. It seems apparent then, that Claimants are attempting to submit an appeal in the present case and have the Tribunal review officials' conduct during the conduct of administrative proceedings. This is grossly misplaced and not the proper purpose of an investment arbitration tribunal constituted under the auspices of the DR-CAFTA.

783. Investment tribunals have repeatedly held that their mandate is not to act as appeal mechanisms for domestic decisions.<sup>804</sup> In effect, in *Saipem v Bangladesh*, it was stated that:

"[T]his Tribunal does not institute itself a control body [...], nor as enforcement court, nor as supranational appellate body for local court decisions."<sup>805</sup>

784. Thus, an international investment tribunal cannot be used as an appeal body to remedy Claimants' lack of diligence in pursuing the corresponding proceedings in Costa Rica. Not least, it is entirely within the remit and power of a Costa Rican court to ensure Claimants appreciate how they have misinterpreted or purposefully avoided lawful compliance with Costa Rican law. That is not a role that should be imposed upon to an international tribunal.

785. Claimants contend that international law is the applicable law and recourse to Costa Rican law should not be adopted. However, even applying international law, as a threshold question, will determine that this case is not ripe for consideration by an international arbitral tribunal – particularly in circumstances where there has been absolutely no denial of any international law rights.

786. All in all, acts and decisions by low-level officials whose sayings are not final and binding do not raise the international State responsibility of Costa Rica. Since Claimants allegations are concentrated in the conduct of Costa Rican officials who do not have the final word on the matter –and in any event, Claimants themselves made themselves unable to continue with the proceedings by fleeing the country– they are barred from bringing their claims before this Tribunal. Otherwise, they would be given an appeal which does not exist in the system of international adjudication.

<sup>804</sup> **RLA-62**, *Robert Azinian, Kenneth Davitian & Ellen Baca v The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para 99; **RLA-64** *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, Award, ICSID Case No. ARB(AF)/98/3, 26 June 2003.

<sup>805</sup> **RLA-92**, *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

**VIII. CLAIMANTS WERE TREATED IN ACCORDANCE WITH THE MINIMUM STANDARD OF TREATMENT AS PROVIDED BY ARTICLE 10.5 OF DR-CAFTA**

**A. Claimants could have legitimately expected Respondent to enforce its environmental law**

787. Claimants argue that Costa Rica violated their legitimate expectations under Article 10.5 of the DR-CAFTA as to the operation of Costa Rica's real estate development and environmental laws.<sup>806</sup> As stated in Respondent's Counter Memorial, not only Claimants' expectations were not violated, but also Claimants had failed to specify how they perceive the fair and equitable treatment standard to have been breached in this case.<sup>807</sup>

788. At this time in their Reply Memorial, Claimants attempt to "clarify" matters by indicating that they are entitled to compensation due to an alleged breach of the "...*legitimate expectation that they would be able to act on the permits granted to them, and to be free from being shaken down for payment by corrupt local officials.*"<sup>808</sup> Unfortunately for Claimants, the road to this conclusion is plagued with inaccuracies and shortcuts. The consequence is Claimants' allegation of a breach of Article 10.5 must fail.

**1. Claimants' unfounded insistence on relying on *Tecmed***

789. Claimants insist on relying on the *Tecmed* case. In support of their argument, they pose a "war of legal authorities,"<sup>809</sup> as if solely the *quantum* of them provides quality and accuracy to their contentions.

790. In addition, and presumably because of the strength of Respondent's arguments, they rely on an *argumentum ad hominem*,<sup>810</sup> incurring in the fallacy of attacking the character of Zachary Douglas and Anna Joubin-Bret when criticizing the consistency of the *Tecmed* approach, instead of providing an argument challenging the soundness of Respondent's argument that said case does not reflect the standard of FET.<sup>811</sup>

791. Respondent repeats its reliance on its submissions that undermine Claimants' interpretation of *Tecmed* – a decision which has all too frequently been relied upon in a primitive and rudimentary fashion that means tribunals are misled from the true test for legitimate expectations. Claimants repeat their mistake.

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<sup>806</sup> Claimants' Memorial, paras. 283-292, 322-334; Claimant's Reply, paras. 69-70, 107, 352-365.

<sup>807</sup> Respondent's Counter-Memorial, paras. 473-475.

<sup>808</sup> Claimants' Reply Memorial, para. 69.

<sup>809</sup> Claimants' Reply Memorial, para. 69-70.

<sup>810</sup> Claimants' Reply Memorial, para. 70, fn. 28.

<sup>811</sup> Respondent's Counter-Memorial, paras. 479-80.

## 2. The standard of objectiveness as the measure of legitimate expectations

### a) Claimants' alleged legitimate expectations do not derive from an objective analysis

792. Claimants contend 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..."<sup>812</sup> and "...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"<sup>813</sup> (emphasis added)
793. As Respondent has previously noted, not all expectations are protected as part of the guaranteed standard of treatment.<sup>814</sup> Claimants seem to agree since, as they point out, the development in a consistent manner with environmental sustainability and compliance with applicable municipal legal rules and administrative processes would have provided content to Claimants' expectations.
794. It is only when an investor's "*expectations have an objective basis, and are not fanciful or the result of misplaced optimism, [that] they are described as 'legitimate expectations'*".<sup>815</sup> As the tribunal in *Suez v. Argentina* noted, "*one must not look single-mindedly at the Claimants' subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view.*"<sup>816</sup>
795. Therefore, the issue at hand is not whether Claimants subjectively believed they could rely on the EV they held; rather, it is whether their belief was justified and reasonable, from an objective point of view, in light of Costa Rican law and the circumstances surrounding the Parties and their interactions.
796. In this sense, the legal framework applicable in Costa Rica informs the legitimate expectations of an investor. The tribunal in *Duke Energy v Ecuador*, stated that all the circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State, should be taken into account for the assessment of the reasonableness or legitimacy of the

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<sup>812</sup> Claimants' Reply Memorial, para. 354.

<sup>813</sup> Claimants' Reply, para. 356.

<sup>814</sup> Respondent's Counter-Memorial, para. 481.

<sup>815</sup> RLA-28, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 532.

<sup>816</sup> **RLA-93**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 228.

investor's expectations. Although the juridical circumstances were not included expressly, the tribunal obviously intended to refer to them.<sup>817</sup>

797. As explained in Respondent's Counter Memorial,<sup>818</sup> the legal framework that Claimants faced when they decided to invest in Costa Rica mandated that they had to obtain first an EV from SETENA, eventually apply for a permit to the SINAC in case they have to remove trees, and then to obtain work permits from the Municipality. All these proceedings in strict compliance with environmental provisions which prevail in Costa Rica.<sup>819</sup>
798. However, Claimants neither developed the Las Olas Ecosystem in a manner consistent with the standards of environmental sustainability, nor did they comply with those proceedings.<sup>820</sup> In this context, Claimants cannot possibly rely on "legitimate expectations" when they provided erroneous and misleading information to Respondent's agencies. Furthermore, Claimants cannot possibly rely on a "legitimate expectation" which deviates from the objective appreciation of what Costa Rican law and practice unambiguously provides. Claimants' argument demonstrates once more how they completely mischaracterize and misinterpret Costa Rican law.
799. Furthermore, State representations that are based on the investor providing incomplete or inaccurate information do not give rise to legitimate expectations. This principle was confirmed by the tribunal in *Thunderbird v. Mexico*.<sup>821</sup> Accordingly, it is surprising that Claimants relied on this case, taking into account that it provides support for Respondent's allegations.<sup>822</sup> Claimants omitted to mention that it was a case in which the investor had relied on a legal opinion given to it by the Mexican authorities concerning the legality of its proposed gaming operations. After the investment was made, the Mexican authorities shut down the facilities because they were found to involve a considerable degree of chance, in violation of the statutory gambling prohibition. The tribunal found that the legal opinion could not create legitimate expectations upon which the investor could reasonably rely, notably because the investor, in seeking the opinion, had not disclosed relevant information as to the nature of the gaming machines, thereby "*put[ting] the reader on the wrong track.*"<sup>823</sup>

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<sup>817</sup> **RLA-102**, *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008.

<sup>818</sup> Respondent's Counter-Memorial, Section III.B.4.

<sup>819</sup> Id., Section III.A.

<sup>820</sup> Id., paras. 271-307, paras. 487-505.

<sup>821</sup> CLA-70, *International Thunderbird Gaming Corp. v. United Mexican States*, IIC 136 (2006), Award, 26 January 2006, paras. 151-155.

<sup>822</sup> Claimants' Memorial, paras. 283, 289.

<sup>823</sup> CLA-70, *International Thunderbird Gaming Corp. v. United Mexican States*, IIC 136 (2006), Award, 26 January 2006, paras. 151-155.

800. As in *Thunderbird v Mexico*, Claimants misled the Respondent and put it on the wrong track. Specifically, they deliberately misled SETENA in the process of obtaining the EV by failing to disclose the existence of ecosystems on the land.

801. Claimants attempt to quickly disregard Respondent's arguments that the lack of objectiveness in Claimants' expectations was demonstrated when submitting the Protti Report.<sup>824</sup> The only reason for Claimants not to fairly object to Respondent's argument is because it clearly demonstrates that since 2007 Claimants were aware of the existence of wetlands in the Project Site and they intentionally decided to keep this information from SETENA.<sup>825</sup> While Claimants protest the relevance of those known discoveries at the time, their own expert testimony endorses the common position that there are (and always have been) wetlands on the Las Olas property.

802. The faulty EV application misled SETENA as to the real physical conditions on the Project Site, and resulted in the issuance of an EV that Claimants were not entitled to obtain or reasonably rely upon as a State assurance. Therefore, the EV could not have generated a legitimate expectation that their development would not be stopped if they caused damage to the environment.

b) *The EV does not provide content to their legitimate expectation defense*

803. In order to support the position that Claimants could rely on the EV they obtained, they also resort to Mr Ortiz's opinion asserting that Respondent's acts to revoke or suspend the EV allegedly violated Claimants "legitimate expectations" under Costa Rican laws.<sup>826</sup> Claimants contend in this regard that:

"The Respondent's failure to acknowledge these principles [legal certainty; retroactivity; legitimate expectations; estoppel] of Costa Rican law spells doom for its defense and further substantiates the Claimants' legal position on the Respondent's breaches of its DR-CAFTA treaty obligations."<sup>827</sup>

804. In this sense, in paragraph 266 of their Reply,<sup>828</sup> Claimants list Respondent's actions that — in Mr Ortiz's opinion— constituted violations to Claimants' legitimate expectations under Costa Rican law. As it will be seen, none of these allegations withstand scrutiny.

805. First, Claimants include a reference to permits contending that "*granting permits without any government body or public official raising any red flags*" could be deemed as a breach of the standard. This is completely untrue. As stated above, Claimants misled the

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<sup>824</sup> Claimants' Reply, para. 363.

<sup>825</sup> Respondent's Counter-Memorial, paras. 161., 285-6.

<sup>826</sup> Claimants' Reply Memorial, para. 266.

<sup>827</sup> Id., para 268.

<sup>828</sup> Id., para 266.

authorities by concealing the real physical conditions of the Las Olas Ecosystem which were made clear to them by the Protti Report.

806. Second, Claimants also referred to "*contradictions among different government bodies and officials.*" Nevertheless, the actions of the Government cannot be considered inconsistent when they were motivated in taking the necessary steps to enforce the law, absent any specific undertaking that it will refrain from doing so.<sup>829</sup> As explained below, Costa Rica has never made any representation that it will not enforce its environmental law. In addition, Costa Rican agencies have not acted inconsistently; rather, they acted driven by the application of the environmental laws, and this is legitimate and reasonable.
807. Any incomplete process will inherently display characteristics that could be construed as inconsistencies. Had Claimants allowed Costa Rican legal processes to reach their natural conclusion a definitive position would have been achieved. The evolution of the Costa Rican authorities' appreciation of the Las Olas Project site and the existence of any sensitive ecosystems has, to state the obvious, an iterative process. It is unfair and misleading to construe such an iterative process as displaying inconsistencies when it was incomplete due to the Claimants' disengaging.
808. Continuing with "the list," Claimants included the "*issuance of injunctions without any administrative proceeding or judicial review.*" As explained by Dr Jurado, the injunctions issued by SETENA, SINAC and the TAA all complied with the applicable framework under Costa Rican environmental law, where the "15 day term" does not apply.
809. Lastly, Claimants alleged that "*keeping injunctions in place for more than the time allowed by our legal system*" also constituted a violation of Claimants' legitimate expectations. As to this particular accusation, Mr Ortiz refers to the TAA Injunction that is still in place. As explained above, the TAA Injunction cannot be changed given that the original situations that motivated its issuance have not changed to date.
810. Thus, even when analyzing the list of alleged violations of legitimate expectations derived from the EV Claimants held, the conclusion remains the same: none of the circumstances described constituted a breach of the said standard simply because EV could not provide content to their legitimate expectations defense.
- c) *Costa Rica has never made any specific promise to Claimants that it would not enforce its Law in the face of environmental violations*
811. Furthermore, not every assurance given by public officials rises to the level of a legitimate expectation. Encouraging remarks from government officials do not of themselves give rise

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<sup>829</sup> **RLA-135**, Ronald S. Lauder v. The Czech Republic, UNCITRAL Award, 3 September 2001, para 297.

to legitimate expectations.<sup>830</sup> For legitimate expectations to arise, the state conduct must be specific and clear.<sup>831</sup> There must be an "unambiguous affirmation"<sup>832</sup> - "ambiguous and largely informal" representations do not suffice.<sup>833</sup>

812. Costa Rica has never made any specific promise to Claimants that it would not enforce its law on the face of environmental violations. Claimants further accept that to legitimize the expectations the investor shall "*perform a reasoned and prudent assessment of 'the state of the law and the totality of the business environment' prior to, and in the process of, establishing his investments.*"<sup>834</sup> Therefore, Claimants cannot expect Respondent not to enforce its environmental laws when they knew from the very beginning that it was one of Costa Rica's principal policies.
813. Claimants maintain that the DR-CAFTA mandates "*...host State officials to exercise delegated governmental authority in a manner that avoids frustrating the legitimate, investment-backed expectations.*"<sup>835</sup> But DR-CAFTA also balances the investor's right to stability on the one hand, and the state's right to regulate certain areas of the law —such as the environment—on the other. Tribunals acted accordingly, weighting the investor's legitimate expectations against the State's duty to act in the public interest.<sup>836</sup> And this is exactly what all Costa Rican agencies did and never stated it would refrain from doing so: apply the environmental law provisions in Costa Rica.
814. This was not ignored by Claimants. Indeed, they recognize in their Reply that "*[t]he 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.*"<sup>837</sup> However, there is another way of stating the same point regarding how environmental law should have been observed – and how that informs what Claimants' legitimate expectations were. That is the simple point that Claimants' were on actual or constructive notice of Costa Rica's environmental laws (and practice) in their entirety – and the enforcement of those laws was immediately and automatically part of their legitimate expectations when they purported to make their investment.

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<sup>830</sup> **RLA-100**, *William Nagel v The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, para. 326 (government officials' mere encouraging remarks to investor about likelihood of obtaining license found insufficient to create legal expectation that investor would receive the license).

<sup>831</sup> See CLA-42, *Metalclad Corporation v Mexico*, Award, ICSID Case No. ARB(AF)/97/1, (2001) 16 ICSID Rev-FILJ 168, (2001) 40 ILM 36, (2001) 26 YB Com Arb 99, (2002) 119 ILR 618, (2002) 5 ICSID Rep 212, (2001) 13(1) World Trade and Arb Mat 45, 25 August 2000.

<sup>832</sup> **RLA-101**, *Gami Investments, Inc. v The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, para. 76.

<sup>833</sup> RLA-22, *Marvin Feldman v Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

<sup>834</sup> Claimants' Memorial, para. 286.

<sup>835</sup> Claimants' Reply Memorial, para. 360.

<sup>836</sup> CLA-71, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, *IIC 210 (2006)*, Partial Award, 17 March 2006, para. 306; CLA-100, *Total v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 123, 309.

<sup>837</sup> Claimants' Reply Memorial, para. 354.

815. In addition, Claimants argue that DR-CAFTA aims to uphold transparency, predictability and legal certainty in favor of the investors.<sup>838</sup> However, such obligations cannot be construed as an obligation to refrain from enforcing existing laws:

"... The pre-investment legal order forms the framework for the positive reach of the expectation, which will be protected, and also the scope of considerations upon which the host state is entitled to rely when it defends against subsequent claims of the foreign investor. Here, it becomes clear that the standard of fair and equitable treatment centers to a considerable degree, on expectations of the foreign investor and that in the individual case the legitimacy of these expectations will largely depend upon the objective state of the law as it stands at the time when the investor acquires the investment."<sup>839</sup>

816. Thus, Claimants should have known and should have expected that they were required to develop and exploit their real estate project respecting Costa Rican environmental laws. Otherwise, such expectations would not be legitimate (i.e., objective), when balanced against Costa Rica's legitimate regulatory powers to enforce its environmental law.

817. In a very recent case involving the Kingdom of Spain, a tribunal chaired by the president of the ICC Court of Arbitration held that:

"In this regard, the Arbitral Tribunal shares the Respondent's position according to which, **"in order to exercise the right of legitimate expectations, the Claimants should have made a diligent analysis of the legal framework for the investment."** This position is consistent with the position adopted by other tribunals. The tribunal in Frontier, for example, considered that **"a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the moment of the investment."** Indeed, **in order to be in violation of the legitimate expectations of the investor, regulatory measures must not have been reasonably foreseeable at the time of the investment.** The Arbitral Tribunal considers that in the present case, the Claimants could have easily foreseen possible adjustments to the regulatory framework as those introduced by the rules of 2010."<sup>840</sup> (emphasis added)

818. Claimants' expectations are shaped on the basis of what was the legal situation prevailing in Costa Rica, which means that they should have foreseen at the time of the purported investment that Costa Rica would enforce its environmental law in case on non-compliance. It is then groundless to assert that Claimants have legitimate expectations based on non-compliance of the environmental legal framework surrounding the investment.

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<sup>838</sup> Id., para. 360.

<sup>839</sup> **RLA-105**, Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39(1) *The International Lawyer* <<http://www.jstor.org/stable/40707790>> accessed 22 October 2016.

<sup>840</sup> **RLA-136**, *Charanne B.V. and Construction Investments S.A.R.L. v Spain*, SCC, Award, 21 January 2016.

**3. Claimants cannot rely on the irregular and lacking local advice they received in order to provide content to or justify their legitimate expectations defense**

819. As stated above, legitimate expectations cannot derive from misplaced optimism or ignorance. This misplaced optimism is patent in Claimants' efforts to argue that they hired local technical and legal professionals to "*remain in full compliance with the host State's legal and administrative requirements,*"<sup>841</sup> as if the fact of receiving assistance immunizes Claimants from any irregularity and leaves untouched their subjective expectations.

820. As will be demonstrated, both the technical and legal local advice provided to Claimants was deficient and irregular, all of which strengthens Respondent's argument as regards the fact that Claimants cannot rely on the expectation that they would be able to act on the permits granted to them.

821. As regards the legal advice which was supposedly received, Claimants go to great lengths to describe the due diligence they say they conducted when starting their development of the Las Olas Project:

"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."<sup>842</sup>

"As the Claimants have emphasized throughout this arbitration, at all times, **we relied on our local experts and attorneys to instruct us in the law, to ensure we were in compliance with Costa Rican law and the permitting process at all times.** This included receiving advice regarding the necessity of acquiring an EV permit from SETENA for each of the sections of the Las Olas project."<sup>843</sup>

"**As a foreign investor, we relied on our local counsel, local professionals and other local experts, who liaised with the Costa Rican authorities to provide all the necessary information that the Government required in order to ensure the issuance of a permit.**"<sup>844</sup>

"**As we have mentioned time and again, we used local companies, experts, and attorneys to file all of our permit applications with the appropriate governmental agencies.** Upon review of our documentation, the permits would be issued, or the government would revert back to our attorneys for more information."<sup>845</sup>

822. Thus, Claimants would have the Tribunal believe that they were fully prepared and informed of what Costa Rican law provided. The reality is quite different. First, as the

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<sup>841</sup> Claimants' Reply Memorial, para 355.

<sup>842</sup> Claimants' Reply Memorial, para. 356.

<sup>843</sup> Second Witness Statement of David Aven, para. 54.

<sup>844</sup> Id., para. 58.

<sup>845</sup> Second Witness Statement of Jovan Damjanac, para. 48.

record shows, their conduct has illustrated a profound misconception of what Costa Rican environmental law and practice entails.

823. Second, during the Document Production stage, Respondent requested that Claimants produce the entire due diligence reports and legal advice that Claimants' alleged having conducted. After the Tribunal ordered Claimants to produce a privilege log detailing the legal advice received by Claimants, Claimants came up with **one sole entry** relating to legal advice from Laclé & Gutiérrez Abogados regarding "the ownership structure of Las Olas."<sup>846</sup>

824. Thus, according to Claimants' own undertaking in the context of their disclosure obligations, (and the showings in their privilege log), they did not receive **any** legal advice relating to the compliance with Costa Rican environmental laws and regulations and its enforcement by local agencies. This is a quite astounding admission.

825. Claimants also allege having received "*sound advice from local experts*"<sup>847</sup> to develop their project and conclude that there were no wetlands or a forest on the Las Olas Project. Yet, none of the "experts" Claimants relied on had the appropriate qualifications to determine the existence of wetlands or forests on the Project Site or simply "advised" Claimants to move on with the development regardless of those ecosystems. But in any event, at no point was any "advice" committed to paper – even in the face of numerous written exchanges with the Costa Rican authorities – and in the face of the obligation that such written processes form an integral part of the environmental application.

a) *Mr Bermúdez acted carelessly during the provision of services to Claimants*

826. For the development of the EV for the First Condominium site, Claimants hired DEPPAT as the Environmental Regent. As explained in the Counter Memorial, at the time, DEPPAT did not disclose the real physical conditions of the Project Site to SETENA.

827. Mr Bermúdez also acted as the Environmental Regent for the Concession site for more than three years. Mr Bermúdez has given no explanation as to why, one day before DEPPAT was hired as Environmental Regent for the Condominium Site, DEPPAT was fired by Claimants, for breaches of environmental laws as Environmental Regent for the Concession site. Mr Bermúdez says he has absolutely "no idea where this suggestion came from."<sup>848</sup> However, Claimants' letter of June 1, 2010, delivered to SETENA and, submitted by Respondent as Exhibit R-36, precisely explains Claimants' request for

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<sup>846</sup> **R-399**, Claimants' Privilege Log, 22 July 2016.

<sup>847</sup> Claimants' Reply Memorial, para. 95.

<sup>848</sup> Second Witness Statement of Esteban Bermúdez, para. 21.

replacement of DEPPAT as environmental Regent for the Concession in the following terms:

**"Our request is founded on the omissions and breaches that the environmental responsible has committed in exercising duties which environmental laws and regulations oblige him as environmental responsible to know, recommend and execute and follow up. This situation seriously exposes our company in relation to the environmental commitments acquired and which we want to ensure compliance. In the analysis of the services and responsibilities in charge of the environmental responsible, we could confirm that the environmental responsible, has seriously breached the obligations and responsibilities referred in the environmental law regulated by SETENA [...]"<sup>849</sup>**

828. This letter was signed by Ms Paula Murillo, the legal representative of La Canícula and Claimants' representative. According to Claimants, Ms Murillo had "no day-to-day involvement in, or control over, the development of the Las Olas project."<sup>850</sup> Nonetheless, as Ms Murillo was firing DEPPAT for serious environmental breaches; Mr Aven was appointing DEPPAT as the Environmental Regent for the Condominium site.<sup>851</sup>
829. During the development of the Condominium site and the Easements and other lots site, Mr Bermúdez stood quietly knowing the impacts that Claimants were undertaking on the Las Olas Ecosystem.
830. Further, Respondent has noted serious inconsistencies in the Environmental Logbook prepared by Mr Bermúdez. Exhibit C-106 submitted by Claimants showed as the last entry in the logbook March 2, 2012. However, Document AVE.7.18 disclosed by Claimants during the Document Production stage reflects two new entries from May 17, 2012 and July 31, 2012:

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<sup>849</sup> R-36, Request to replace DEPPAT as Environmental Regent, 1 June 2010.

<sup>850</sup> Claimants' Memorial, para. 6.

<sup>851</sup> R-33. Letter by David Aven to SETENA appointing DEPPAT as Environment Regent in Exp. Adm. D1-1362-2007, 14 June 2010.



and ERM hydrophilic vegetation in the 3 wetlands identified by KECE."<sup>853</sup>

832. Respondent will now explain why Mr Mussio's "advice" to Claimants cannot be relied on by Claimants to constitute any "objective" expectations that the Project would not be suspended from development by local agencies.

i. *Mr Mussio's "expertise" to determine the existence of wetlands*

833. Claimants dedicate many paragraphs to repeating how "Ms Vargas," "Mr Martínez," or "Mr Bucelato" had no competence to determine the existence of wetlands. However, their own advisor, with no technical qualifications to determine the existence of wetlands, asserts the non-existence of wetlands on the Project Site:

"Such areas, according to my experience and knowledge, do not constitute wetlands."<sup>854</sup>

834. Mr Mussio also assumes expertise which he does not have to the determination of a forest under Costa Rican law:

"[t]he area where we planned infrastructure works according to the design and the processing of the permits **did not meet the criteria to be considered a forest.** Most of the property was cattle grazing land."

835. No forestry studies were conducted prior to the submission of the EV for the Condominium site.<sup>855</sup>

ii. *Mr Mussio knew about the irregularities involving the existence of wetlands on the Project Site since 2008*

836. Mr Mussio surprisingly asserts that he only found out about the "problems" with the Las Olas Project in 2010:

"I became aware in 2010 of the problems that Las Olas was having with the permits. It was a surprise to me and to the rest of the team at Mussio Madrigal because the existence of wetlands or a forest was never determined at the time of our involvement. In my opinion, this came about as a result of a complete lack of coordination among the various entities of the State, as I understand it that the determination of the expert entity responsible for ascertaining whether a wetland exists from a technical point of view, MINAE, was not taken into account when issuing the orders to suspend the environmental permits."<sup>856</sup>

837. This is completely false. As explained in the Counter Memorial<sup>857</sup> and proven by Respondent's Exhibit R-20, on September 30, 2008, Mr Mussio was informed by two inspectors of MINAE and SINAC of the investigations regarding the existence of a wetland at the Project Site.

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<sup>853</sup> Siel Siel Report, paras. 24-25.

<sup>854</sup> Witness Statement of Mauricio Mussio, para. 26.

<sup>855</sup> Siel Siel Report, para. 5.

<sup>856</sup> Witness Statement of Mauricio Mussio, para. 36.

<sup>857</sup> Respondent's Counter-Memorial, paras. 198-199.

838. Mr Mussio does admit that the inspectors told him that the purpose of the visit was to "check and verify alleged anomalies due to a complaint" and that he told Mr Aven about the inspection.<sup>858</sup> Further, Mr Mussio admits walking in the western side of the property (where Wetlands No. 5 and No. 3 are located), and explaining to the inspectors that the accumulation of water in two points was due to "water discharge pipes resulting from the construction of the coastal roadway and public streets."<sup>859</sup> This conversation sounds much like Mr Mussio's explanation of the physical conditions of Wetland No. 1, when he alleges that the poor drainage is due to the "blockage of surface water runoff."<sup>860</sup>

c) Mr Arce only provided "advice" after impact to forests had already been consumed

839. Claimants rely on the alleged advice provided by Mr Arce to contend that the felling of trees and impacts to a forest were perfectly legal. For instance, Mr Damjanac justifies the illegal cutting and burning of trees on an alleged legal advice:

"In paragraph 14 of her Witness Statement, Ms. Vargas stated that "according to what the neighbors told me," the "cutting and burning of trees . . . took place during the weekends because public officials do not work those days." This is a false (and strange) accusation based on secondhand, biased reports.

We were not cutting and burning trees—only maintaining our property by cutting "Secate" (a high grass that, according to our attorneys, is not protected vegetation under Costa Rica's forestry laws). The grass grows 24 hours a day, 365 days of the year in Costa Rica."<sup>861</sup>

840. First, Claimants did not receive any legal advice from any "attorneys" on whether the cutting and burning of trees was legal or not. This much is apparent from Claimants' own admissions during the disclosure phase. Second, it was not until September 2010 that Mr Arce, forestry engineer not an attorney, visited the Project Site for the first time,<sup>862</sup> thus, this was the first time Claimants "knew" that the cutting they were undertaking since March 2009 was "perfectly legal." All of the impacts, documented in Ms Vargas 2009 and 2010 reports,<sup>863</sup> prior to September 2010 were done without any advice or guidance on whether the cutting or burning of trees was legal or not.

841. Further, it is undisputed that Claimants did not have a prior inventory of the type of vegetation on the Project Site to determine whether they were cutting "zacate" or wetland vegetation or trees making up a forest prior to the INGEOFOR Report which was conducted in December 2011, after SINAC had filed a criminal complaint against Claimants for the illegal felling of trees.

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<sup>858</sup> Witness Statement of Mauricio Mussio, paras. 58-59.

<sup>859</sup> Id., 57.

<sup>860</sup> Id., para. 48.

<sup>861</sup> Second Witness Statement of Jovan Damjanac, paras. 26-27.

<sup>862</sup> Second Witness Statement of Minor Arce.

<sup>863</sup> R-26 Inspection Report (DeGA-049-2009), 26 April 2009; R-204, Report pictures (DeGA-091-B-2009), 16 June 2010; C-67, Monica Vargas Complaint to MINAE, 31 May 2010; and C-70, Monica Vargas Second Report on Bucelato Allegations, 16 June 2010.

842. Further, Mr Arce contradicts himself by demanding that Ms Vargas follow a technical methodology to determine the existence of a forest on the Project Site that he himself did not follow. Mr Arce points that:

"I have also reviewed Ms. Vargas's witness statement (paragraph 11) and in my opinion it is not possible, technically or legally, to conclude through mere observation that the area in question is a forest, since, for example, **it is necessary to take tree density measurements, trunk diameter measurements and to determine species type, height, area and coverage. If these measurements have not been taken, it cannot be concluded that the area in question is a forest or that there were protected trees under the law.**"<sup>864</sup>

843. However, Mr Arce's 4-page report of September 2010 did not follow any of these technical proceedings neither when he visited the Project Site in September 2010 nor when he prepared said report to Claimants.<sup>865</sup>

844. Mr Arce holds regarding the Forestry Law:

"It is important to note that from my site visit and the analysis I carried out in my capacity as forest engineer, I determined that there were several tree species, including the coral tree (*Erythrina* sp.) and pochote (*Pochota quinata*) for which there are no restrictions for felling under Article 28 of the Forest Act/Law 7575."<sup>866</sup>

"There are different categories or types of trees, among which are the following: fruit trees, forest trees, ornamental trees, medicinal trees, among others. The Forest Act is a special law that only covers one of those different categories: forest trees. This means that there are no regulations applying to felling of trees in the other categories."<sup>867</sup>

"As I have noted previously, there are different species of trees, and not all species are of interest to the legislation, and there are some that the legislation does address that do not require felling permits, so it may be the case that trees were felled that did not require a permit to do so."<sup>868</sup>

845. Mr Arce's "liberal interpretations" of Forestry Law do not correspond to the precautionary principle demands.<sup>869</sup>

846. Mr Arce quotes the specific article of the Forestry Law where from the wording is clear that is an exception and not a "liberal rule" as Mr Arce points out:

I previously explained that the Forest Act establishes certain species of forest trees that can be felled or cut down without restrictions, in accordance with Article 28 of the Forest Act, which states the following, verbatim: "**Felling permit exception.** *Forest plantations, including agroforestry systems and trees planted individually and their products, require no permit for felling, transportation, processing or export. However, in cases in which there is a forest contract executed before the effective date of this law with the Nation to receive Forest Credit*

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<sup>864</sup> Second Witness Statement of Minor Arce, para. 16.

<sup>865</sup> C-82, Forestry Report of Minor Arce Solano Concerning the Las Olas Project Site, September 2010.

<sup>866</sup> Second Witness Statement of Minor Arce, para. 10.

<sup>867</sup> Id., para. 17(a).

<sup>868</sup> Id., para. 21(a).

<sup>869</sup> R-365, Tribunal de Casacion Penal, Decision 2003-0396, 8 May 2003.

*Certificates or income tax deductions, felling must be carried out in accordance with the management plan approved by the National Forest Administration.*"<sup>870</sup>

847. Even Mr Ortiz, Claimants own expert, admits that this is an **exception** to the general rule under which the tree clearance requires a permit from SINAC:

"To carry out tree clearance, a license is required. Everyone involved in the felling of trees (landowner, agent, timber merchant and/or contractor) must ensure that a license has been issued before any felling work is carried out. All parties involved in illegal felling (that is, cutting trees without the required permits) may be prosecuted before the TAA. **Nonetheless, it must be noted that article 28 of the Forest Act/Law 7575 expressly establishes an exception to the above said rule**, as it provides that forest plantations, including agroforestry systems and trees planted individually and its products will not require a tree felling, transportation, industrialization nor exportation license."<sup>871</sup> (emphasis added)

848. As it can be inferred from the preceding paragraphs, Claimants' insistence on the hiring of highly qualified local professionals —as if they were a warranty of legitimate expectations— is far from the case. The advice given to Claimants by those local professionals suffered from serious irregularities that completely disregarded it as an element that can provide content to the alleged expectations. It is apparent that the deficient advice is a consequence of Claimants' own negligence. Costa Rican law is quite clear, and wholly supports Respondent's position. It is not a legitimate expectation if an expectation is premised on a misunderstanding or misapprehension of the law.

#### **4. Claimants' allegations on corruption have no legal basis**

849. Claimants also assert that they expected to "*be free from being shaken down for payment by corrupt local officials.*"<sup>872</sup> However, such argument fails.
850. As will be further developed in detail —but here particularly in relation to legitimate expectations—, a tribunal will not rely on presumptions, inferences, or speculation in assessing the creation of the legitimate expectation when confronted with a lack of contemporaneous evidence on the record surrounding the relevant circumstances.<sup>873</sup> It follows that it will not rely on bare allegations that do not meet the heightened standard of proof for such charges as corruption.<sup>874</sup> Therefore, Claimants' statements on the existence of an alleged bribery which affected their legitimate expectations, and which are not based on conclusive evidence, should be dismissed.

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<sup>870</sup> Second Witness Statement of Minor Arce, para. 17(b).

<sup>871</sup> Expert Report of Luis Ortiz, para. 106.

<sup>872</sup> Claimants' Reply, para. 69.

<sup>873</sup> CLA-70, *International Thunderbird Gaming Corp. v. United Mexican States*, IIC 136 (2006), Award, 26 January 2006, paras. 151-155.

<sup>874</sup> See Respondent's Counter-Memorial, paras. 592-610.

851. Accordingly, Claimants could not have expected Costa Rica not to enforce their environmental law, especially when Claimants concealed sensitive information from Respondent regarding the impacts their project would actually have on the environment. Any alleged expectation could not be as such if it is based on information that it was not disclosed to the State.

**5. Claimants' argument on estoppel rule and legitimate expectations doctrine under Costa Rican law is alien to DR-CAFTA**

852. In order to support their claims on the alleged lack of coordination of administrative bodies—which would affect Claimants' legitimate expectations—they raise arguments on *"estoppel rule and the protection of legitimate expectations under Costa Rican law."*<sup>875</sup> Claimant argue, based on Mr Ortiz's opinion, that administrative bodies *"...may not annul, revoke or suspend indefinitely an act or resolution that has previously been issued to grant rights to a third party."*<sup>876</sup> In other words, they contend that *"the administrative body cannot issue an act (such as SETENA Environmental Liability) and then fail to recognize the act's validity."*<sup>877</sup> This is completely devoid of sense, legal application or logic.

853. Under this section titled "estoppel rule and the legitimate expectations doctrine under Costa Rican law," Claimants confuse arguments on estoppel—allegedly founded on non-retroactivity of laws—the principle of legal certainty, and the legitimate expectations principle, all of them said to derive from Costa Rican law.<sup>878</sup> They also include an alleged violation of due process and expropriation, without providing any proper context.<sup>879</sup>

854. This position not only shows a complete misunderstanding—by Claimants themselves—of what they are claiming under international law, but also a clear example of how they try to internationalize a dispute that should be local courts.

855. Even if Claimants' argument is analyzed from the international law perspective—as it should have been framed by Claimants—their position collapses. Respondent has already replied to Claimants' arguments on legitimate expectations, and now it contends that the estoppel rule, under international law, is not applicable to the case at hand.

856. Under international law, it is well settled that estoppel claims can only be brought when (i) there is a statement of fact which is clear and unambiguous; (ii) this statement is voluntary, unconditional, and authorized; and (iii) there is reliance in good faith upon the statement

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<sup>875</sup> Claimants' Reply, para 262.

<sup>876</sup> Ibid.

<sup>877</sup> Claimants' Reply, para 263.

<sup>878</sup> Claimants' Reply, para 263-264.

<sup>879</sup> Claimants' Reply, para 263.

either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.<sup>880</sup>

857. Claimants have not discharged their burden of meeting these requirements, presumably because any application of those is fatal to their argument. In effect, the doctrine of estoppel requires as the first condition, a statement of fact which is clear and unambiguous. The EV cannot be considered as a statement of fact by Costa Rica, since it is a preliminary administrative act which does not grant any subjective rights to holders, and thus, depends on the construction permits:

"This subordination to the municipal permit is precisely what characterizes the environmental viability as a preparatory act, since its issuance does not itself allow the developer to initiate the activity, work or project for which the environmental impact study was submitted.

In other words, obtaining the environmental viability does not have any legal effect because it does not create rights in favor of the recipient. Rather, it forms part of the authorization process, and therefore can be classified as a preparatory act without its own effects."<sup>881</sup>

858. Even if we consider the construction permits as the alleged statement of fact, they were neither unequivocal nor they purport to be given regardless of the investor's failure to comply with relevant environmental laws.

859. This was recently emphasized by the tribunal in *Pac Rim v El Salvador*, where the claimant had relied on the estoppel doctrine to challenge the State's refusal to grant it a permit after it had encouraged it to spend "*tens of millions of dollars to undertake mineral exploration activities.*" As in the present case, the respondent State in *Pac Rim* decried the investor's representation that it had expected the State to grant it rights and permits despite its failure to comply with the relevant laws. The tribunal agreed:

"[T]he Claimant never received any assurances from the Respondent that [its] concession application would be approved by the Respondent if the application did not comply with the existing laws of the Respondent. The Tribunal therefore rejects the Claimant's conclusion that the [State's] indulgence towards its drilling and other activities at El Dorado 'unequivocally demonstrate the Respondent's recognition of [its] right to eventually obtain the concession."<sup>882</sup>

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<sup>880</sup> **RLA-138**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶111.

<sup>881</sup> Second Witness Statement of Julio Jurado, paras. 12-13.

<sup>882</sup> **RLA-139**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, para. 8.51. See also **CLA-52**, Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford University Press 2003) at .

860. In the instant case, the fact that Claimants had never received any assurances from the respondent State that the construction permits will be granted if it did *not* comply with the existing laws of Costa Rica undermines their argument on estoppel.
861. Even if the Tribunal decides to look at Costa Rican domestic law, Claimants' position cannot be upheld.
862. First, for the doctrine of *actos propios* to be applied, a right has to be granted. As stated, the EV is not an act which grants rights to the holder. Then, in the absence of a right, the doctrine could not be applicable since it is considered an act which does not have any legal effect:
- "By definition, in the absence of a personal right, one would not be able to apply the principle of *actos propios*, since we would not be discussing an act with legal effects of its own."<sup>883</sup>
863. Second, Claimants' argument also fails under the *confianza legítima* doctrine. Its application collapses if the administrative body ignores information, facts or data that should have been provided by the administered:
- "It is vital to underline that this *confianza legítima* cannot arise from the administrative body's ignorance of relevant information, facts or events. This especially so if these facts or documentation are found within the responsibilities of the administered, who must present them transparently and in good faith."<sup>884</sup>
864. Third, Claimants' arguments of violation of legitimate expectations according to Costa Rican law are based on Respondent's alleged failure to conduct *lesividad* proceedings to annul the permits. However, this argument fails under the standards of international law. An investor's legitimate expectations must be assessed at the time the investment is made. Any circumstance arising after that critical date is irrelevant in terms of informing the investor's purportedly "legitimate" expectations.
865. Claimants allege that the expectations violated by Respondent were that agencies should have undertaken *lesividad* proceedings after finding irregularities in the permits granted. In some peculiar manner, Claimants insinuate that the fact that such proceedings were not commenced violates their legitimate expectations, because such proceedings *should have been* commenced. The critical problem with this proposal is that it presupposes a new legitimate expectation is formed well after the date they made their investment. International law does not permit this.
866. If Claimants are arguing that at the time when the *lesividad* proceedings were not commenced, this somehow violated their "legitimate" expectations, one has to scrutinize

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<sup>883</sup> Second Witness Statement of Julio Jurado, para. 134.

<sup>884</sup> Second Witness Statement of Julio Jurado, para. 137.

precisely what the expectation of Claimants was at the time they made their investment. Claimants argue it was that Costa Rican law should be observed. And indeed, Costa Rican law was observed. Moreover, Claimants can only credibly assert this as an expectation if they also embrace the legitimate expectation that the environment was meant to be protected by Costa Rican agencies. And again, this is precisely what has happened. The development of Claimants has been suspended pursuant to the injunction proceedings. Accordingly, any expectation that Costa Rican law be invoked so as to protect the environment has been satisfied. The means might not match exactly what Claimants preferred but the end, is the same: the sensitive ecosystem has been preserved.

867. It is quite obvious that no "prudent and sophisticated" investor (as Claimants self-style themselves) would necessarily expect its project to fail due to irregularities. However, if it did, Costa Rica has wholly upheld its law and therefore (seemingly) Claimants' expectations.

868. In sum, Claimants' attempt to base their arguments on the estoppel doctrine under international and domestic law, has no legal basis.

**B. Claimants were not denied justice**

869. Claimants wrongfully suggest that Respondent's allegations regarding due process were "*devoted to criticism of a single case cited by Claimants,*" and for such reason "*Claimants have nothing to rebut with respect to the content and character of the due process principle [...].*"<sup>885</sup> Respondent contends that Claimants do not have the luxury of ignoring Respondent's defence in the hope it will simply be forgotten and their claim prevails. Moreover, such simplistic reply—with the aim of confusing the Tribunal—entails a total misunderstanding of Respondent's arguments and compels Costa Rica to recall certain main aspects of its position.

**1. Claimants' breach of FET allegation is a denial of justice claim disguised as a due process claim**

870. Claimants try to clarify that their claim for failure to afford due process cannot be framed as a denial of justice claim.<sup>886</sup> In order to avoid the high threshold that a claim of denial of justice entails, Claimants allege that under DR-CAFTA a due process violation automatically encompasses a breach of FET. As a result, Claimants allege that several actions that were not undertaken by Costa Rican officials (such as providing notice of the investigations) were a violation of due process.

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<sup>885</sup> Claimants' Reply Memorial, paras. 71-72.

<sup>886</sup> Claimants' Memorial, para. 316.

871. Under Claimants' interpretation, the general principle of due process constitutes an autonomous element of FET. Claimants support this assertion by alleging that *"the due process principle directly informs the minimum standard of treatment"* contained in Article 10.5 DR-CAFTA.<sup>887</sup> But Claimants intentionally avoid mentioning the specific provision where the "due process principle" is contained.

872. When drafting DR-CAFTA, the Contracting Parties decided *"for greater certainty"*<sup>888</sup> to be explicit on which conduct embodied the obligation to provide FET. Therefore, Article 10.5.2 (a) DR-CAFTA expressly states that:

**"fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world...."**<sup>889</sup> (emphasis added)

873. An interpretation based on the plain text of the treaty indicates that the obligation not to deny justice is just an element of FET and any breach to this obligation is to be analyzed *in accordance with* the principle of due process.<sup>890</sup> Thus, the provision envisages that due process is not a standard *per se* under Article 10.5.2(a) DR-CAFTA but a factor to be taken into consideration when analyzing a denial of justice claim.

874. Accordingly, under DR-CAFTA, any denial of justice claim requires a showing of non-compliance with the principle of due process,<sup>891</sup> meaning that the claimant has the burden to prove that the state did not act in accordance with such principle. The Treaty does not support an independent claim for lack of due process on its own. The only time a tribunal can look at due process violations is when hearing a denial of justice claim.

875. To be clear, Article 10.5.2 DR-CAFTA provides for the standard of treatment of FET. Article 10.5.2 (a) DR-CAFTA expresses one of the prongs of FET: an obligation of the state not to deny justice. Under the express wording of Article 10.5.2 (a) DR-CAFTA, the obligation of the state not to deny justice comprises as an element, the state's duty to act *in accordance with* due process. Therefore, the interpretation of the Treaty should follow this sequence:

- Standard of treatment → FET
- FET → obligation not to deny justice (*in accordance with* due process)

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<sup>887</sup> Claimants' Reply Memorial, para. 357.

<sup>888</sup> RLA-6, Dominican Republic – Central America Free Trade Agreement, 7 October 2007, Article 10.5(2).

<sup>889</sup> Ibid.

<sup>890</sup> **RIA-114**, Vienna Convention on the law of treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33, 8 LLM 679, Article 31(1).

<sup>891</sup> **RLA-122**, United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (UNITED NATIONS 2012) 80; Respondent's Counter-Memorial, para. 565.

876. Further, Claimants contend that the inclusion of denial of justice in DR-CAFTA is only a manifestation of the general principle of due process.<sup>892</sup> Such assertion is striking given that the only time Article 10.5.2(a) DR-CAFTA refers to due process, is when expressly referring to how the obligation not to deny justice should be afforded to investors.<sup>893</sup> The Treaty provide for a "violation of due process" as an independent standard of treatment or as an autonomous element of FET.
877. Therefore, Claimants cannot raise their "lack of due process" claim as a direct violation of FET. To comply with the express wording of the Treaty, Claimants must frame their due process allegations in the context of a denial of justice claim.
878. As will be explained below, any claim for denial of justice obligatorily requires the investor to show (i) an exhaustion of local remedies and (ii) a complete failure of a national judicial system to satisfy the minimum standards. Clearly, Claimants cannot prove any of those requirements and this is exactly why, Claimants have impermissibly decided to disguise their denial of justice claim as an autonomous claim for lack of due process.

## 2. Claimants' did not exhaust the local remedies

879. The first obstacle that Claimants cannot overcome to prevail with this claim is the requirement to exhaust local remedies. Exhaustion of local remedies is a *sine qua non* requirement of any denial of justice claim:

"Denial of justice requires, as a rule, the exhaustion of local remedies, given that when local remedies are still effectively available the judicial ill-treatment may still be corrected by higher courts. As a systemic miscarriage of justice, denial of justice implies that the whole judicial system is given a chance to correct itself."<sup>894</sup>

880. Claimants allege that the requirement of exhaustion of local remedies does not apply under the Treaty. Claimants wrongfully contend that DR-CAFTA Contracting Parties have renounced to any right to rely on the rule of exhaustion of local remedies as a defense to claims brought under Article 10.5.<sup>895</sup> Claimants resort to Articles 10.18(2)(b) DR-CAFTA, 10.18(3) DR-CAFTA and 10.18(1) DR-CAFTA to allege that it was the DR-CAFTA Contracting Parties' intention not to require an exhaustion of local remedies.<sup>896</sup> Claimants make this argument to avoid accepting the fact that they have not exhausted local remedies.

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<sup>892</sup> Claimants' Memorial, para. 315.

<sup>893</sup> Note that Article 10.7 DR-CAFTA also refers to due process. However, such allusion is made in the context of expropriation as one of the conditions of lawful expropriation.

<sup>894</sup> **RLA-123**, Carlo Focarelli, *Denial of Justice*, in Max Planck Encyclopedia of Public International Law (MPEPIL 2013), para. 29.

<sup>895</sup> Claimants' Reply Memorial, paras. 271-272.

<sup>896</sup> *Id.*, 76-78.

881. First, Article 10.18(2) refers to the procedural limitations on the consent of the Contracting Parties to submit a claim to arbitration:

"Article 10.18: Conditions and Limitations on Consent of Each Party

No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), 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."<sup>897</sup>

882. Article 10.18(2)(b) DR-CAFTA sets forth the requirements a claimant shall comply with in order to submit a claim to arbitration. A claimant is required to file a notice of arbitration together with a written waiver of its right to initiate or continue before any local administrative tribunal or court any proceeding related to a measure alleged to constitute a breach under the Treaty.

883. Claimants extend the applicability of this procedural waiver to allege that Contracting Parties have renounced any right to rely on the rule of exhaustion of local remedies as a defense to claims brought under Article 10.5. Claimants do not explain how they reached this conclusion. In paragraph 76 of their Reply Memorial they solely mention Article 10.18(3) and only refer to Article 10.18(2) when quoting the Treaty's provision.

884. Claimants fundamentally confuse the *procedural* waiver contained in Article 10.18(2)(b) DR-CAFTA with the *substantive* requirement to exhaust local remedies under a denial of justice claim. In fact, this confusion has been highlighted by Professor Douglas:

"There are two manifestations of the principle that an individual must have recourse to the remedies afforded by the domestic legal system. The first manifestation is a requirement for the jurisdiction of the court or tribunal or the admissibility of the claim at the international level (...) The second manifestation is a substantive element for the responsibility of a State for a certain type of delictual conduct, which has traditionally been described as denial of justice. A State is only responsible for the final result produced by its system for the 'administration of justice. **These manifestations of the principle are so different in fundamental respects that to refer to them as a single concept is**

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<sup>897</sup> RLA-6, Dominican Republic – Central America Free Trade Agreement, 7 October 2007.

**misleading and indeed it has been a source of confusion throughout the long history of engagement with the concept of denial of justice.**"<sup>898</sup> (emphasis added)

885. In the same way, Dugan and others state that:

"[T]he local remedies rule may be required as a substantive element of an international wrong, rather than merely being a procedural prerequisite. In such situations, although the treaty may have waived the exhaustion requirement, as is the case with NAFTA, the exhaustion may still be required to prove international responsibility of the State."<sup>899</sup>

886. Thus, Claimants' use of Article 10.18(2) is misleading as it confuses procedural requirements relating to the submission of a claim to arbitration and a substantive requirement relating to the bringing of a claim for denial of justice.

887. Second, Claimants also rely on Article 10.18(3) to allege that this provision illustrates Costa Rica's waiver of the exhaustion of local remedies requirement for denial of justice claims. Article 10.18(3) states that:

"Article 10.18: Conditions and Limitations on Consent of Each Party

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) **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.**"<sup>900</sup> (emphasis as added by Claimants).

888. This article provides a right to a claimant to maintain local proceedings without making the required waiver under Article 10.18(2), when in those proceedings the claimant is seeking interim injunctive relief before a local court.

889. Claimants allege that Article 10.18(3) grants to a claimant "*a right to maintain municipal proceedings*" while there is an ongoing arbitration.<sup>901</sup> Then, under Claimants' interpretation, this provision shows how the Contracting Parties have renounced any right to rely on the rule of exhaustion of local remedies as a defense to claims brought under Article 10.5.

890. This is nonsense. First, Article 10.18(3) exclusively refers to actions that seek interim injunctive relief, not *any kind* of "municipal proceedings" as Claimants allege. Second,

<sup>898</sup> **RLA-124**, Zachary Douglas, "International Responsibility for domestic adjudication: denial of justice deconstructed," 2014 International & Comparative Law Quarterly 63(4), 867.

<sup>899</sup> RLA-18, Christopher Dugan and others, *Investor-State Arbitration* (Oxford University Press 2008). 360.

<sup>900</sup> RLA-6, Dominican Republic – Central America Free Trade Agreement, 7 October 2007.

<sup>901</sup> Claimants' Reply Memorial, para. 77.

Claimants allegation suffers from the same weakness as for their argument under Article 10.18(2)(b) DR-CAFTA: this provision deals with an exception to a procedural requirement to submit a claim to arbitration and cannot be confused with the substantive requirement to exhaust local remedies as a pre-condition to bring a claim for denial of justice.

891. Third, on their Claimants' Memorial, Claimants also argue that the terms established in Article 10.18(1) DR-CAFTA and Article 10.16(2) DR-CAFTA render "illusory" any requirement for exhaustion of local remedies due to the "*incredible short window*" they provide for a claimant to submit a claim to arbitration.

892. On the one hand, Article 10.18(1) DR-CAFTA states that:

"Article 10.18: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than **three years** have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage."<sup>902</sup> (emphasis added)

893. On the other hand, Article 10.16(2) sets forth:

"Article 10.16: Submission of a Claim to Arbitration

**At least 90 days** before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent")."<sup>903</sup> (emphasis added)

894. According to Claimants, "three years, less 90 days notice, is not nearly long enough for any foreign investor in any DR-CAFTA country to exhaust all available local remedies."<sup>904</sup> Notwithstanding and as explained in the Counter Memorial, for every case where a claimant brings a denial of justice claim, the statute of limitations would not start to run until local remedies are exhausted.<sup>905</sup> Article 10.18(1) provides that no claim may be submitted to arbitration if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the alleged breach. Certainly, a denial of justice claim would only arise when, after giving the state the opportunity to redress any violations by its own means, the state chooses to maintain its position. Only in this instance, the claimant would be deemed to have taken knowledge that a denial of justice has occurred.

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<sup>902</sup> RLA-6, Dominican Republic – Central America Free Trade Agreement, 7 October 2007.

<sup>903</sup> Ibid.

<sup>904</sup> Claimants' Memorial, para. 273.

<sup>905</sup> Respondent's Counter-Memorial, para. 572.

895. Since Claimants have certainly not exhausted local remedies (Claimants abandoned the action in the TAA and Mr Aven fled from his criminal trial) the statute of limitations cannot yet start to run.<sup>906</sup> Hence, Claimants' entire argument on waiver to overlook the requirement of exhaustion of local remedies unfailingly collapses.

896. All of the "illustrative" cases Claimants rely on to suggest that the Contracting Parties have renounced to the exhaustion of local remedies rule as a defense to a denial of justice claim are baseless. Therefore, Claimants' denial of justice claim disguised as a "lack of due process" claim, cannot succeed given that Claimants have not complied with its core requirement: exhausting local remedies in Costa Rica.

**3. Even if the Tribunal considers that the exhaustion of local remedies requirement does not apply to the present case, Respondent's conduct could not be considered as a denial of justice**

897. As pointed out in the Counter-Memorial, the threshold of denial of justice is high and Claimants have failed to meet such standard.<sup>907</sup> Claimants insist on framing their denial of justice claim as one of due process, in an attempt to "lower the standard" that is required, as if any departure from the principle of due process could be deemed as a denial of justice and then, a breach of FET.<sup>908</sup> For the reasons stated above, it cannot.

898. The standard an investor has to prove to successfully bring a claim for denial of justice requires a showing of a complete failure of a judicial national system. Costa Rican actions cannot evidence a **systemic failure of its entire legal system**:

"The Tribunal notes that a claim for denial of justice under international law is a demanding one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of a judge in question were probably motivated by corruption. **A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.**"<sup>909</sup> (emphasis added)

899. Respondent has already discussed how Claimants' fail to meet this standard in order to assert international responsibility of Costa Rica.

900. Indeed, even if the Tribunal were to find that there have been some occasional departures from the principle of due process, Respondent simply cannot be deemed to have "denied justice" (in accordance with international law) because the proceedings conducted by

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<sup>906</sup> Id., paras. 568-572.

<sup>907</sup> Counter-Memorial, para. 564.

<sup>908</sup> Claimants' Reply Memorial, paras. 371-378.

<sup>909</sup> **RLA-125.** *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 273.

Costa Rican agencies were not concluded, and were conducted in good faith and reasonable.

901. For example, in *Genin v Estonia*, the tribunal established that certain departures by Estonia from the applicable regulatory framework —although they invited criticism— did not rise to the level of a breach of FET. In that case it was alleged that no formal notice was sent to the investors regarding the revocation or grace period to comply with the Central bank's requirements. No invitation was made to the session where the decision to revoke the license had been taken, and the decision to revoke had immediate effect. However, given that the revocation was found to be a reasonable regulatory decision, such departures of due process were not sufficient to establish a breach.<sup>910</sup>
902. In addition, in *Gami v Mexico*, the tribunal considered that good faith in the efforts by the Respondent State to achieve the objectives of its laws and regulations may counterbalance instances of disregard of legal or regulatory requirements.<sup>911</sup>
903. In the instant case, Claimants' allegations focused on the apparent lack of transparency, the lack of a provision of notice, and a failing of the right to be heard. This should be counterbalanced with the aim of the proceedings followed by Costa Rican authorities, which was the preservation of Las Olas Ecosystem. Although it could be argued that Respondent's conduct was not perfect, to do so would be tantamount to criticizing any task that was only half completed. Thus, a premature criticism is not a sound foundation in which to level any serious allegation of state responsibility.
904. Respondent's conduct is far from a real departure of the principle of due process (in the context of an allegation of denial of justice) particularly when one considers the protected legal (i.e., environmental) interests in danger. Thus, there is no scope to allege a breach of FET based on a lack of due process when it is so heavily flawed in its analysis and framing.

#### **4. Respondent afforded Claimants due process at all times**

905. In the unlikely case that the Tribunal considers that the Treaty supports an autonomous "lack of due process" claim, the facts still evidence that Respondent afforded Claimants due process at all times.
906. First, we invite the Tribunal to focus on the proper meaning of "due" process. It means to observe the full procedure available. Therefore, the procedure has to be allowed to

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<sup>910</sup> **RLA-126**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, paras. 363-365.

<sup>911</sup> **RLA-127**, *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award, 15 November 2004, para. 97.

complete itself in order to conclude whether the process observed was "due." Here, Claimants have abandoned the various processes, and thereby denied the Respondent any opportunity to illustrate how due process functions. That unilateral decision to extricate themselves from the process does not then permit Claimants to criticize such process before its completion.

907. Second, in their Memorial, Claimants heavily relied on *Al Warraq v. Indonesia* to support their alleged claim for lack of due process. In their Reply, Claimants downplay its applicability asserting that "*it was merely one of a number of cases cited for the general proposition that an investment tribunal ought to have recourse to the international law on human rights,*"<sup>912</sup> that "*the other reference...was an illustrative footnote, not provided to support the applicability of the principle of due process*"<sup>913</sup>; and that "*it was provided as a discursive demonstration.*"<sup>914</sup> The reality is that *Al Warraq v. Indonesia* is blatantly inapplicable to the case at hand.<sup>915</sup> Claimants' statements do nothing but reaffirm that such case does not provide any content to the due process principle.

908. Third, it is curious that Claimants go to lengths in their Memorial and Reply Memorial to provide content to a due process obligation under international law, but, when it comes to applying all of those concepts to the facts of the case, Claimants reduce their allegations to a alleged "*failure to provide notice*" of the investigations conducted by local agencies.<sup>916</sup> As it will be demonstrated below, Claimants were afforded due process at all times.

a) *Respondent did not owe a duty to notify Claimants of internal investigations conducted within its local agencies*

909. Claimants argue that Respondent failed to "*provide any meaningful opportunity for comment on issues of grave importance to the future of the investment enterprise.*"<sup>917</sup> Respondent has already addressed this issue in its Counter Memorial, explaining that (i) Costa Rican agencies never hid information from Claimants, (ii) Claimants always had access to the public records resting at public agencies; and (iii) in any case, the investigations conducted by local agencies did not require notification to Claimants because of their "preparatory act" nature.<sup>918</sup>

910. Respondent will now address each of the new elements raised by Claimants in their attempt to show that they should have been notified of the investigations.

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<sup>912</sup> Id., para. 72.

<sup>913</sup> Ibid.

<sup>914</sup> Ibid.

<sup>915</sup> Counter-Memorial, paras. 573-577.

<sup>916</sup> Claimants' Reply Memorial, para. 373.

<sup>917</sup> Ibid.

<sup>918</sup> Counter-Memorial, paras. 529-545.

i. *The investigations conducted by Ms Díaz*

911. To allege violation of due process rights in the proceedings conducted by the *Defensoría*, and not Ms Díaz personally (as Claimants misleadingly state), Claimants rely on a statement of Mr Ventura who contends that:

"At paragraph 537 of the Counter Memorial, Costa Rica says that the communications of Ms Díaz of the *Defensoría* related to "*complaints against the public administration*" and therefore did not involve private parties and on this basis the only parties notified are the administrative institutions being accused. Whilst it might be strictly true that the focus of the *Defensoría's* investigations was the acts of the public administration in granting permits and licenses to the Las Olas project, it is not true to say that they did not involve private parties. The acts that were being investigated by the *Defensoría* granted rights to the Las Olas project and the Claimants. So whilst the *Defensoría* might only have been required to notify the public parties it was investigating once a formal decision was taken, the effect was to deprive the Claimants (who stood to lose rights as a result of the outcome of the investigation) of the right to be kept informed of the investigative process."<sup>919</sup>

912. In her second witness statement, Ms Díaz reaffirms that the *Defensoría* has no duty to notify third parties of its proceedings and that Mr Ventura's personal interpretations of the law are incorrect. The Constitutional Chamber of the Supreme Court of Justice of Costa Rica has confirmed on multiple occasions that there is no violation of **due process rights** in the proceedings conducted by the *Defensoría* where the private parties are not notified of the actions undertaken by the institution.<sup>920</sup> Along the same line, Ms Díaz explains that:

"The *Defensoría* is a body that oversees the legality of actions taken in the public sector. Article 1 of Law No. 7319 provides that the jurisdiction of this Office is aimed at the investigation of acts or omissions of the entities that comprise the public sector or state-owned enterprises, and how these may lead to violations of citizen rights and interests.

In this regard, the scope of third party actions is of no concern to the institution. In this case, the *Defensoría* analyzed the performance of the municipal administration and not of the developer, a private party. If the *Defensoría* were to grant an audience to private parties, it would exceed its competency framework. [...]

Similarly, the concern raised by Claimants on this point has already been broadly addressed by the Constitutional Chamber, which has clearly stated that there can be no violation of fundamental rights of third parties— such as due process to which Mr Ventura is concerned – from the *Defensoría's* intervention. This is for the simple reason that **it has no ability to impose, by its exercise of authority or influence, decisions on the Public Administration that can directly injure the rights of those third parties.**"<sup>921</sup> (emphasis added)

<sup>919</sup> Second Witness Statement of Manuel Ventura, para. 9.

<sup>920</sup> **R-347**, Decision No. 2749-96; **R-348**, Decision No. 3571-98; **R-359**, Decision No. 2007-8125. 12 June 2007

<sup>921</sup> Second Witness Statement of Hazel Díaz, paras. 20-21, 23.

913. Ms Díaz's explanation is confirmed by Mr Ortiz, Claimants' own expert, who agrees on that "the acts of the Defensoría **do not have legal effects that may have directly hindered the Claimants.**"<sup>922</sup> (emphasis added)

ii. *The investigations conducted by SINAC*

914. This section addresses the notification of the investigations that SINAC conducted regarding (i) the use of the Forged Document by Claimants, and (ii) the existence and impacts to wetlands on the Project Site.

915. First, as to the physical inspections undertaken by SINAC officers, Claimants argue that "the landowner must be duly notified of the investigation process and be provided documentation relating to the investigation." Claimants rely on paragraphs 16 and 17 of Mr Ortiz's report:

"Article 16 of the Wildlife Protection Law Number 7317, indicates that the landowner must be duly notified since the investigation is being held within private property and informed of the investigation process.

Likewise, **SINAC must provide documentation relevant to the investigation and is under the obligation to disclose documents it has on file for a property at the request of the owner.** However, once a formal administrative proceeding has been initiated, SINAC is then obligated to have all the supporting documentation within the administrative file and the owner of the property, as direct party to the proceeding, is entitled to have access to all the information."<sup>923</sup> (emphasis added)

916. The first assertion of Mr Ortiz is false. Article 16 Wildlife Protection Law prescribes SINAC officers' authority to stop, transit, enter and carry out inspections in private property. It does not refer to "investigations," a "duty to notify" or any "duty to inform." Article 16 literally establishes that:

"For the faithful fulfillment of the obligations under this law, wildlife inspectors, forestry inspectors, rangers and officials duly accredited by SINAC for those purposes and in the performance of their duties are empowered to stop, transit, enter and carry out inspections within any lands and on any ships, as well as in industrial and commercially involved facilities and to seize the bodies, parts, products and derivatives of wildlife, along with equipment used in the commission of a crime or activity prohibited by this law.

In the case of private homes the permission of the competent judicial authority or owner will be required."<sup>924</sup>

917. Thus, the "notice" that Mr Ortiz points to is actually an authorization of the property's owner to enter the property and not any duty to notify of investigations as Mr Ortiz argues. In this case, SINAC inspectors always approached Claimants when entering the property. In any

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<sup>922</sup> Expert Report of Luis Ortiz, para. 120.

<sup>923</sup> Expert Report of Luis Ortiz, para. 17.

<sup>924</sup> C-220.

event, if they did not, under Costa Rican Forestry Law, SINAC officers are invested with police power to enter and inspect private property without any notification to the landowner where illegal activities, like the refilling of a wetland or the cutting down of a forest, is taking place.<sup>925</sup>

918. The second assertion of Mr Ortiz is vague. Mr Ortiz does not support his assertion with quoting any legal rule or jurisprudence. Mr Ortiz also states that SINAC is obliged to have "*all the supporting documentation within the administrative file*" and that the owner of the property "*is entitled to have access to all the information.*" It is not clear how this sentence can mean that the owner "*must be duly notified of the investigation process.*" Claimants not only stretch the opinions of Costa Rican agencies' reports to favor their interests but they do the same with the words of their own experts.

iii. *The investigations conducted by the TAA*

919. Since Respondent has not advanced any new elements to rebut paragraphs 538 and 544 of the Counter Memorial Respondent stands by those submissions.

iv. *The investigations conducted by Ms Vargas*

920. Since Respondent has not advanced any new elements to rebut paragraphs 538 and 544 of the Counter Memorial Respondent stands by those submissions.

921. Overall, Claimants' and Claimants' expert Mr Ortiz, all agree that under Costa Rican law, there is no duty to notify third parties of ongoing internal investigations, as explained by Dr Jurado in his first witness statement.<sup>926</sup> Claimants, then argue that it was a violation of their legitimate expectations under Costa Rican law.<sup>927</sup> This argument has already been addressed by Respondent *supra*. Second, when Mr Ortiz addresses this argument, he inexplicably enters into irrelevancies regarding the doctrine of abuse of rights under Costa Rican law.<sup>928</sup> Neither Claimants nor Mr Ortiz have explained or claimed an abuse of rights under Costa Rican law, thus, this is a non-issue.

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<sup>925</sup> C-170, Article 54; C-220, Article 15.

<sup>926</sup> First Witness Statement of Julio Jurado, paras. 115-120.

<sup>927</sup> Claimants' Reply Memorial, para. 206; Expert Report of Luis Ortiz, para. 69.

<sup>928</sup> Expert Report of Luis Ortiz, paras. 137-151.

v. *The INTERPOL Red Notice and its deletion*

922. Claimants identify as one of the alleged violations of due process "*Respondent's failure to provide notice*" to Mr Aven of the inclusion of his name on the INTERPOL's Red Notice list and its further deletion.<sup>929</sup>
923. First, it is not true that Mr Aven was not provided notice of the inclusion of his name on the INTERPOL's Red Notice list. Both Mr Aven and his counsel were notified of the international arrest warrant issued on May 25, 2014.<sup>930</sup> As Judge Rosaura explains the legal consequence of the issuance of an international arrest warrant is the accused's inclusion on the INTERPOL Red Notice list, when the criminal offense satisfies the requirements prescribed in INTERPOL's Regulations, which in this case, it did.<sup>931</sup> This legal consequence was expressly established in the international arrest warrant notified to Mr Aven and his counsel.<sup>932</sup> Further, when INTERPOL approved the Red Notice against Mr Aven, it communicated his name's inclusion to the criminal Court of Quepos, and that communication is part of the criminal record that was and is readily available to the parties and their counsel.<sup>933</sup>
924. Second, as to the deletion of his name from the list, INTERPOL also communicated the criminal court of Quepos of this event and, again, that information was always available to Mr Aven and his counsel as Judge Rosaura confirms:

"It should be added that, as stated on page 758 of Costa Rica's criminal record, when Interpol approved the red alert notice on Mr Aven, Interpol communicated this fact to the Tribunal. The Tribunal then added this to the criminal docket, which was freely accessible to the Claimants' lawyers. The same thing happened when the red alert notice was lifted, as noted on page 793 of the record. This goes to show that **the information was available to the legal representatives of Mr Aven, such that there was no violation of any right and that they could claim whatever they considered to be relevant. In any case, Costa Rica cannot answer for the acts of an international public body such as Interpol.**"<sup>934</sup> (emphasis added)

**C. Costa Rica did not engage in arbitrariness**

925. Claimants allege that Respondent has confused their claim of arbitrariness as if it were a denial of justice claim, "*so as to make it easier to rebut.*"<sup>935</sup> There is no such confusion on the part of Respondent. DR-CAFTA does not contain any express provision on prohibition

<sup>929</sup> Claimants' Reply Memorial, para. 373(i).

<sup>930</sup> **R-150**, International Arrest Warrant (Orden de Captura Internacional), 25 May 2014.

<sup>931</sup> Expert Report of Rosaura Chinchilla, paras. 81-86.

<sup>932</sup> Id., para. 83.

<sup>933</sup> **R-352**, Latest folios from criminal proceedings, 2015.

<sup>934</sup> Id., para. 86.

<sup>935</sup> Claimants' Reply Memorial, paras. 79-82.

of arbitrary measures. This has been recognized by Claimants in footnote 329 of their Memorial.<sup>936</sup> Because the Treaty does not envisage an independent standard for arbitrariness on the conduct of the Contracting Parties, tribunals have linked arbitrary state conduct with FET, and particularly, with the denial of justice standard.<sup>937</sup>

926. This is exactly the legal framework that Claimants provide to their claim on arbitrariness. In their Memorial, the entire section on the alleged "arbitrariness" of Costa Rican officials is based solely on the conduct of Mr Martínez.<sup>938</sup> In their Reply, Claimants devote a chapter to *"the arbitrary criminal investigation and trial of Mr Aven."*<sup>939</sup> Therefore, for Claimants supporting their allegations of the arbitrary conduct of Respondent, Claimants only refer to the conduct of Mr Martínez. Mr Martínez's conduct, as an official of Costa Rica's Judiciary, are deemed judicial not administrative acts.

927. Since Claimants base their case on the conduct of the judiciary, it should accordingly be considered pursuant to international law under the test for denial of justice. Unfortunately for Claimants and as stated above, Claimants have not met any of the requirements to proceed with any claim for denial of justice.

928. Furthermore, Claimants try to dismiss Respondent's arguments on the lack of arbitrariness in the exercise of public authority by Costa Rican agencies by stating that, because Respondent relied on *Pantechniki v. Albania*, Respondent *"cites a single award"*<sup>940</sup> and that *"it was the only case cited by the Respondent as authority for its proposition."*<sup>941</sup> They also allege that this case does not support Respondent's position because:

"[T]he only relevant lesson to be had from the reasoning of Arbitrator Paulsson in the *Pantechniki Award* is that all such determinations *'must perforce be made on a case-by-case basis'*, and perhaps his admonition that remedies need not necessarily *'be pursued beyond a point of reasonableness.'*"<sup>942</sup>

929. More specifically, Claimants make the following arguments against Respondent's reliance on *Pantechniki v Albania*:

- First, the *tribunal* in *Pantechniki v Albania* dealt with abandonment by a claimant of local proceedings relating to the same measures challenged before an arbitral tribunal under an investment protection treaty. In this case, *Pantechniki* commenced litigation before the Albanian courts to enforce its contractual right to compensation. The Albanian district courts and the Court of Appeal dismissed

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<sup>936</sup> Claimants' Memorial, para. 307 and fn. 329.

<sup>937</sup> **RLA-131**, *Mondey International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (11 October 2002), para.127.

<sup>938</sup> Claimants' Memorial, paras. 369-377.

<sup>939</sup> Claimants' Reply Memorial, paras. 316-334, 379.

<sup>940</sup> *Id.*, para. 73.

<sup>941</sup> *Ibid.*

<sup>942</sup> Claimants' Reply Memorial, para 74.

Pantechniki's claims Pantechnik appealed to the Supreme Court of Albania, but withdrew its appeal before the case was decided, choosing instead to commence ICSID arbitration. When faced with Mr Pantechniki's denial of justice claim, the tribunal held that because the claimant abandoned its appeal before the Supreme Court, the claimant had not afforded the Albanian legal system, as a whole, a reasonable opportunity to correct any alleged aberrant judicial conduct, and therefore the claim of denial of justice was bound to fail.<sup>943</sup> Nothing could be more similar to the abandonment by Mr Aven of the ongoing criminal proceedings in Costa Rica;

- Second, Claimants challenge Respondent's reliance on *Pantechniki v Albania* alleging that it is "instructive" with respect to Claimants' argumentation on the inapplicability of the exhaustion of local remedies rule to a denial of justice claim.<sup>944</sup> As stated above, the enforcement of the fork-in-the-road provision in *Pantechniki v Albania* is irrelevant to the case at hand because such analysis was made during the jurisdictional phase of the proceedings and does not apply to the substantive element of denial of justice;<sup>945</sup> and
- Third, Claimants allege that "the only relevant lesson to be had from the reasoning" in *Pantechniki* is its "admonition that remedies need not necessarily 'be pursued beyond a point of reasonableness'." Claimants do not provide further support for this assertion. Claimants neither provide further support for this assertion nor apply such assertion to the case at hand. Even if any reasonableness standard regarding the extent to which remedies should be exercised is to be applied, Claimants did not act accordingly. Claimants did not pursue the proceedings in Costa Rica until a point of "reasonableness," much to the contrary, they arbitrarily decided to abandon them. Moreover, if Claimants are alluding to the principle of futility, their failure to label their argument as such is more an illustration of the embarrassment they should have for even proposing that futility could be applicable in the present case.

930. Although the requirements for a denial of justice violation are not met in this case, Costa Rica responded to each of the accusations against Mr Martínez's conduct as they were made in the Claimants' Memorial.<sup>946</sup> Nonetheless, in their Reply, Claimants insist on their arbitrariness claim alleging that Mr Aven's criminal trial was "highly prejudicial and

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<sup>943</sup> RLA-36, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 96.

<sup>944</sup> Claimants' Reply Memorial, para. 75.

<sup>945</sup> Id., para. 74.

<sup>946</sup> Respondent's Counter-Memorial, paras. 578-591.

*corrupt*<sup>947</sup> based on their personal and biased interpretations of Costa Rican criminal law and criminal procedural law.

931. In this regard, Costa Rica's expert on Costa Rican criminal law, Judge Rosaura Chinchilla Calderón, has reviewed the record for the criminal proceedings initiated against Mr Aven and has presented her conclusions in an Expert Report. Judge Chinchilla currently sits as an appeals Judge for the *Tribunal de Apelación de Sentencia Penal* of the Second Judicial Circuit of San Jose. She has been a member of Costa Rica's criminal judiciary system since 1992, been active in academia since 2004 and has appeared in front of the National Congress to render opinions in regard to on-going legal reforms in the criminal system. She has also contributed to the elaboration of criminal regulation, and has introduced consultations regarding its constitutionality at the Constitutional Chamber of Costa Rica.

932. Judge Chinchilla concludes in her expert report that the criminal proceedings initiated against Mr Aven, were reasonable and in strict compliance with the laws of Costa Rica:

"In light of the above, and after a review of the documents presented in the case, I can affirm with all certainty that I do not detect any arbitrariness in either the request for the issuance of a red alert notice (assuming they were presented, a verification of the relevant documents would have satisfied the objective criteria [for the request]) or in the issuance of the international capture order against Mr Aven. Furthermore, I do not detect any violation of due process or of any other of Mr Aven's constitutional rights in the criminal process that followed. Indeed, all appropriate measures for the protection of such rights (in particular, his right to a defence) were taken.

Without a doubt, the actions taken by the authorities (both with respect to the case in which the Claimant was the complainant, as well as the criminal proceedings against him) were appropriate, reasonable and compliant with the laws of this country."<sup>948</sup>

933. Respondent will now address each of the "specific errors" alleged to have been committed by the prosecution during the criminal investigation and trial, in order to prove that Claimants' views are wrong.

#### **1. Criminal courts are the competent *fora* to hear environmental claims**

934. Claimants suggest that Mr Martínez exceed his competence in prosecuting Mr Aven because he "*attempted to resolve complex environmental regulatory issues in a criminal court.*"<sup>949</sup> It is curious that in his first witness statement, Mr Morera referred to this argument as a "strategy,"<sup>950</sup> and only after Claimants' Reply Memorial, it is raised as an

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<sup>947</sup> Claimants' Reply Memorial, para. 318.

<sup>948</sup> Expert Report of Rosaura Chinchilla, paras. 87-88.

<sup>949</sup> Claimants' Reply Memorial, para. 320.

<sup>950</sup> First Witness Statement of Néstor Morera, para. 31-33.

independent "legal argument." Anyways, regardless of how Claimants want to call it, strategy or argument, this position is completely unstained under Costa Rican law.

935. Mr Martínez expresses his disapproval of such "strategy":

"I am in total disagreement with the legal position that Mr Morera is trying to argue. There is nothing more inaccurate than to claim that the analysis of ecosystems are not proper in criminal procedures and should be carried out in civil or administrative courts. A simple look at the types of offenses put forth by the Forestry Law allows for understanding, with utter complete clarity, that the analysis is a characteristic of the criminal process, without it being exclusive to the [criminal] seat, of course. [...]"

Mr Morera's position such that technical issues should only be resolved by civil or administrative courts puts into question the existence of criminal jurisdiction in matters of environmental offences. It leads us to ask ourselves; how is a criminal law judge to sanction or absolve if he does not consider these technical issues?"<sup>951</sup>

936. Not only Mr Martínez and local case law have upheld the competence of criminal courts to hear environmental criminal offences, Judge Chinchilla confirms that it was the Legislative Branch that decided the incorporation of environmental crimes as part of the enforcement of environmental law, a part from civil or administrative regulations, to protect the environment and sanction damages against it.<sup>952</sup>

## 2. The *ultima ratio* principle does not override the precautionary principle

937. Claimants argue that under the *ultima ratio* principle, it was absurd to prosecute Mr Aven in order to prevent serious environmental harm.<sup>953</sup> Judge Chinchilla, has analyzed Claimants' allegation and disagrees with that conclusion:

"Criminal law is governed, in theory, by the principles of fragmentation and subsidiarity. This means that, even in relation to serious misconduct, the legislator should aim for a non-criminal solution. That is why it is said that criminal law is the *ultima ratio* for solution of any controversy. This does not preclude the legislator from resorting to a penal regime when he considers that the protection given to the common legal right by other means has been insufficient or inefficient to comply with the purpose given to the law. In Costa Rica, criminal policy stems from the Legislative Assembly and the only way to reverse the representatives' decision to use the criminal process to protect the common legal good, is through a contrary judgment of the Constitutional Chamber. That is to say, only the Constitutional Court can decide whether the legislators exceeded their discretion in reverting to a criminal process and thus disrespected those principles. In this case, none of the investigated offenses has been declared unconstitutional, and there are no decisions that permit the inference

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<sup>951</sup> Second Witness Statement of Luis Martínez, paras. 41, 43.

<sup>952</sup> Expert Report of Rosaura Chinchilla, para. 20.

<sup>953</sup> Claimants' Reply Memorial, para. 321.

that there has been any violation of the principles of fragmentation and subsidiarity.

On the other hand, the fact that the criminal law is the *ultima ratio* does not mean that interim measures established by the legislator are inappropriate to protect the legal good and the process itself. A legislator characterizes criminal interim measures in regard to flight risk and obstruction of due process. He also takes into account that, in the case of a civil suit or complaint by a party, where the corresponding established procedures in the special legislation are met, that party will have access to measures for the protection of the affected interest. That is to say, there is no contradiction between the *ultima ratio* principle and the precautionary principle of environmental law. Thus, it is possible for the law to contain the applicable interim measures."<sup>954</sup>

**3. Mr Martínez did not attempt to resolve any conflicts caused by alleged inconsistencies in Costa Rican agencies' reports**

938. Claimants allege that Mr Martínez "*grossly overstepped his competence*" by trying to resolve alleged inconsistencies between agencies' reports.<sup>955</sup>

939. Further, Claimants state that:

"[A]t the time of Mr Aven's criminal trial, the issue of whether the project site contained wetlands and forests was disputed in numerous reports issued by multiple environmental agencies containing inconsistent findings."<sup>956</sup>

940. This is not true. The PNH, the competent body to determine the existence of wetlands in Costa Rica, had determined the existence of a palustrine wetland on the Project Site. First, regarding the July 2010 SINAC Report (which determined that there was not a wetland on the Project Site) was a preliminary act prepared in the middle of the investigations against Claimants' wrongdoings and its findings could not be conclusive on the existence of wetlands on the Project Site.

941. Second, as to the SETENA resolution concluding that there was not a body of water on the Project Site, this was irrelevant to the criminal trial because SETENA has no authority to determine the existence of wetlands in Costa Rica. Mr Martínez had to follow the appropriate criterion which was clearly outlined by SINAC through the PNH determining the existence of a wetland on the Project Site.

942. Third, as to the INTA Report, Mr Martínez explains that the PNH Report on Wetlands issued on April 18, 2016, SINAC had already determined the existence of wetlands by addressing technical criteria necessary to make such determination (including findings of

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<sup>954</sup> Expert Report of Rosaura Chinchilla, paras. 49-50.

<sup>955</sup> Claimants' Reply Memorial, para. 322.

<sup>956</sup> Id., para. 334.

hydric soils during the joint visit conducted between Mr Gamboa and Mr Cubero).<sup>957</sup> The INTA Report never determined that there was no wetland on the Project Site, but that the soil could not be considered hydric under the Land Classification Methodology, an instrument that was not intended to identify hydric soils in Costa Rica.

943. As to the existence of forest, at the time of the criminal trial, SINAC, the competent body to categorize forests in Costa Rica, had also determined that a forest was impacted on the Project Site. No other agency, except for Claimants' self-serving report from INGEOFOR, had said the contrary.

#### **4. Mr Martínez had sufficient evidence to prove Mr Aven's criminal intent**

944. Claimants argue that Mr Martínez could not have proved "*that Mr Aven actually intended to commit a crime*"<sup>958</sup> and list the following permits and reports that "*were available to Mr Martínez to review prior to the criminal trial,*" none of which has a bearing on Mr Aven's intent.<sup>959</sup>

- The EV for the Concession site: this permit allowed the development of a hotel on the Concession site not on the Condominium site, where Claimants intended to perform the illegal works;
- *The SINAC Letter of April 2, 2008*: this document only certified that the area was not within a WPA, it never "confirmed," as Claimants allege, that the Condominium site did not contain wetlands. Wetlands are protected regardless of whether they are contained in a WPA or not;
- *The July 2010 SINAC Report*: this was an internal report within SINAC, which was only available to Mr Aven on March 2011,<sup>960</sup> after the drainage and refilling of the wetland was done. Clearly, Mr Aven could not have relied on this report to impact wetlands since March 2009;
- *The SETENA Report of August 19, 2010*: this report is dated after Claimants' illegal works on the site had started. Further, SINAC, not SETENA, is the competent body in Costa Rica to determine the existence of wetlands;
- *The INTA Report*: this report was issued after the illegal works had already been performed by Claimants and after multiple injunctions had been issued to enjoin

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<sup>957</sup> First Witness Statement of Luis Martínez, paras. 22-23.

<sup>958</sup> Claimants' Reply Memorial, para. 316.

<sup>959</sup> Id., para. 325.

<sup>960</sup> C-72.

them. How could this report issued in May 2011 prove that Mr Aven had no intent to drain wetlands back in March 2009?; and

- *The INGEOFOR Report*: this report was prepared after Mr Damjanac had been charged with the crime of illegally cutting down a forest and after SINAC had determined the existence of a forest and Claimants' impacts to it on the October 2011 SINAC Report. Again, this report has no bearing on what Mr Aven allegedly knew since March 2009, when the cutting down and burning of trees started on the Project Site.

945. As for the EV for the Condominium site, this permit was obtained by concealing information from SETENA and misleading it to grant the EV. Claimants knew or should have known that the clearing of roads and the felling and burning of trees was destroying Wetland No. 1 and they kept performing those works until Costa Rican authorities legally enjoined them from continuing with those works. Judge Chinchilla also explains why these *ex post* permits cannot automatically exclude intent to commit an environmental crime:

“[T]he mere fact that a person obtains permits from the public administration for a specific project, whatever the type, does not mean that he has complied, or will comply with the laws or requirements (in this case, the environmental laws or requirements). Permits are based on the information provided by the applicant at a particular time. This does not exclude the possibility that, on the one hand, there may be facts missing at the moment the information is provided or, on the other, supervening illegality.

The fact that a permit from the state has been improperly obtained for some purpose (for example, to drive a car) does not authorize the recipient to commit illicit acts (continuing with the example: to run over a person or drive under the influence of alcohol or drive over the speed limit). Here, a well-known phrase applies: *nemo auditor propiam trupitudem*. If the person, with the pretext of this authorization, acts unlawfully, it is possible that interim measures will be adopted to protect the endangered legal good. In this case, the intervention of the criminal authorities in the exercise of their function is authorized, be it for falsehood of the information (where it is documentary information or offered under oath) or due to ulterior illicit acts. The adjudication of the offences is the within the exclusive competence of criminal bodies (the Prosecutor's Office, to prosecute and the criminal courts to judge).”<sup>961</sup>

946. Further, as asserted by both Mr Martínez and Judge Chinchilla,<sup>962</sup> if Mr Martínez did not have "elements to prove intent," the judge in the intermediary stage would not have allowed the case to go to trial. But, the judge did.

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<sup>961</sup> Expert Report of Rosaura Chinchilla, para. 46.

<sup>962</sup> Second Witness Statement of Luis Martínez, para. 56; Expert Report of Rosaura Chinchilla, para. 45.

947. Finally, Judge Chinchilla confirms that, upon review of the evidence relied on by the Prosecution in the case against Mr Aven, Mr Martínez had several elements to prove intent:

"The above is of importance, as I have read the second witness statement of Mr Néstor Morera Vázquez. In paragraphs 18-19 of his statement, he indicates that it was impossible for the prosecution to prove that Mr Aven had the culpable intent (*dolo*) to drain and refill a wetland, or cut down trees protected by the forestry laws of the country. That is not true. As stated by the Prosecutor – and this is reflected as much in the indictment as in the first decision of a judge assessing the case (the *auto de apertura a juicio*) – **testimonial and documentary evidence was offered aiming to demonstrate, for example, that the wetlands' refilling works were undertaken off-hours and on non-business days. That is, at times when the control offices were not open (which allows one to infer a motive to evade discovery, in the knowledge that of their own wrongdoing). The alleged beneficiaries of the work undertaken here were the claimants, and it was apparently under their orders that the work was carried out. The lay people of the area, lacking formal education, knew that there was a wetland; that trees were being cut down and burned so as to leave no evidence; that there were processes, involving the claimants' project, in which forged documents were presented with respect to essential elements going to the resulting criminal implications, etc. All of those elements, analysed as a whole, permit the extraction of criteria to support a finding of the requisite *dolo*, in its knowledge and voluntariness aspects. In any case, it was in the following hearing that all this was to be analysed, including a weighing of the probative evidence offered by both sides to prove or disprove this issue.** However, because of Mr Aven's absence, the trial was unable to take place. Thus, evidence was indeed offered to support what Mr Morera misses."<sup>963</sup> (emphasis added)

948. In any case, Judge Chinchilla confirms that this issue must be decided by the criminal law judge hearing the case, excluding any other authority:

"In any case, it was during the trial against the claimant and to the Tribunal that was judging him to decide what had to be analyzed, that is, to weigh the probative value of the evidence submitted by the parties to affirm or deny this issue, and this trial could not take place due to Mr Aven's absence. Thus, there was indeed evidence offered to prove what Mr Morera puts aside."<sup>964</sup>

## 5. Mr Martínez "bias" against Mr Aven

949. Mr Martínez has already confirmed in his first and second witness statement that he does not know Claimants and he did not know Mr Aven before the criminal proceedings and he does not have any personal bias against them.<sup>965</sup>

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<sup>963</sup> Expert Report of Rosaura Chinchilla, para. 45.

<sup>964</sup> Ibid.

<sup>965</sup> First Witness Statement of Luis Martínez, para. 40; Second Witness Statement of Luis Martínez, para. 9.

950. Claimants allege that the fact that Mr Martínez "dropped the charges for forgery" against Mr Aven constitutes no proof that he was not biased against him.<sup>966</sup> However, Claimants contend that Mr Martínez "*insisted on prosecuting Mr Aven*" in relation to the forgery of the Forged Document. Mr Martínez never brought any criminal charges for the criminal offence of forgery against Mr Aven.

951. As Mr Martínez explains in his second witness statement, the accusation of the crime of forgery derived from the criminal complaints filed by both SINAC and Mr Bucelato in early 2011.<sup>967</sup> Therefore, Mr Martínez had to investigate all of the crimes thereby accused and after analyzing the evidence gathered, decide whether to (i) bring charges for the accused crimes (through the filing of an *acusación penal*) or (ii) request the judge to dismiss those crimes (through a request for *sobreseimiento definitivo*). Mr Martínez, after conducting a thorough investigation, concluded that he did not have sufficient evidence to bring charges against Mr Aven for the authorship of the Forged Document and, on October 11, 2011, requested the court to dismiss those accusations.<sup>968</sup>

952. Moreover, Claimants repetitive argument on the inexistent charges for forgery is in direct contradiction to what Mr Aven points to in paragraph 125 of his witness statement, where he admits that by May 6, 2011 (when the inquest or summons was being conducted), there were no criminal charges filed against him and "*Mr Martínez was only conducting a criminal investigation.*"<sup>969</sup>

## **6. Mr Martínez had documentary evidence that proved the refiling of a wetland and the felling of a forest**

953. Claimants accuse Mr Martínez of "*lack[ing] credible evidence*" and having to rely on inconsistent or irrelevant testimony.<sup>970</sup> Respondent must once again respectfully express its objection to having the Tribunal, opine on or judge the course of the trial proceedings. This is a clear example of how Claimants pretend this Tribunal to act as an "appeals court" on a pending criminal trial that has not had a final judgment from any court in Costa Rica.

954. Mr Martínez also rejects the opinion of Claimants in this regard and explains that only a judge from the Costa Rican judiciary has the authority to resolve the dispute with the issuance of a final judgment:

"A definitive determination of the commission of a criminal offence is a matter for a trial court. It has not been possible to reach that stage in the trial against Mr Aven. This stage of the hearing in respect of Mr

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<sup>966</sup> Claimants' Reply Memorial, para. 329.

<sup>967</sup> Second Witness Statement of Luis Martínez, para. 14.

<sup>968</sup> **R-66**, Criminal complaint filed by SINAC (ACOPAC-CP-015-11-DEN), 28 January 2011.

<sup>969</sup> Second Witness Statement of David Aven, para. 125.

<sup>970</sup> Claimants' Reply Memorial, para. 330.

Damjanac was annulled, and thus, likewise, there is no adjudication concerning the criminal charges presented in this case."<sup>971</sup>

**7. The "settlement offer" did not require Mr Aven to admit to wrongdoing**

955. Claimants excuse Mr Aven's lack of will to negotiate a settlement with the Prosecution arguing that *"any settlement agreement requiring a guilty plea was unacceptable."*<sup>972</sup>

956. This is just another of Claimants' mistaken interpretations of Costa Rican law. The Prosecution requested of Claimants that any impacted areas be excluded from Claimants' development. This seems to be what Claimants interpret as an "admission of guilt." As Judge Chinchilla confirms, a settlement agreement that required the accused to admit their guilt would be void:

"An accepted conciliation does not imply the admission of guilt by the accused, and no negotiation in this regard is valid. If this were to happen, the act would be void. [...]"

[T]he conciliation never came to fruition, not because Mr Martínez acted in an arbitrary manner, but because Mr Aven refused to negotiate certain conditions put forth by the prosecutor regarding environmental protection. The negotiation of these conditions is not even within the discretion of the prosecutor, but rather they are set out in the Policy for the Prosecution of Environmental Crimes, as adopted by Costa Rica's Office of the Prosecution. Keep in mind that, although it is not the purpose of a conciliation to impose criminal sanctions, in the case of environmental crimes the objective is to protect the environment and to prevent the continuation of harmful acts. Pursuant to the principle of hierarchy and unity of the Prosecutor's Office, prosecutors cannot ignore these criteria. What the prosecutor proposed was consistent with this, was easy to comply with, and would have avoided the continuation of the criminal process and the ongoing environmental damages. However, the party searched for an alternative course without willingness to compromise their objectives, which is against the principles of negotiation."<sup>973</sup>

957. Thus, Claimants' interpretations that agreeing to restore the harm caused to the ecosystems on the Project Site would "imply an admission of guilt" has no support under Costa Rican law.

958. Claimants further allege that the restoration plan proposed by Mr Martínez would not have allowed Claimants *"to develop the project in any meaningful way."* Mr Martínez explains how Mr Morera has mischaracterized this offer:

"Clearly Mr Morera misrepresents the proposal that the prosecution made to Mr Aven when he stated that this plan prevented Mr Aven from developing the project. It is not the case that the plan inhibited the

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<sup>971</sup> Second Witness Statement of Luis Martínez, para. 57.

<sup>972</sup> Claimants' Reply Memorial, para. 330.

<sup>973</sup> Expert Report of Rosaura Chinchilla, paras.75-76.

development in those areas that, up to that time, were known to have forests and wetlands."<sup>974</sup>

959. What Mr Martínez and the representative of the Attorney General's Office, as representative of the victim (Costa Rica), requested was the restoration of the land and the continuance of any development being mindful of the protection of those ecosystems from further impact. This in no way seems "arbitrary," "disproportional" or "discriminatory."

#### **8. The "disastrous and contradictory trial testimony"**

960. Claimants and their witnesses opine on the testimonies provided at the criminal trial.<sup>975</sup> Again, Claimants fall into the same trap of having the Tribunal act as an "appeals courts" to review ongoing criminal proceedings. This is impermissible.

961. Mr Martínez explains that Claimants' impressions are irrelevant, because the only authority that has a power to judge them is a judge of the Costa Rican Judiciary:

"First, I note that in paragraphs 330 to 334, the Claimants express their opinion about the testimonies of each of the witnesses called to testify in the first hearing that took place in the case of Mr Aven and Mr Damjanac. As explained by the Claimants, the testimony of each witness is contained in the audio and video record, and each party can reach their own conclusions as to whether or not the testimony proves or disproves the commission of the offence. What I wish to reiterate is that my opinion, or that of the Claimants, is irrelevant to this case as, ultimately, it is only a judge of Costa Rica's criminal system – and no one else – who should decide whether or not the accused has committed the charged offense."<sup>976</sup>

962. While Claimants argue that they "*do not offer the descriptions above for the purposes of rearguing the merits of Mr Aven's criminal case,*"<sup>977</sup> it is quite obvious that a review of this testimony would only have the Tribunal conduct an "appeals" review of the merits of the criminal case, which exceeds the jurisdiction of this Tribunal.

#### **9. The 10 day rule is a mechanism envisaged to protect the rights of criminal defendants rather than an "*obscure mechanism*" of criminal procedure**

963. Claimants distort the *raison d'être* of the provision behind article 336 of Costa Rica's Criminal Procedure Code categorizing it as an "*obscure mechanism of criminal procedure.*"<sup>978</sup> It is exactly these types of assertions that show Claimants' patent ignorance of Costa Rican law. As Judge Chinchilla explains in her expert report, the principle behind

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<sup>974</sup> Second Witness Statement of Luis Martínez, para. 54.

<sup>975</sup> Claimants' Reply Memorial, para. 332.

<sup>976</sup> Second Witness Statement of Luis Martínez, para. 7.

<sup>977</sup> Claimants' Reply Memorial, para. 333.

<sup>978</sup> Id., para. 318.

article 336 (the concentration principle), is one of the key policy principles in Costa Rican criminal procedural law:

"The principle of concentration is one of the political principles of the criminal process in Costa Rica. It signifies that all judicial proceedings are to be as concentrated (close and unified in time) as possible to avoid, due to delay, the parties forgetting what happened. In this regard, Costa Rica's legislation puts forth several duties including, inter alia: (i) that once the hearing is closed, judges have a clear deadline within which they must deliberate and reach a decision, even if it is expressed in a schematic and summary fashion (Article 360 of Criminal Procedure Code). This deadline varies in relation to the complexity of the matter and type of procedure at hand but, if exceeded, the hearing will be annulled; (ii) that between the rendering of the short judgment and the rendering of the complete sentence there is also a deadline that cannot be exceeded, otherwise annulment of the judgment will result (Numeral 364 of the Criminal Procedure Code); and (iii) that between each act of the criminal process, there can be no more than 10 business days, otherwise the act is to be annulled (Article 336 of the Criminal Procedure Code)."<sup>979</sup>

964. Further, Claimants argue that Mr Martínez exploited the 10-day rule to get a second opportunity to re-argue the merits of his case. This is simply untrue. Mr Martínez has explained that the reason why he and the Attorney General Office's representative decided to go to a re-trial was to avoid the subsequent invalidity of the proceedings:

"Once more, I must clarify that it is not true that I considered applying the ten-day rule in order to have a new opportunity to carry out the hearing because I believed that I had lost the first trial. Both the Attorney General's Office and the Prosecutor's Office refused to agree to a waiver of the period in order to avoid the invalidity of all that was considered during the appeal stage.

[...]

[T]he fact that both the Attorney General's Office and the Prosecutor's Office based their decision not to prorogue (prorrogar) the hearing on the applicable jurisprudence of the criminal courts demonstrates that their decision was studied and well-founded, and not arbitrary as suggested by the Claimants."<sup>980</sup>

965. Judge Chinchilla agrees with Mr Martínez position, after having reviewed the legal authorities Mr Morera and Mr Martínez relied on:

"I have reviewed the decisions that Mr Martínez invokes in support of his thesis and I can confirm that, indeed, they exist and they support what he states. Furthermore, I myself have supported that thesis in other cases brought before me. I have also reviewed the witness statement of Mr Néstor Morera, which states that there is inconsistent case law in this regard, and I can also attest that [that case law] exists and mentions what he states. Nevertheless, I cannot classify the decisions that Mr Morera cites as the latest jurisprudence (as he does), nor, less so, can I support the claim that these decisions would leave

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<sup>979</sup> Expert Report of Rosaura Chinchilla, para. 67.

<sup>980</sup> Second Witness Statement of Luis Martínez, paras. 36, 39.

without effect the latter. This is so, for three reasons: (i) as the criminal justice system in Costa Rica was modified in 2012, procedural definitions arise largely from the decisions of the *Tribunales de Apelación de Sentencia Penal* and not from the Third Chamber [of the Supreme Court of Justice], or the Courts of Cassation, whose competence is reserved for hearing inconsistent case law (usually on substantive issues) and other matters of lesser quantity. To my knowledge, this issue has not been defined [by the Third Chamber] to date; (ii) among all of the decisions submitted by the two witnesses, the most recent is the one relied on by Mr Martínez which supports the position he holds; and (iii) although Mr Morera refers to a decision of the Constitutional Chamber, that decision alludes to rules that have since been repealed and which were contained in the old Code of Criminal Procedures, which was replaced by the current Criminal Procedure Code. Under the repealed Code of Criminal Procedures, upon which the Constitutional Chamber decision relied (furnished by Mr Morera), the parties that would have contributed to the nullity would not have been able to oppose the nullity. The Code [now] in force, however, states that absolute nullity grounds cannot be ratified, not even by agreement of the parties. **So, although it is accepted that there is conflicting case law, the assessment made by Mr Martínez and the Office of the Attorney General not to accede to the continuation of the trial was reasonable and not arbitrary; and considered the most recent reforms to the justice system and the most up-to-date decisions emanating from this reform.**"<sup>981</sup> (emphasis added)

966. Finally, as Judge Chinchilla points out, Claimants' theory that Mr Martínez "*took advantage of*" the 10-day rule is mere speculation given that the general rule is that the parties are not permitted to modify the evidence originally submitted for the re-trial:

"Furthermore, [their speculation] would stem from the theoretical possibility of changing witnesses from the first trial to the second, which is unacceptable. The binding law in Costa Rican criminal procedure is that evidence admitted at the outset of the trial is the [evidence] which should be judged (Article 320 of the Code of Criminal Procedure)."<sup>982</sup>

#### 10. Mr Martínez had no duty to challenge the EV before the public administration

967. Claimants impose an inexistent duty on Mr Martínez to challenge the EV before the administrative authorities:

"While I address some of these allegations below, it escapes me why Costa Rica did not demand at the time of Mr Martínez's criminal investigation, a request for a "*lesividad*" hearing if it wished to contest the issuance of those permits. To my knowledge Mr Martínez never requested a "*lesividad*" hearing, even though he apparently did not agree with the SETENA resolutions since he refused to comply with them."<sup>983</sup>

968. This is completely inaccurate as Mr Martínez explains this was not part of his competence as a Prosecutor:

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<sup>981</sup> Expert Report of Rosaura Chinchilla, para. 70.

<sup>982</sup> *Id.*, para. 77.

<sup>983</sup> Second Witness Statement of David Aven, para. 53.

"First, it did not fall to me to initiate any process of lesividad, which is a contentious administrative matter. My function is the prosecution of possible criminal offenses. The case at hand did not properly encompass the question of SETENA's environmental viability, which is not even a permit but a requisite as per Article 17 of the Organic Environmental Law."<sup>984</sup>

969. Judge Chinchilla also confirms that it is not for the Prosecution to follow any administrative procedures to annul any permits:

"[...] In other words, for the criminal authorities to have the competence to investigate the matter, the commission of the act alone is sufficient. The [authorities] are not obligated to follow administrative procedures that are intended to annul the permits, as happened previously. If they were, the criminal justice would be a fraud."<sup>985</sup>

**D. Costa Rican agencies' conduct did not entail an abuse of rights**

970. Claimants wrongfully allege that Respondent decided to abstain from providing answers as regards two of the three claims on abuse of rights treatment. Claimants contend that Respondent only focused on Mr Bogantes' alleged bribes without answering their allegations on Mr Ovideo's bribe and the alleged misuse of the INTERPOL notification system.<sup>986</sup> Respondent's arguments are sufficiently comprehensive to meet all of Claimants' contentions in this regard.

**1. Claimants did not satisfy the standard of proof in relation to any bribery allegations**

971. Claimants contend that, "*Respondent has little more to say than that it believes the Claimants have not proved their case*"<sup>987</sup> and that "*it merely maintained...the uncontroversial proposition that a tribunal will generally require 'clear and convincing evidence' to find, as fact, that corruption occurred,*"<sup>988</sup> as if the question of the standard of proof is irrelevant in cases of alleged corruption. This is perverse. Claimants have to prove their case, which they comprehensively and objectively have failed to do in relation to any bribery allegations. This is not an incidental or throw away remark conjured by Respondent to avoid an issue. Claimants' failure to prove their case is *the only* issue.

972. In addition, Claimants point out that Respondent did not dispute that a host state could be held liable for acts of officials that constitute an abuse of rights.<sup>989</sup> What is of relevance here, is that this does raise the issue of the burden of proof on the party claiming that

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<sup>984</sup> Second Witness Statement of Luis Martínez, para. 45.

<sup>985</sup> Expert Report of Rosaura Chinchilla, para. 47.

<sup>986</sup> Claimants' Reply Memorial, para. 366.

<sup>987</sup> Id., para. 367.

<sup>988</sup> Id., para. 83.

<sup>989</sup> Ibid.

bribery actions have taken place, and the high standard in this regard, which Claimants seem to agree with by stating that it is uncontroversial.<sup>990</sup>

973. The burden and standard of proof are not minor questions, taking into account the kind of allegations that are involved in issues of bribery and corruption. Due to the gravity of this kind of claims and the seriousness of the legal consequences in case they are upheld, tribunals decided to impose the burden of proof on the party alleging issues of corruption and to require from it a high standard of evidence. This stands to reason.
974. In this regard, it has been sustained that there is general consensus among international tribunals and commentators regarding the need for a high standard of proof in cases of corruption, and that these allegations require **clear and convincing evidence**.<sup>991</sup> Moreover, claimants must fully comply with their undisputed burden to prove there was corruption, and it is not sufficient to present evidence, which could possibly indicate that there might have been, or even probably was corruption.<sup>992</sup>
975. This standard (recognized also by English laws of evidence, to the extent applicable given the seat of arbitration) is fatal to Claimants' allegation on bribery due to the scarcity of evidence provided. In fact, Claimants admit that the only evidence they have to support their corruption allegations are the witness statements of Mr Aven and Mr Damjanac.<sup>993</sup> No further evidence has been produced. *Ex-post facto* witness statements provided in contemplation of the proceeding and from the parties are self-serving and insufficient to establish corruption, whether in international proceedings against a state, or in any other forum.
976. English Law provides that the cogency of the evidence relied upon needs to be commensurate with the seriousness of the conduct alleged. Moreover, while English law stipulates that the standard of proof in civil claims is the balance of probabilities, in cases where very serious misconduct is alleged, and a dishonest state of mind must be shown, the balance of probabilities test has some flexibility.
977. For present purposes, that places a greater burden on Claimants to prove the alleged, serious misconduct. However, as this Rejoinder sets out, stronger evidence is not only missing – but any credible evidence is missing.<sup>994</sup>

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<sup>990</sup> Ibid.

<sup>991</sup> **RLA-128**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221.

<sup>992</sup> RLA-50, *Liman Caspian Oil B.V., et al. v. Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, paras. 423-4.

<sup>993</sup> Claimants' Reply Memorial, para. 368.

<sup>994</sup> *JSC BTA Bank v Abylazarov & Ors* [2013] EWHC 510 (Comm) 19 March 2013.

978. It is clear that said statements are not made by independent and unbiased witnesses, but by one of the Claimants and their agent, both having a personal interest in the matter. Thus, their statements are tainted with the strong interest they have on Claimants' case and could not be deemed as *"inferences as part of the fact finding process"* as Claimants allege.<sup>995</sup>

979. If Claimants have better evidence than their own word, they should have brought it to this proceeding. Indeed, Claimants alleged having a tape recording the alleged bribe solicitation.<sup>996</sup> It is curious that even if Claimants relied on said evidence as a key for their case, they have not presented it to this Tribunal. The answer is simple: no bribery had ever taken place.

## **2. In any event, Claimants' bribery allegations do not have any bearing on the the outcome of this case**

980. In any case, Claimants' bribery allegations lack any relevance over the development of the Las Olas Project, and are not supported by the circumstances of the case. Claimants argue that because there was an alleged refusal to pay the alleged solicited bribes by Mr Bogantes, Respondent countered by shutting down the Project.<sup>997</sup> However, such unfounded allegations only have the purpose of camouflaging the reasons why Costa Rica decided to protect the Las Olas Ecosystem from the unlawful conduct of investors.

981. Claimants allege that Costa Rica violated DR-CAFTA by engaging in bribe solicitation from public officials. Specifically, Claimants contend that Costa Rican officials, namely Mr Ovideo from the Municipality and Mr Bogantes from SINAC, solicited bribes on three occasions.<sup>998</sup>

982. According to Mr Aven, in 2009, Mr Ovideo, who was acting as the city manager of the Municipality, asked him for a US\$ 200,000 bribe.<sup>999</sup> Mr Aven does not explain what the intended purpose of this alleged bribe was. He only states that Mr Ovideo told him that *"the way it worked was that 'when it rained everyone got wet'."*<sup>1000</sup> Thus, Claimants do not specify how Mr Ovideo's alleged bribe solicitation, and Mr Aven's alleged refusal to pay such bribe, affected, contributed to, or caused the measures at issue in this arbitration.

983. Regarding Mr Bogantes' alleged bribe request, a first bribe is alleged to have occurred in July 2010 when Mr Damjanac and Mr Bogantes were walking around the Project Site and

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<sup>995</sup> Id., para. 83.

<sup>996</sup> Claimants' Notice of Arbitration, para. 31.

<sup>997</sup> Claimants' Memorial, para. 166.

<sup>998</sup> Id., paras. 385-392.

<sup>999</sup> Second Witness Statement of David Aven, para. 125.

<sup>1000</sup> First Witness Statement of David Aven, para. 134.

Mr Bogantes told Mr Damjanac that the developers would have to give him a lot of money in order to keep the project running.<sup>1001</sup> A second bribe solicitation allegedly occurred in the Las Olas office in late August of 2010. Mr Bogantes allegedly asserted that there was a wetland and a forest and insisted that the developers contributed to his retirement plan in order to solve the problems and ensure the project advanced smoothly.<sup>1002</sup>

984. Claimants contend that Respondent has little to say in this regard and that it only relies on the argument of the high standard of proof that has to be fulfilled by Claimants.<sup>1003</sup> Although Claimants do not meet such standard, it is Respondent's position that the facts of the case demonstrate that any bribery could have never taken place.

985. First, Claimants did obtain reports from SETENA and SINAC that were favorable to their development during the period of the alleged bribe solicitations by Mr Bogantes:

- Just after the alleged first Bogantes bribe solicitation, the July 2010 SINAC Report mentioned that the site was not located in an area of wetlands, a [finding] that was temporarily favorable to Claimants;<sup>1004</sup>
- On July 16, 2010, the Municipality issued the construction permits for the easements of the Las Olas Project;<sup>1005</sup> and
- On September 7, 2010, Claimants obtained the construction permits for the Condominium Site.<sup>1006</sup>

986. If Mr Bogantes would have had any influence on SINAC's or the Municipality's decision power, those agencies would not have issued the referenced acts and reports. Put simply, if Mr Bogantes had solicited a bribe, he did the most terrible job of understanding how a bribe actually functions – so much so that it rather makes a mockery of the allegation itself.

987. Second, Claimants have not demonstrated that Mr Bogantes had a role in the issuance of the reports they deem adverse to their development. Mr Aven's personal opinions on the "influence" of Mr Bogantes in the decision making process of independent agencies from SINAC cannot be accepted as "conclusive proof" of any links of those decisions with Mr Bogantes' alleged bias against Claimants.

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<sup>1001</sup> Second Witness Statement of David Aven, para. 96.

<sup>1002</sup> Id., para. 97.

<sup>1003</sup> Claimants' Reply Memorial, para. 367.

<sup>1004</sup> C-72.

<sup>1005</sup> C-71.

<sup>1006</sup> C-85.

988. Third, Claimants have not shown how Mr Bogantes played any role in the issuance of the injunctions that suspended works on the Project:

- On February 4, 2011, SINAC issued an injunction ordering Claimants to refrain from construction and other work on the Project site;<sup>1007</sup>
- On April 13, 2011, SETENA issued an injunction ordering that any works on the site be stopped and that the Municipality refrains from granting any construction permit to the Las Olas Project;<sup>1008</sup>
- On April 13, 2011, the TAA issued an injunction ordering the cessation of any works or activity that could cause an environmental damage involving the affectation of a wetland by the cutting of trees and the installation of drainage tubes;<sup>1009</sup> and
- On November 30, 2011, the criminal Court of Quepos issued a judicial injunction against the Las Olas Project, which was extended during the course of the proceedings.<sup>1010</sup>

989. Claimants' allegations that Mr Bogantes influenced Costa Rican agencies to shut down the Project are completely absurd. How could Mr Bogantes be able to orchestrate the issuance of injunctions from SINAC, SETENA, the TAA and a criminal court?

990. Finally, the agencies held by Claimants as primarily responsible for allegedly violating Claimants' rights under DR-CAFTA, the *Defensoría*, the Municipality and the Prosecutor's Office represented by Mr Martínez, have no relation whatsoever with Mr Ovideo or Mr Bogantes. Likewise, Claimants' contention that Respondent has engaged in an abuse of rights and arbitrary conduct through the misuse INTERPOL notifications, and the conducting of the criminal investigations and proceedings by Mr Martínez are not related to any of the alleged bribe solicitations.

991. As a post-script to this attempt to rationalize Claimants' failures, Claimants overlook one fundamental fact. There are wetlands at the Las Olas site. Therefore, if a bribe had been sought, it would have been posited in a situation where there actually was no wetland, and the spectre would have been that any person seeking the bribe might somehow rule there was a wetland (when there was not). However, the expert testimony from both sides to this arbitration concur that there are (and were) wetlands. Therefore, it beggars belief how the

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<sup>1007</sup> C-112.

<sup>1008</sup> C-122.

<sup>1009</sup> C-121.

<sup>1010</sup> C-146.

perpetrators of bribes could have tried to procure a bribe – fail to do so – and as stated above, issue preliminary positions that supported Claimants.

**3. Respondent duly complied with the obligation to investigate the alleged bribe solicitations**

992. Claimants also note that Respondent did not dispute their allegation that Costa Rica failed to investigate or prosecute the bribe solicitations according to Article 18.8 DR-CAFTA.<sup>1011</sup> Article 18.8 DR-CAFTA deals with anti-corruption measures Contracting Parties shall adopt in compliance with the Treaty.

993. Respondent fully complied with such mandate. First, regarding Mr Ovideo's alleged request of bribery, it is in this arbitral proceeding that the issue is brought for the first time to Respondent's attention. Indeed, Claimants did not include any reference to this alleged bribe in the criminal complaint they filed in September 2011.<sup>1012</sup> Thus, without being raised before, Respondent could not have taken any action to investigate a bribery allegation due to Mr Ovideo's conduct under Article 18.8 DR-CAFTA.

994. Second, Respondent indeed acted in accordance with Article 18.8 DR-CAFTA in relation to Mr Bogantes' allegations of bribery. Regarding the first time that the alleged bribe solicitation took place, Claimants did not file any criminal complaint. As in the case of Mr Oviedo, Respondent did not take any action since Claimants never raised the issue.

995. In relation to the second time that an alleged bribe solicitation took place Mr Aven filed a criminal complaint against Mr Bogantes. Respondent acted immediately after the filing of the criminal complaint in September 16, 2011. However, the investigation of the alleged bribery attempt conducted by the Ethics Prosecutor had to be terminated due to the lack of interest of Mr Aven in collaborating to continue the process of investigation.<sup>1013</sup>

996. Judge Chinchilla also reviewed this proceeding and agrees that there was no irregularity with the conduct of the Ethics Prosecutor:

“I have reviewed the request for dismissal of proceedings arising out of the criminal complaint filed against Christian Bogantes and I do not observe any irregularity in the actions taken. I say this because of the following: there are certain types of crimes where the collaboration of the passive subject or victim is necessary to gather evidence against the accused. Although the victim is not obliged to do so, their cooperation allows for a solid case that is not only based on their allegations – especially where the victim is vulnerable or lacks credibility, as would be the case here – but for a penal process against the complainant himself. [...] In the case at hand, the allegedly affected

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<sup>1011</sup> Claimants' Reply Memorial, para. 370.

<sup>1012</sup> C-139.

<sup>1013</sup> Respondent's Counter-Memorial, paras. 597-610.

complainant did not collaborate with the proceedings. On top of that, if one adds that his bribery accusation arose in the context of accusations that he was already facing, his credibility is further weakened and it was not possible to gather more evidence. Thus, one had to terminate the process and that was the appropriate mechanism."<sup>1014</sup>

997. Third, as regards Claimants' allegations that Mr Martínez should have investigated Mr Aven's bribery allegations, Respondent contends that he was under no legal duty or obligation to conduct an investigation of the alleged bribe. Mr Martínez is a prosecutor specialized in environmental crimes and has no competence to investigate corruption related crimes. Mr Aven seemed to acknowledge this fact since he then filed the criminal complaint before the corresponding authority months after mentioning it to Mr Martínez.
998. Not only has Mr Martínez explained this in his first witness statement,<sup>1015</sup> but Judge Chinchilla has also confirmed that Mr Martínez acted in accordance to law:

"In his second witness statement, Mr David Aven indicates that he informed an environmental prosecutor about an alleged bribe and that the prosecutor did not investigate. Nonetheless, on the one side, it is important to differentiate between a simple narrative (which does not impose any responsibilities) and a formal complaint (which entails an oath and forewarning of criminal liability if the statement is false) and, on the other, one must consider the context in which the statement was offered. If the statement is made during the course of an investigation against the alleged complainant, it is typically a defence strategy rather than a genuine complaint. When this happens, some additional element (more than the bare accusation) is required to substantiate the claim. It should be noted that, Mr Aven's narrative was made at the time that he was formally being accused and, as the accused, his narrative – being just a simple phrase – was lacking in details or elements that would lend it veracity.

In theory, any person can make a report to the police or to the Prosecutor's Office, and these authorities cannot frustrate this right. Nevertheless, from what has been stated and analysed in this case, I do not observe that there has been a formal claim by Mr Aven. That is to say, he not only gave his narrative to an incompetent authority – i.e. he informed an authority of an alleged offense beyond the scope of that authority's competence – he also failed to use the formal reporting mechanism, as he gave only a simple narrative without additional elements that would substantiate it. This reasonably explains Mr Martínez's decision not to rush forward or embark on an inquiry that was outside of his competence and lacked determinative support."<sup>1016</sup>

"[...] Mr Aven could have filed a formal complaint to initiate the investigation, that is, [he] had at his disposal other means and mechanisms to proceed if he disagreed with the prosecutor's preliminary conclusion not to investigate. When he did not take those steps, and much later when he actually did, he failed to collaborate with

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<sup>1014</sup> Expert Report of Rosaura Chinchilla, para. 59.

<sup>1015</sup> First Witness Statement of Luis Martínez, para. 41-45.

<sup>1016</sup> Expert Report of Rosaura Chinchilla, paras. 30-31.

efforts to ascertain the truth of the matter and demonstrated inertia during the course of the procedure."<sup>1017</sup>

999. Thus, Costa Rica complied with the mandate of Article 18.8 DR-CAFTA. Respondent investigated the cases brought to its attention, which were only done by Claimants on one occasion, to the extent that Mr Aven's collaboration allowed the investigation to proceed.

1000. All in all, the alleged abuse of rights by Costa Rican agents based on bribe solicitations not only do not have any relevance over the development and later cessation of the Las Olas Project but also they are not supported by the circumstances of the case. It might be for such reason that Claimants failed to provide **clear and convincing evidence** in this regard.

#### **4. Mr Aven's inclusion on the INTERPOL Red Notice was appropriate**

1001. Lastly, Claimants contend that Respondent has not provided any evidence regarding the appropriateness of the issuance of the INTERPOL Red Notice on Mr Aven. Under Costa Rican law, the INTERPOL Red Notice is just a legal consequence of the issuance of an international warrant arrest, and there is nothing "*egregious*" about it.<sup>1018</sup>

1002. Mr Martínez explains that this is the nature of criminal proceedings when an individual accused of a case in Costa Rica decides to flee the country:

"What I am aware of is that the international arrest warrant dictated by the criminal law judge flows from the fact that Mr Aven did not present himself at the trial and, to this day, he refuses to appear. The purpose of the international arrest warrant is that Mr Aven must face justice irrespective of whether or not he is innocent."<sup>1019</sup>

1003. Judge Chinchilla agrees with Mr Martínez that the request for an international arrest warrant was more than appropriate:

"[I]f a person is subject to criminal proceedings in Costa Rica is absent from those proceedings, removes himself from his residence designated for the purposes of judicial notices, or refuses to be present at court proceedings that require his presence, these actions will be deemed to indicate hostility to judicial authority (Article 89 of the Code of Criminal Procedure) and this is considered a flight risk. This, in turn, allows for a preventive prison sentence that has, as its end, the conclusion of the process. If the person is absent from the country, this preventive prison sentence generates an international arrest warrant. The issuance of this warrant alerts bodies competent to track and arrest [the fugitive] wherever he is in the world. It should be noted that in this case it was not necessary, as Mr Aven suggests, that he be personally notified of the second hearing. It was sufficient that it take place where he had voluntarily indicated for this purpose. On the other hand, it is the duty of the accused to keep his address and not to change it without

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<sup>1017</sup> Id., para. 64.

<sup>1018</sup> Claimants' Reply Memorial, para. 14.

<sup>1019</sup> Second Witness Statement of Luis Martínez, para. 74.

previous authorization. Following the notice from the accused's defence that he had left the country, it was clear that he had change his residence without authorization and this permitted a finding of hostility, which is not a finding made by the prosecutor, but by the jurisdictional body.

[...]

I have analysed the criminal proceedings against Mr Aven. From this review, I can conclude that the proceedings here noted are the same as would be taken with respect to any person – be they national or alien – that had absented himself from the proceedings and distanced himself from the country where a criminal trial was pending against him. It is the same process that I would have authorized to apply in any case, if the decision were mine.”<sup>1020</sup>

1004. After indicating that the proceedings followed by the criminal court are the same that she would use if the decision depended upon her, Judge Chinchilla explains that both (i) the years of prison term corresponding to this type of crime, and (ii) Mr Aven's decision to flee the country, justified his inclusion in the INTERPOL Red Notice list:

"Mr Aven was accused in Costa Rica for drainage of wetlands (a 1 to 3 year prison term). In accordance with the Extradition Law of Costa Rica, this offence carried a maximum penalty more severe than a one year prison term: it was possible to ask for Mr Aven's extradition, contrary to the assertions by the Claimants in their Reply Memorial that it is necessary for the crimes to be serious. While it is true that in Costa Rica serious crimes have a maximum sentence of four-year prison term, it is not true that a prerequisite for extradition is that a crime must be serious. The legal prerequisite for extradition is that the sentence be at least a one-year prison term, which is the case here.

Mr Aven was in the midst of legal proceedings at the time of the hearing. Not only did he not attend the hearing (the previous hearing having been annulled), he was out of the country, without having previously notified the court as he was obligated to do. Although, in his defense, Mr Aven did ask to attend the trial via videoconference, this was not possible because, in accordance with national law, he would be effectively giving his testimony from a territory in which Costa Rica had neither jurisdiction nor competence. [...] Pursuant to the laws of Costa Rica, and because Mr Aven was absent without permission from the Court, the judgment found him in default and imposed a preventive prison sentence in view of his flight risk.<sup>1021</sup>

As per Interpol's Rules on the Processing of Data, a red notice publication is issued where [...], there is sufficient evidence to petition for extradition in a criminal proceeding, [and] there is accordance between the facts and the content of the regulation. The following sections of the above regulation indicate other minimum cumulative criteria for the publication of a red notice, among which is that it be a serious crime and which expressly excludes private disputes, private administrative questions or disputes. None of these exceptions fits the

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<sup>1020</sup> Expert Report of Rosaura Chinchilla, paras. 79,81.

<sup>1021</sup> Expert Report of Rosaura Chinchilla, paras. 82-83.

criminal process against Mr Aven, which was a criminal procedure for a criminal offence. [...]"<sup>1022</sup>

1005. In sum, the evidence brought by Respondent to this proceeding is overwhelming in the sense that the inclusion of Mr Aven in the INTERPOL Red Notice was appropriate according to the circumstances of the case at hand, and therefore, there has not been a misuse of rights in this regard. Thus, there is no room for allegations of abuse of rights by Costa Rican officials.

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<sup>1022</sup> Id., para. 86.

## IX. CLAIMANTS WERE NOT EXPROPRIATED

1007. Claimants argue that Costa Rica has breached Article 10.7(1) of the Treaty by taking actions which, according to them, constitute an indirect expropriation under Annex 10-C paragraph 4 of the Treaty.<sup>1023</sup> In their Counter Memorial, Respondent provided a test under DR-CAFTA in order for the Tribunal to analyze whether a claim for expropriation will succeed. In this regard, Respondent argued that (i) the investment which has allegedly been expropriated has to be covered by the Treaty, and (ii) the alleged measures by the State:<sup>1024</sup>

- shall not be considered as State non-discriminatory regulatory action;
- shall have an economic impact;
- shall have interfered with legitimate expectations of the investors; and
- shall not involve a bona fide exercise of police powers by the host State.

1008. If all the alleged actions fall under all the categories above, then it is necessary to consider whether the expropriation is legal or illegal for compensation purposes.<sup>1025</sup>

1009. As evidenced in Respondent's Counter Memorial, Claimants' allegations on expropriation do not resist this scrutiny. Although now in their Reply they try build defenses in order to demonstrate their compliance with the test, they failed in each of their attempts to find that expropriation has taken place, as it will demonstrate below.

### A. Costa Rica has not deprived Claimants' of the value or control of their investment

1010. Claimants suggest that the level of impairment to establish that an expropriation has occurred is whether "*Respondent's conduct effectively neutralized the Claimants' ability to enjoy (i.e. realize the inherent value of) their shared investment [...] as part of an approved commercial real estate development.*"<sup>1026</sup>

1011. Claimants allege then "*a substantial deprivation of the investment*"<sup>1027</sup> or "*effective neutralization*" has taken place.<sup>1028</sup> However, Claimants omit to mention that when tribunals have applied such test, they consider a number of circumstances to determine whether the threshold is met, namely: (i) whether the investor is in control and has full

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<sup>1023</sup> Claimants' Memorial, para. 399.

<sup>1024</sup> Counter-Memorial, paras. 612-614.

<sup>1025</sup> Counter-Memorial, para 612.

<sup>1026</sup> Claimants' Reply Memorial, para. 87.

<sup>1027</sup> Claimants' Memorial, para. 394.

<sup>1028</sup> Ibid.

ownership of the investment; and (ii) whether the government manages the day-to-day operations of the company.<sup>1029</sup>

1012. For instance, in *Nykomb Synergetics Technology Holding AB v Latvia*, the tribunal considered that no expropriation took place since the Respondent state did not take possession of the investor or its assets, and did not interfere with shareholders' rights or with management's control of the enterprise.<sup>1030</sup> In *Generation Ukraine, Inc. v Ukraine*, where the Respondent did not provide lease agreements for a construction project — although the investor remained in possession of the property—, the tribunal found that an expropriation has not occurred.<sup>1031</sup>

1013. As it can be inferred from those cases, whether the investor is in control of the investment is a key consideration. In the case at hand, Claimants are in control of the investment and they have full ownership of it. This has never changed and at no point has any Costa Rican agency taken control of the ownership of the land. Costa Rica is not managing the day-to-day operations and it has not interfered with the de facto control over the land. It remains the case as Claimants acknowledge that the Project Site has the potential of realizing substantial returns upon resale even if the Project is not developed.<sup>1032</sup> Therefore, there is simply no room for any accusation that there has been a substantial deprivation or "neutralization" of property (whatever that means).

1014. Furthermore, Claimants omit to mention that the level of impairment required to establish that an indirect expropriation has occurred requires that the alleged measures have to be permanent. This was stressed by the tribunal in *Generation Ukraine, Inc. v Ukraine*, where it affirmed that the challenged measure "[...] did not come close to creating a **persistent or irreparable obstacle** to the Claimant's use, enjoyment or disposal of its investment" (emphasis added) and decided to dismiss the expropriation claim.<sup>1033</sup> As it was stated in the Counter Memorial, the measures adopted by Costa Rica consist of a series of injunctions which ordered the cessation of works until the claims of environmental harm were resolved.

1015. The reason why such measures have been extended is because Claimants decided to abscond in order to avoid facing responsibilities. Were Claimants to engage in the

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<sup>1029</sup> **RLA-67**, *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para 263; CLA-81, *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September, 2007, 284.

<sup>1030</sup> **RLA-66**, *Nykomb Synergetics Technology Holding AB, Stockholm v The Republic of Latvia, Riga*, SCC 118/2001, Award, 16 December 2003, para. 4.3.1.

<sup>1031</sup> **RLA-65**, *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.32.

<sup>1032</sup> Claimants' Memorial, para 41.

<sup>1033</sup> **RLA-65**, *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.32.

injunction proceedings, progress might be made to advance the *status quo* of the property to a situation other than that in which it currently is.

1016. Claimants also allege that their investment turns to be an "*unused former grazing land now beset by squatters.*"<sup>1034</sup> The only party responsible for such result is Claimants themselves, for reasons already explained above.

1017. In sum, the level of impairment that is required to establish that an expropriation has occurred is that the challenged measure has to interfere with an investment to the point that it deprives the investor of his or her fundamental rights of ownership, use, enjoyment, or management in a substantial and permanent or persistent way. Objectively, this test has not been met, and there is simply no evidence to support such a finding.

#### **B. Indirect expropriations are not per se unlawful**

1018. Claimants contend in the first place that Respondent relies "*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.*"<sup>1035</sup> In this context, Claimants raised the argument that because Respondent did not accompany the alleged indirect expropriatory measures with compensation, those measures are unlawful.

1019. Contrary to Claimants' allegations, the mere failure to pay compensation does not render an indirect expropriation unlawful. There is no reason to consider that because an expropriation has occurred in an "indirect" manner, it is *per se* unlawful due to the lack of payment of compensation.

1020. Indeed, the Permanent Court of International Justice in the *Chorzow Factory* case provided for said distinction considering that an expropriation would still be lawful although no compensation was made."<sup>1036</sup> In *Tidewater v Venezuela*, the Tribunal also followed the same line of reasoning in relation to indirect expropriation:

"[...] an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation [...]. The Tribunal concludes that a distinction has to be made between a lawful expropriation and an unlawful expropriation. An expropriation only wanting fair compensation has to be considered as a provisionally

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<sup>1034</sup> Claimants' Reply Memorial, para. 87.

<sup>1035</sup> Claimants' Reply Memorial, para. 84.

<sup>1036</sup> CLA-12 / RLA-53, *Case Concerning the Factory at Chorzow (Germany v Poland) (Merits)* PCIJ Rep Series A No 17.

lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation."<sup>1037</sup>

1021. Thus an expropriation cannot be considered unlawful if solely based on non-payment of compensation, because legality refers to whether the State is authorized to expropriate or not. Compensation is a separate obligation which refers to the consequence of the expropriation.<sup>1038</sup>

1022. In the case at hand, if any expropriation is going to be found, Respondent's failure to pay compensation does not render unlawful an expropriation that complies with all the other requirements for a lawful expropriation.

**C. Claimants' alleged investment is not protected under DR-CAFTA**

1023. In the Counter Memorial, Respondent alleged that the construction permits did not grant Claimants a right to be immune from the application of mandatory environmental law and therefore, they cannot claim that by enforcing its law, Costa Rica expropriated vested rights.<sup>1039</sup>

1024. Claimants contend that *"Respondent's argumentation is based upon its second gross mischaracterization of the Claimants' case,"* because *"Respondent founds its ploy on what it claims to be the Claimants' own words."*<sup>1040</sup> Claimants rely again on the alleged mischaracterization of the case by Respondent by playing on words.

**1. Claimants' alleged investment are the construction permits according to Claimants**

1025. Claimants allege that *"Respondent founds its ploy on what it claims to be the Claimants' own words"*<sup>1041</sup> in order to blame Respondent for mischaracterizing their arguments. On the contrary, Respondent builds its argument relying on Claimants' assertions and the text of the Treaty, as it is reasonably entitled to do.

1026. Indeed, Claimants in their Memorial stated with total clarity that:

"[T]he 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."<sup>1042</sup> (emphasis added)

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<sup>1037</sup> **RLA-87**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, paras. 140-1.

<sup>1038</sup> **RLA-98**, Mohsen Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (Kluwer Law International 1999).

<sup>1039</sup> Respondent's Counter-Memorial, para. 620.

<sup>1040</sup> Claimants' Reply Memorial, para. 381.

<sup>1041</sup> Ibid.

<sup>1042</sup> Claimants' Memorial, para. 409.

1027. Immediately after, Claimants indicated that the question was whether Respondent's conduct prevented them from utilizing the construction permits granted to develop their project.<sup>1043</sup>

1028. From these passages of their claim it can be concluded that Claimants' allegations on expropriation focus on the construction permits. Now Claimants suddenly change their mind contending that their allegation encompasses property rights in the land:

"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."

1029. Furthermore, it is noteworthy that at this very late stage in Claimants' own proceedings there is still an unclear articulation of what the investment supposedly comprises. Claimants did not elaborate any argument in relation to an alleged expropriation of rights in the land. In fact, when they applied the law to the case at hand to provide content to the expropriation claim, they refer particularly to the conduct of Ms Vargas, Ms Díaz, Mr Martinez and Mr Bogantes in relation to the proceedings initiated as a consequence of the permits required to develop their project, which were suspended.<sup>1044</sup> No arguments in relation to the *possession* of land were made. This might be because of the gaping holes in the chain of ownership raised by Respondent in this case. The only allegation in this regard was that although they retain title, the illegal squatters make it something other than a reality. However, as stated above, those responsible for such circumstances are Claimants alone.

1030. Since the alleged expropriatory measures adopted by Costa Rica related to the authorization needed to develop their Project, their case on expropriation is not about the land, but about the construction permits which were suspended.

## **2. The construction permits cannot be considered an investment**

1031. According to footnote No. 10 to Article 10.28 of the Treaty, whether a particular type of permit has the characteristics of an investment *depends* on the extent of the rights that the holder has under the law of the Party. In particular, the article stresses that if the permit does not create any rights protected under the domestic law, therefore it is not an investment.

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<sup>1043</sup> Claimants' Memorial, para 409.

<sup>1044</sup> Claimants' Reply Memorial, paras. 389-390.

1032. This provision then mandates the application of Costa Rica law. Under Costa Rican law such permits are subject to the strict scrutiny that the activity which they would allow does not impact the environment.
1033. In the case at hand, said permits would be in breach environmental laws. The construction permits do not grant Claimants a right to breach Costa Rica's environmental law, and if they do, they have to be immediately stopped due to the precautionary principle. Hence, which act of indirect expropriation can take place if all what Respondent did was to suspend construction activities in breach of environmental laws?
1034. In this sense, it can logically be concluded that an expropriation cannot take place when a right does not exist under domestic law. Claimants' construction permits are subject to strict compliance with mandatory environmental law, and when such law cannot be complied with, those permits cannot be maintained and no right to develop exists at all. Thus, the construction permits cannot be considered, in the terms of Article 10.28, footnote no. 10, an investment.
1035. In addition, Claimants allege that Respondent intentionally did not mention the EV, when such permission constitutes "*...sine qua non point of embarkation for its real estate permitting process...*"<sup>1045</sup>
1036. Much to the contrary, the EV is irrelevant to the argument. As Dr Jurado points out, under Costa Rican law, an EV is a preliminary administrative act which does not grant any subjective rights to holders, and thus, cannot be considered an investment protected by the DR-CAFTA:
- "The environmental viability issued by SETENA is to be understood as within the characteristics that describe a preparatory act in the context of the authorizations that a developer must obtain to initiate a project. It is subject to the issuance of a final act, it materialized with the construction permit by the corresponding Municipality.
- This subordination to the municipal permit is precisely what characterizes the environmental viability as a preparatory act, since its issuance does not itself allow the developer to initiate the activity, work or project for which the environmental impact study was submitted.
- In other words, obtaining the environmental viability does not have any legal effect because it does not create rights in favor of the recipient. Rather, it forms part of the authorization process, and therefore can be classified as a preparatory act without its own effects."<sup>1046</sup>
1037. All in all, since the investment that Claimants alleged to be expropriated are the construction permits which, when in breach of environmental law, do not provide a right

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<sup>1045</sup> Claimants' Reply Memorial, para. 383.

<sup>1046</sup> Second Witness Statement of Dr Julio Jurado, paras 9, 12, 13.

under domestic law, no investment is covered by the DR-CAFTA. Even if the EV would to be considered as an investment, as stated, it does not grant any right under the law of Costa Rica.

**D. Costa Rica's actions fall in the exception provided in Paragraph 4(b) of Annex 10-C of DR-CAFTA**

**1. The prior character of the exception**

1038. Claimants consider that Respondent "...attempts to reinvent the standard methodology for determining whether an indirect expropriation has occurred..."<sup>1047</sup> and that the provision established in Annex 10-C(4)(b) of the Treaty could not be applied before the Tribunal has determined whether an expropriation has occurred. In this regard, they allege that Respondent's position is "...inconsistent with U.S. treaty practice, which informs the model agreement upon which the DR-CAFTA was based."<sup>1048</sup>

1039. Claimants insist on the reading of the DR-CAFTA based on scholars referring to "U.S.treaty practice"<sup>1049</sup> (Model US-BIT) instead of concentrating on the Treaty applicable to the case at hand, which provides a complete chapter on environmental issues. It is in light of such circumstance that Annex 10-C(4)(b) should be read as an exception to expropriation measures.

1040. In this sense, due to the character of an exception, Annex 10-C(4)(b) has to be applied prior to any determination of expropriation:

**"[...] its effect is not to exclude compensation but, more plainly, to exclude a qualification of expropriation.** Moreover, this doctrine has increasingly permeated the drafting of model investment treaties in the last few years and, as seen next, it has also been discussed and applied in the specific context of environmental regulations adverse to the interests of foreign investors."<sup>1050</sup> (emphasis added)

1041. In the same line of reasoning, it has been considered that:

**"[...] Paragraph 4(b) of Annex 10-C of DR-CAFTA also employs language different from NAFTA's with respect to nondiscriminatory regulatory government actions. The Methanex tribunal adopted a strong presumption in favor of the regulating government by limiting the exception to cases in which there were "specific commitments" made by the state to the private investor contrary to the regulations imposed. By contrast, DR-CAFTA employs a more general term, "rare circumstances," to carve out an exception to the same presumption. Given the vague nature of the term "rare circumstances," it could be a comparatively broad exception to**

<sup>1047</sup> Claimants' Reply Memorial, para. 88.

<sup>1048</sup> Id., para. 90.

<sup>1049</sup> Id., paras. 90-91.

<sup>1050</sup> **RLA-83**, Jorge E. Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 83, 369.

**the presumption in favor of 'nondiscriminatory regulatory actions.'"<sup>1051</sup> (emphasis added)**

1042. Thus, the analysis whether a conduct falls under the exception has to be made prior any categorization of expropriation. If the answer is "no," the rules to determine whether an expropriation has occurred become applicable.

**2. The application of the police powers doctrine**

1043. In addition to these arguments, Claimants suggest that police power doctrine embedded in sub-paragraph (4)(b) of Annex10-C *"...is not an 'exception' to paying compensation for indirect expropriation that the Respondent hopes it could be..."*<sup>1052</sup>. In this regard, Claimants consider that the police powers doctrine is instead provided in 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"*<sup>1053</sup>.

1044. Relying on such argument, Claimants misplace the reason why DR-CAFTA drafters intended to include the exception contained in sub-paragraph (4)(b) of Annex10-C. If it were not for cases such as the instant case, what would be the reason to agree on this provision?

1045. Particularly, provisions such as sub-paragraph (4)(b) of Annex 10-C have been considered as provision which, based on police powers, excludes any liability:

"International law acknowledges that state regulations that result in infringements upon alien property rights do not entail liability if they are bona fide and nondiscriminatory, because such regulations are within the police powers of a state. Thus, regulations enacted in the public interest were not likely intended to be limited by the obligations of investment treaties. ..." <sup>1054</sup>

1046. Claimants insist that Respondent's conduct could only fall in Article 10.7. Nevertheless, such article only provides the conditions in case the host State decides to expropriate *without* reasons of public welfare. In the case at hand, the enforcement by Costa Rica of its environmental regulations in relation to Claimants' project, by ordering the suspension of works, could only be interpreted as the application of its police powers regarding the

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<sup>1051</sup> **RLA-71**, Rachel D. Edsall, "Indirect Expropriation Under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations" (2006) 86(4) Boston University Law Review 931, 958.

<sup>1052</sup> Claimants' Reply Memorial, para. 387.

<sup>1053</sup> Id., para. 388.

<sup>1054</sup> **RLA-73**, Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" (2008) 41(3) Vanderbilt Journal of Transnational Law 775, 827-828.

environment, excluding any liability in this regard. Indeed, environmental issues were expressly envisaged in the exception.

1047. Finally, Claimants refer to the conduct of Mr Martínez, alleging that "[...] *the arbitrary manner in which he would subsequently pursue the case against Mr Aven brought him outside the boundaries of public purpose and was additionally per se discriminatory.*"<sup>1055</sup> In addition, they contend that Mr Bogantes alleged bribe disregard the police powers doctrine.<sup>1056</sup>
1048. Since Claimants are relying on their arguments based on Article 10.5 DR-CAFTA to provide support to its claim on expropriation, Respondent stands by the arguments stated above in relation to the absence of abuse of rights and the compliance with the obligation not to deny justice.
1049. All in all, Claimants' allegations on expropriation do not resist the test provided in the Treaty for an expropriation to occur. Firstly, Claimants' alleged investment is not protected under DR-CAFTA. Secondly, Costa Rica has not deprived Claimants' of the value or control of their investment. Lastly, Costa Rica's actions fall in the exception provided Paragraph 4(b) of Annex 10-C of the DR-CAFTA.

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<sup>1055</sup> Claimants' Reply Memorial, para. 389.

<sup>1056</sup> Ibid.

**X. CLAIMANTS ARE NOT ENTITLED TO ANY COMPENSATION**

**A. The quantification of Claimants' losses made by Dr Abdala is based on mistaken premises**

**1. The DCF model disguised as a "mixed approach" is not appropriate**

1050. Claimants affirm in their Reply that Dr Abdala's valuation cannot be considered as based on a discounted cash flow ("DCF") model or being an income approach,<sup>1057</sup> as if they were regretting from the element of the methodology already proposed in the First Abdala Report, perhaps motivated by the shortcomings raised by Respondent in its Counter Memorial and the First Hart Report.

1051. Claimants now attempt to masquerade the DCF model suggesting that it "...is indeed one element of Dr Abdala's valuation, but it is not the only element".<sup>1058</sup> As stated by Dr Hart, what Dr Abdala did in his Second Report is to modify certain inputs into his valuation model, yet did not change his methodology, which in essence remains as a DCF model based on a probability of success and failure,<sup>1059</sup> since it is the element which has the most impact on the value.

1052. To provide support to the alleged mixed approach Claimants indicate that it is backed by valuation literature, including Professor Damoradan, upon which Dr Abdala heavily relied.<sup>1060</sup> However, Dr Abdala picked and chose certain sections of an article written by him, attempting to avoid any reference the author made to the caution that it has to be had taken when a probabilistic approach is applied.<sup>1061</sup>

1053. Claimants contend that the "mixed approach" "...reflects the true market value of the investment at the relevant time".<sup>1062</sup> A DCF would be perfectly applicable to a scenario of an ongoing project, because the prospecting buyer estimates the cash flows and discounts them to the valuation date, applying a discount rate that accounts for the various types of risks that cash flows are subjected to, as well as the time value of money.<sup>1063</sup> However, the future cash streams of a project shall be estimated with a reasonable degree of certainty.<sup>1064</sup>

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<sup>1057</sup> Claimants' Reply Memorial, para 394.

<sup>1058</sup> Claimants' Reply Memorial, para 394, 397.

<sup>1059</sup> Second Hart Report, para 104.

<sup>1060</sup> Second Abdala Report, para 13.

<sup>1061</sup> Second Hart Report, para 104.

<sup>1062</sup> Claimants' Reply Memorial, para 397.

<sup>1063</sup> Second Hart Report, para 106.

<sup>1064</sup> Ibid.

1054. Certainty does not exist in the case at hand due to the stage of the project. Las Olas Ecosystem could not be qualified, from any point of view, as an ongoing project. Rather, it is a new one in the pre-operational phase, and as such, the estimates of cash flows cannot be reasonably certain and would be speculative, which is not reliable for a DCF valuation.<sup>1065</sup>

1055. Claimants also allege that Dr Abdala's approach "...is the same approach adopted by potential buyers in real life".<sup>1066</sup> However, a hypothetical buyer would not perform the same calculation:

"Any logical buyer would consider the multiple changes in business plans, the lack of historical operations, and management's lack of experience when deciding whether to invest in this project or not. The buyer would not go through the motions of applying a probability of success to a baseless DCF valuation that had been prepared based on inputs from inexperienced people."<sup>1067</sup>

1056. Dr Hart pointed out, to demonstrate how illogical it is to use a probabilistic approach, that under this approach any prospective buyer, even if the project implies a failure, would still pay for 68% of the cash flows that were never achieved.<sup>1068</sup> Claimants consider that this assertion is misplaced because "the hypothetical buyer is, by definition, purchasing the investment before he/she knows whether it will succeed or not"<sup>1069</sup> and Dr Abdala alleges that Dr Hart confused *ex-ante* with *ex-post* valuation.<sup>1070</sup>

1057. Claimants and Dr Abdala distort the affirmation of Dr Hart:

"An *ex-ante* valuation is determined before a specific event, whereas an *ex-post* valuation can be derived once the specific event has passed. My comment about paying 68% of the cash flows of the failed project was not intended as an *ex-post* valuation. It is simply an indication of how illogical it is to use a probabilistic approach to value a project like Las Olas."<sup>1071</sup>

1058. Hence, either as a methodology itself or as an element of the alleged mixed methodology the DCF must be disregarded in the present case, and it cannot be utilized to construe any assessment as to the valuation of the alleged damages.

1059. Claimants and Dr Abdala attempt to rely on *Unglaube v Costa Rica*, where the Tribunal applied the "highest and best use of land" as a valuation principle, to a not going concern

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<sup>1065</sup> Second Hart Report, para 106, 108.

<sup>1066</sup> Claimants' Reply Memorial, para 400.

<sup>1067</sup> Second Hart Report, para 105.

<sup>1068</sup> First Hart Report, Section 8.4.

<sup>1069</sup> Claimants' Reply Memorial, para 401.

<sup>1070</sup> Second Abdala Report, para 21.

<sup>1071</sup> Second Hart Report, para 105.

property.<sup>1072</sup> In this regard, Claimants allege that this case presents similarities to the case at hand. However, such similarities that might have justified the decision of the tribunal do not exist. While in *Unglaube v Costa Rica* there was a second phase of the project which was contiguous to the first phase (and which the parties agreed was successful), no adjacent success stories exists in the present case. In addition, the tribunal based its analysis on property values in the region, which are not present in the case at hand. Such differences obviously have an impact on the decision of the tribunal to apply an income-based analysis, and the fact that they are not present in this case turns this decision inapplicable.

1060. In effect, international jurisprudence has reacted against the application of the DCF method, not only in the context of loss of profits,<sup>1073</sup> but also in scenarios such as the case at hand where claimants are seeking compensation for expropriation:

"In the Tribunal's view, the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation. At the time the project was cancelled, only 386 lots--or about 6 percent of the total- had been sold. All of the other lot sales underlying the revenue projections in the Claimants' DCF calculations are hypothetical. The project was in its infancy and there is very little history on which to base projected revenues."<sup>1074</sup>

"In these circumstances, the application of the DCF method would, in the Tribunal's view, resulting in awarding 'possible but contingent and unterminted[d] damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account'. (Chorzow Factory case, Series A, No. 17, 1928, at p. 51). As the tribunal in the Amoco case observed: 'One of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded'.<sup>1075</sup>

1061. Then, these cases demonstrate the trend in investment treaty arbitrations not to base the calculations on a method which is speculative or put a lot of weight in probability (such as the DCF or the alleged mixed approach) in respect of projects which do not yet have a substantial history of operations and a record of profits.

## **2. Dr Hart's cost approach method is applicable to the valuation of Las Olas Project**

1062. Claimants allege, agreeing with Dr Abdala, that the cost approach suggested by Dr Hart "...is not an accepted method to derive market value, as it fails to recognize the value at

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<sup>1072</sup> CLA-105, para 309.

<sup>1073</sup> Counter Memorial, paras 670-673.

<sup>1074</sup> CLA-38, Southern Pacific Properties (Middle East) v Egypt, Award of 20 May 1992, (1995) 3 ICSID Reports 189, para 188.

<sup>1075</sup> CLA-38, para 189.

which the asset can be transacted, which seldom will be equal to the funds already spent on it".<sup>1076</sup>

1063. On the contrary, and as explained by Dr Hart:

"It is generally considered that the cost approach gives the best indication of market value when the property in question is new and at an appropriate (highest and best) use. In the real estate industry, the cost approach is best suited for new properties, where the future cash flows are unknown or uncertain, as is the case here."<sup>1077</sup>

"Since the Las Olas Project was pre-operational, with no historical performance upon which to base any projections and thus uncertain future cash streams, and the business plan used as the basis of the valuation was prepared by inexperienced individuals, it remains my opinion that the cost approach yields the least speculative measure of value."<sup>1078</sup>

1064. Claimants' total ignorance of how a real estate project works is reflected in the unfounded analogy they provide: "[t]his 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".<sup>1079</sup> By this assertion, Claimants compares apples and oranges, since certainly, a real state project such as the one that they attempt to develop has no point of comparison with a "house".

1065. Indeed, Dr Hart sustains that:

"Dr. Abdala states in his First Report that he assumed the sale of the hotel to a third-party would have the same profit margin as the sale of constructed houses. This is not entirely true, as Dr. Abdala actually assumed that the sale of the hotel would have the same profit margin as the sale of lots and constructed houses together."<sup>1080</sup>

1066. Furthermore, Claimants suggest that Dr Hart misrepresents the methodology proposed since the historically incurred cash costs spent by the investor does not equate to the value of the asset.<sup>1081</sup> It is clear that Claimants' argument is an excuse to avoid any use of the historically incurred cash costs since, as informed by Dr Hart, they have not put forward a cost claim nor the necessary supporting details in this regard:

"To identify the proper costs to include in the claim, Claimants should have produced all historic costs by month and type. Evidence of payment and other accounting documents should have also been provided in support of their claim. In response to this request, Claimants submitted copies of numerous contracts, invoices, checks,

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<sup>1076</sup> Claimants' Reply Memorial, para 404 and Second Abdala Report, para 7.

<sup>1077</sup> Second Hart Report, para 217.

<sup>1078</sup> Second Hart Report, para 218.

<sup>1079</sup> Claimants' Reply Memorial, para 405.

<sup>1080</sup> Second Hart Report, para 166.

<sup>1081</sup> Claimants' Reply Memorial, para 406.

and receipts in an unorganized manner. Some of these were in English, some in Spanish, some handwritten, and some even illegible. Further, the amounts shown are not in a consistent currency, some quoted in US dollars and others in Costa Rican colones, which makes it more difficult to tie agreements, invoices, and payments. I note that it is highly unusual that Claimants have submitted no book or tax accounting for this investment, suggesting that the investment may not have been properly disclosed to U.S. taxing authorities."

1067. As Dr Hart points out, a cost approach as derived from the asset approach, mandates to take into account the actual amount spent on the project, and not, as Claimants try to rely, "...on the appraisal value of the land"<sup>1082</sup>;

"As explained in my First Report, a derivation of the asset approach, the cost approach, is commonly used for real estate valuations. The cost approach is "a general way of determining a value indication of an individual asset by quantifying the amount of money required to replace the future service capability of that asset." The cost approach measures **the actual amount spent on the project to date and evaluates the contribution to value made by these funds.** When applying the cost approach, there is an assumption that the value of the property has a direct correlation to the funds spent."<sup>1083</sup> (emphasis added)

1068. Claimants insisted in this regard that the appraisal of the land that should be taken into account should be the one performed by Mr Calderon. In the case that the appraisal of the land is taken into account for the cost approach methodology, the appraisal prepared by him is not in line with the business plan, since it was made prior to the latest business plan developed for the Las Olas Project.<sup>1084</sup>

1069. As demonstrated, Dr Hart's proposed methodology resists the criticisms made by Claimants, and should be applied by the Tribunal in light of the stage of the Las Olas Project.

### **3. The Tribunal should not be persuaded by the assumptions made by Dr Abdala**

1070. Claimants consider that Dr 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".<sup>1085</sup> As it will be demonstrated, each of the assumptions made by Dr Abdala have no basis, as Dr Hart correctly pointed out.

1071. First, Claimants allege that "...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

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<sup>1082</sup> Claimants' Reply Memorial, para 407.

<sup>1083</sup> Second Hart Report, para 217.

<sup>1084</sup> Second Hart Report, paras 188.

<sup>1085</sup> Claimants' Reply Memorial, para 413.

same as that of Los Sueños properties".<sup>1086</sup> Now Claimants try to disengage from Los Sueños, suggesting that Dr Abdala does not base any values in his model, and Dr Abdala acted in consequence in his Second Report:

"Dr. Abdala now tries to defend his 68% probability of success by discussing successful comparable resorts in the area. Interestingly, he now does not mention Los Sueños, which was discussed in the Abdala First Report numerous times."<sup>1087</sup>

1072. Perhaps persuaded by Respondent's arguments and Dr Hart first report that Las Olas is not comparable with Los Sueños, Claimants emphasize that the value of lots is calculated using data from Remax and El Místico and Málaga Residences developments.<sup>1088</sup>

1073. As Dr Hart highlights, El Místico and Málaga Residences developments could not be considered comparable to Las Olas from any point of view. Such differences were evidenced in detail in Table 7.4 in the Second Hart Report. The most striking difference among the properties is the development company of each of these:

"Claimants do not have the adequate track record to run a resort in Costa Rica, thus a probability of success of 68% is actually quite high. In contrast, both El Místico and Residencias Malaga are run by experienced and established real estate companies. As such, it is improper for Dr. Abdala to assume that Las Olas would be successful just because these other two properties have been successful in the area."<sup>1089</sup>

1074. With regards to Remax, Dr Abdala made several errors:

- Dr. Abdala converts the November 2015 Remax listings to May 2011 by using the inflation rate and the change in exchange rate. Dr. Abdala failed to consider the changes in the real estate market and/or other potential factors that could influence property values between the two time periods.<sup>1090</sup>
- From the REMAX webpage, Dr. Abdala used the average of USD/m<sup>2</sup> prices for lots with sizes less than 1,000m<sup>2</sup>, purportedly to be in line with his original average Las Olas lot size of 600m<sup>2</sup>. However, the price for these lots varied widely, from as low as \$46/m<sup>2</sup> to as high as \$779/m<sup>2</sup> and Dr. Abdala did not respond to this, rather he added irrelevant data to a sample. This does not make it "*more accurate*," it just increases the number of dubious inputs already being considered.<sup>1091</sup>

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<sup>1086</sup> Claimants' Reply Memorial, para 415.

<sup>1087</sup> Second Hart Report, para 196.

<sup>1088</sup> Claimants' Reply Memorial, para 416.

<sup>1089</sup> Second Hart Report, para 198.

<sup>1090</sup> Id., para 201.

<sup>1091</sup> Id., para 123.

- Dr Abdala's summary Table 15 lists the average house size at 279 m<sup>2</sup> with an average price of \$497,401. This results in an average price/m<sup>2</sup> of \$1,783, not the \$1,872 Dr. Abdala used as his average. Dr. Abdala states in his Supplemental Report that the value per m<sup>2</sup> of Table 15 is the result of averaging the price per m<sup>2</sup> of all properties included in the sample, and that Dr Hart's calculation only divides the average house price by the average house size, which is less accurate. On the contrary, a weighted average, weighted by square meterage, is more accurate according to Dr Hart, and thus Dr. Abdala's calculation is too simplistic and does not factor in differences in prices based on square meterage.<sup>1092</sup>
- Dr Abdala tried to show the costs associated with renting the properties relying on his REMAX listing. Nevertheless, said listing does not show expenses of the home owners or the resort developers.<sup>1093</sup>
- Dr Abdala calculated a 2011 condo price point of \$318,248 by averaging for-sale condo data pulled from REMAX. Although the average size of his "comparable" REMAX condo is 169m<sup>2</sup>, it appears as though Dr. Abdala didn't accurately review his sample. For example, two of the condos in his sample are listed at 1,790m<sup>2</sup> and 1,850m<sup>2</sup>. Clearly, these condos are either: (1) listed erroneously, or (2) actually show square footage. Assuming the latter, the average size of Dr. Abdala's "comparable" REMAX condo is 119m<sup>2</sup>, or 27% smaller than Dr. Abdala's assumed area.<sup>1094</sup>

1075. From the above mentioned it can be concluded that Claimants' and Dr Abdala's reliance on data from Remax is not accurate and thus, it should not be used in any calculation of the lots in Las Olas Project.

1076. Second, Claimants disregard Mr Hart's critique regarding Dr Abdala's reliance on a 2010 business plan prepared by Claimants, stating that "...it is reasonable that the business plan for a real estate development would change".<sup>1095</sup> Claimants' assertion does not emerge as a constructive criticism, and for such reason, Respondent stands by its arguments developed in its Counter Memorial in relation to the inappropriateness basis of the December 2010 Business plan.<sup>1096</sup>

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<sup>1092</sup> Id., para 139.

<sup>1093</sup> Id., para 142.

<sup>1094</sup> Id., para 147.

<sup>1095</sup> Claimants' Reply Memorial, para 417.

<sup>1096</sup> Respondent's Counter-Memorial, paras 683-685.

1077. Third, Claimants contend that Dr Abdala did not rely on the figures contained within the December 2010 Business Plan for the sales of lots and that he performed an independent analysis using market data.

1078. Dr Abdala now affirms that he did not base his pricing estimates on the business plan but on market values that resulted from his independent research, and that he finds that "...more suitable to reflect the prices at which the project would be able to sell the lots, than what the management had forecasted."<sup>1097</sup> As Dr Hart explains:

"...this statement directly contradicts Dr. Abdala's contention that the business plans evolved to adjust to the business environment at the time. If this was true, the 2010 business plan would be more accurate than market prices from questionably comparable properties five years later. Dr. Abdala's decision to pick and choose what information he sources back to the 2010 business plan discredits any assumptions he makes and calls into question the reliability of his model as a whole. If Las Olas were a legitimate development developed by actual developers, the business plan would have been supported by a pricing file showing contemporaneous property values, along with a long list of paid, committed pre-sales, and we would not be left with Dr. Abdala's ill-matching attempt to value the lots. However as is clear, Las Olas was a speculative "friends and family" venture, not the work of professional developers with an understanding of market prices and real track records of success."<sup>1098</sup> (emphasis added)

1079. Fourth, Claimants contend that Dr Abdala did not fail in taking into account the infrastructure costs, and on the contrary, he 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.<sup>1099</sup>

1080. Dr Abdala states in this regard that: "[a]s with [lot] prices, I did not base my cost estimates on the business plan, but rather on the development budget prepared by Engineer Manuel Calvo Navarro in October 2010 for the infrastructure costs necessary to convert the land into individual lots for sale."<sup>1100</sup> In order to estimate the infrastructure costs, he subtracted \$2.9 million of costs that had already been incurred prior to 2011 from the total budget as outlined by Mr. Calvo of \$8.9 million.<sup>1101</sup> As correctly pointed out by Dr Hart, this is an example where Dr. Abdala deviates from the business plan, even though he argues, as stated above, that the plan evolved and adjusted to the market.<sup>1102</sup>

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<sup>1097</sup> Second Abdala Report, para 35.

<sup>1098</sup> Second Hart Report, para 125.

<sup>1099</sup> Claimants' Reply Memorial, para 419.

<sup>1100</sup> Second Abdala Report, para 52.

<sup>1101</sup> Second Abdala Report, para 52.

<sup>1102</sup> Second Hart Report, para 132.

1081. Fifth, as regarding the profit margin calculated by Dr Abdala, Claimants contend that "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."<sup>1103</sup>

1082. In the Second Abdala Report, he compared the implicit sales value per room of the Las Olas Hotel to an HVS Consulting and Valuation Services review of 16 hotel transactions in Mexico and Central America between 2005 and 2010.<sup>1104</sup> The HVS Report states that these are hotels that bear comparison to the subject property in one or more key areas. In fact, the properties are deemed comparable to the Panamanian hotel Dr. Abdala referred to in his First Report and not to the Las Olas Hotel itself:

**"It does not appear as though Dr. Abdala conducted any due diligence to determine whether or not these particular hotels are at all comparable to the planned hotel at Las Olas.** According to Dr. Abdala, "the average value per room was US\$ 228,324 and the median was US\$ 182,508. The implicit value per room for the Las Olas hotel as a going concern is 22% lower than the average and 2.4% lower than the median value per room of this set of comparables." **Based on Dr. Abdala's model, however, it appears as though he, once again, applied questionable calculations to arrive at his figures noted above.** For one, he grouped three separate Hilton hotels together for no apparent reason. Fixing this error alone drops the average value per room to \$209,679 and the median to \$131,612. Additionally, calculating a weighted average value per room, weighted by the number of rooms, results in an average value of \$198,169. Using the updated figures, the implicit value per room for the Las Olas hotel is 35% higher than the median value per room and only 10% lower than the weighted average."<sup>1105</sup> (emphasis added)

1083. Sixth, Claimants allege that the only reasons that Dr Hart provides as to the critique of the calculation of the probability of success are the source of the data —to which Dr Abdala alleges that the US data is the only appropriate data —, and the time period use —to which he alleged that the six years survival rate is very consistent over time.<sup>1106</sup>

1084. As stated above, there are many flaws in Dr Abdala's calculation as to the probability of success, the use of the US source data and the six years of survival rate are just examples. In this regard, Dr Abala based his analysis on US data, and insisted on a "*broad statistical evidence of survivorship*."<sup>1107</sup> However, he was not able to present new sources and "...continues to rely upon data from the Bureau of Labor and Statistics (which is U.S. data that is not comparable to data for businesses in Costa Rica)."<sup>1108</sup> He admits that "[a]lthough data on survival rates on real estate industry that would be specific to Costa Rica would be

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<sup>1103</sup> Claimants' Reply Memorial, para 420.

<sup>1104</sup> Second Abdala Report, para 65.

<sup>1105</sup> Second Hart Report, para 167.

<sup>1106</sup> Claimants' Reply Memorial, para 421.

<sup>1107</sup> Second Abdala Report, Section II.3.1

<sup>1108</sup> Second Hart Report, para 195.

preferable to assess Las Olas' probability of success, such data, in the form and granularity presented by the BLS, is not available for Costa Rica."<sup>1109</sup> Thus he simply reiterates his analysis from the Abdala First Report.

1085. In addition, he asserts that he was unable to find any real estate price index specific to Costa Rica or any other private or public sources showing historic data on Costa Rica's real estate market.<sup>1110</sup> Dr Hart correctly points out that:

**"He states he was unable to find any real estate price index specific to Costa Rica or any other private or public sources showing historic data on Costa Rica's real estate market, thus he settled with general inflation and a devaluation rate.** Given the global financial crisis, the market for property lots was affected by more than just inflation and currency devaluation. Further, it is very common for real estate inflation to greatly differ from the cost of normal everyday goods such as food and energy that drive much of inflation."<sup>1111</sup> (emphasis added)

1086. This demonstrates the weaknesses of Dr Abdala's calculation of the probability of success, and only reconfirms that it is speculative and flawed.

1087. Lastly, Claimants points out that Dr Abdala updated a number of assumptions, without any reasonable explanation:<sup>1112</sup>

- "changed the 10% discount on listing prices to 7.8%": in support of this modification, Dr Abdala expresses that he "... expanded [his] research and found more precise information on the relationship between listing prices and actual selling prices in 2015..."<sup>1113</sup>. As Dr Hart affirms, Dr. Abdala's "*expanded*" research consists of one source of information, *Coldwell Banker's Florida Keys Real Estate Market Comparison*, which provides sales properties located in an old established town in an exclusive part of Florida, which are not comparable to brand new pre-operational developments at Las Olas and Costa Rican properties in general.<sup>1114</sup>
- "increased the average size of the lots to 649 m2": Dr Abdala expanded the average lot size based on the Master Site Plan.<sup>1115</sup> Thus, Dr. Abdala did not use the December 2010 business plan to calculate sales, which contradicts his

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<sup>1109</sup> Second Abdala Report, para 97.

<sup>1110</sup> Second Abdala Report, para 32.

<sup>1111</sup> Second Hart Report, para 122.

<sup>1112</sup> Claimants' Reply Memorial, para 422.

<sup>1113</sup> Second Abdala Report, paras 113, 115.

<sup>1114</sup> Second Hart Report, para 127.

<sup>1115</sup> Second Abdala Report, para 118.

statements about the business plan evolving to adjust to the current business environment.<sup>1116</sup>

- "used new timeshare data from a report specific to Costa Rica": as explained by Dr Hart, the data Dr. Abdala used is between 26-35% lower than what he used in his First Report. Furthermore, his lower prices are the amounts he increases by retail inflation for the time period from 2015 onward. Thus, "[t]his goes to show how unreliable information based on U.S. vacation properties is when looking at properties in Costa Rica, and discredits any analysis performed by Dr. Abdala based solely on U.S. data."<sup>1117</sup>

1088. In sum, the adjustments Dr Abdala made demonstrate once again the inconsistencies and drawbacks in his analysis, which reinforces Respondent's arguments that the cost basis approach should be applied by the Tribunal.

#### **4. Dr Hart's valuation based on the lack of proper documentation provided by Claimants**

1089. Further, Claimants consider that *"Mr Hart's approach is not to engage in the substance of Dr Abdala's valuation and to provide his own valuation" and that "[h]e has therefore provided the Tribunal with no assistance in valuing the Claimant's losses."*<sup>1118</sup> Dr Hart engaged in the calculation of the compensation although based in the lack of proper documentation provided by Claimants.

1090. It is Claimants' burden to present a proper claim and provide proper support and documentation:

"Claimants have not provided the necessary documentation to perform a damages calculation under the cost approach. Instead, they provided hundreds of pages of copies of agreements, invoices, checks, receipts, etc., resembling a system of shoebox accounting. I have not seen complete financial statements for any of Claimants' entities"<sup>1119</sup>

1091. Although Claimants did not achieve with their burden of proof, Dr Hart made his best efforts in order to calculate the amount of compensation:

"Among the documents provided, I was able to identify an option agreement for the sale and purchase of the property as well as a sale-purchase agreement and share endorsement and transfer agreement. I note that the latter does not contain any signatures. These documents support Mr. Aven's statement that the original purchase price for the

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<sup>1116</sup> Second Hart Report, para 125.

<sup>1117</sup> Second Hart Report, para 155.

<sup>1118</sup> Claimants' Reply Memorial, para 414.

<sup>1119</sup> Second Hart Report, para 229.

entire property was \$1,647,000. I also identified a total of \$1,840,385 in costs which seem to be legitimately related to the Las Olas Project."<sup>1120</sup>

"...I am only able to confirm the original purchase price and the costs mentioned above. Thus, my best estimate of invested costs is the sum of the original purchase price plus the \$1.8 million in costs I identified, amounting to \$3,487,385."<sup>1121</sup>

**5. In any event, any compensation should be reduced by the value of properties Claimants do not own**

1092. Claimants misleading representations regarding the ownership of the land actually owned by the Enterprises has a substantial effect on the valuation of their alleged losses.

1093. The Second Hart Report shows that:

"The map of Las Olas resembles the shape of a funnel, with the tip of the funnel channeling towards the beach. As such, it can be assumed that the most valuable lots are those towards the bottom half of the funnel. However, many of the lots in this area are actually not owned by Claimants. Specifically, the two large areas in the tip of the funnel, are among those lots not owned by Claimants. Claimants have admitted not owning the commercial/tourist site and there is a contention as to whether or not Claimants own the La Canícula concession area. The effect of Claimants not owning these lots must be taken into account when determining damages based on the cost method, as any costs related to these lots should be excluded.

Given that Claimants have not provided detailed costs per lot, I can estimate that the damages must be reduced by at least 22%, based on the proportion of the square meters of these non-Claimant owned lots. Further, I believe that the damages must be reduced by even more than 22%, assuming that these lots are more valuable than most others on the property given the specific locations. However, I cannot quantify an increase to this percentage with the data provided. **Thus, my final estimate of damages is \$2,720,160.**"<sup>1122</sup> (emphasis added)

**6. The valuation date for the calculation of damages has to be May 2011**

1094. Claimants allege that *"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."*<sup>1123</sup>

1095. Respondent reaffirms that the date of valuation for the calculation of damages has to be May 2011, which is the date on which Claimants considered the suspension of works in the

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<sup>1120</sup> Second Hart Report, para 230.

<sup>1121</sup> Second Hart Report, para 231.

<sup>1122</sup> Second Hart Report, para 232-233.

<sup>1123</sup> Claimants' Reply Memorial, para 411.

Las Olas Project took effect and not, as Claimants intended, the date of the award, which now Dr Abdala updated to July 2016.<sup>1124</sup>

1096. It is controverting that Claimants contend on the one hand that "...Respondent has failed to put forward, through Mr Hart, any critique of Dr Abdala's valuation as at that date"<sup>1125</sup> and on the other that this question "...is quite clearly a legal question, not a question of accounting and finance".<sup>1126</sup> If it was truly just a legal question, how do Claimants expect a critique from Mr Hart?

1097. In effect, the valuation date taken into account by Dr Abdala was under the instructions of V&E without any analysis in his First and Second Report. As pointed out by Dr Hart:

"...he did not comment about this in his Supplemental Report. Dr. Abdala simply reiterated that V&E instructed him to use two alternative valuation dates."<sup>1127</sup>

1098. The date of valuation in the case at hand has to be as of May 2011, as explained by Dr Hart in his report:

"...if Claimants claim that Costa Rica caused them to halt all further works on the Las Olas Project as of May 2011, this date should be used to value the project. Per Dr. Abdala's own explanation, he estimated the FMV of the project just prior to the alleged Measures, which would be May 2011, not July 2016. There is no relation between the July 2016 valuation date and the alleged bad act that caused the claimed damages."<sup>1128</sup>

"Claimants attempt to value Las Olas at a current date is baseless and simply serves to increase the damages claimed, as Dr. Abdala's assumptions result in a higher value for the project prior to the addition of any pre-judgment interest. To properly update the valuation to a current date, pre-judgment interest should be added from the valuation date through the award date. I will discuss pre-judgment interest in Section 7.8 below."<sup>1129</sup>

1099. Therefore, Dr Hart's explanation supports Respondent's argument that the valuation date to determine what the investment was worth is the day where the alleged measures by Costa Rica were taken. Since Claimants allege that Costa Rica caused them to suspend their works on Las Olas in May 2011, said date should be the valuation date used in any related damages analysis and the calculation of interest until the date of the award.

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<sup>1124</sup> Second Abdala Report, Section III.

<sup>1125</sup> Claimants' Reply Memorial, para 411.

<sup>1126</sup> Ibid.

<sup>1127</sup> Second Hart Report, para 121.

<sup>1128</sup> Second Hart Report, para 122.

<sup>1129</sup> Second Hart Report, para 123.

**B. The amount to be compensated should be reduced for Claimants' contributory negligence**

1100. Claimants should bear part of the damages for which they claim compensation, and therefore, a percentage of the amount to be awarded should be deducted. It is a well-established principle in international law that the amount of damages can be reduced if the injured party has himself or herself acted negligently contributing to the occurrence of damage:

"Where the claimant's fault has materially added (ie, contributed) to the loss or damage sustained by the claimant due to the conduct of the respondent, the amount of compensation must be reduced accordingly. This is a manifestation of the theory of concurrent causes and the position that the respondent is to be held liable only for the result of his own conduct."<sup>1130</sup>

1101. This has been recognized by the ILC Articles on State Responsibility, which recognize the relevance of contributory fault in the determination of reparation in Article 39:

"In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."

1102. In the context of international investment law, the concept of contributory fault has been taken into account by tribunals in determining damages. In *MTD v Chile*,<sup>1131</sup> the arbitral tribunal found that the respondent State had violated its obligation to fair and equitable treatment as contained in the applicable BIT, but for the calculation of damages, it considered that the behavior of the investor had not been that of a "wise investor."

1103. As explained by Ripinsky:

"In that case, the arbitral tribunal had to assess the role of the investor's allegedly negligent failure to take into account relevant Chilean urban regulations and policies. It transpired from the facts of the case that the investment project (building a new town in Chile), despite being approved by the Chilean Foreign Investment Commission, did not comply with Chilean urban regulations. Hence the investor eventually failed to secure a permit necessary to begin construction. While the Tribunal found that the respondent State's conduct was in breach of the fair and equitable treatment standard, **it also recognized that the investor had contributed to its injury by failing to undertake adequate 'due diligence' of its own, in order to investigate whether**

<sup>1130</sup> **RLA-111**, Sergey Ripinsky, "Assessing Damages in Investment Disputes: Practice in Search of Perfect" (2009) 10(1) *Journal of World Investment and Trade* <<http://ssrn.com/abstract=1547089>> accessed 25 October 2016, 15.

<sup>1131</sup> CLA-59, *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case No. ARB/01/7, 25 May 2004, Award, para 242.

**it would be able to obtain the various licenses and approvals needed for the investment to proceed.**"<sup>1132</sup> (emphasis added)

1104. As in the case of *MTD v Chile*, Claimants had contributed to the alleged damages. In effect, and as stated above, their own conduct led them to the situation they are claiming for:

- Claimants failed to undertake an appropriate 'due diligence' by hiring regrettable technical and legal local professionals;
- Claimants concealed information from Costa Rican agencies in relation to the existence of wetlands and forests;
- Claimants abandoned the criminal proceedings in Costa Rica, and did not challenge, when they had the opportunity, the TAA injunction.

1105. If such conducts—which were already described above— were not sufficient for the Tribunal to consider the claim unfounded, then it must be taken into account in order to make Claimants to bear part of the damages for which they claim compensation.

**C. Mr Aven is not entitled to compensation for moral damages**

1106. In order to support their claim for moral damages in favor of Mr Aven, Claimants rely on three exceptional cases that awarded moral damages to investors: *Benvenuti & Bonfant v. Congo*, *Desert Line Projects LLC v. Yemen* and *Al-Kharafi & Sons v. Libya*.<sup>1133</sup> None of these cases are applicable to Mr Aven's claims because:

- The decision in *Benvenuti & Bonfant v Congo* cannot be transferable as a precedent because it was decided *ex aequo et bono* by the agreement of the parties and, therefore, the tribunal awarded moral damages as an equitable remedy for undefined measures against the claimant;<sup>1134</sup>
- The tribunal in *Desert Line v Yemen* specifically awarded moral damages because (i) the investor was exposed to physical duress and (ii) Yemen's breach of the treaty was considered malicious.<sup>1135</sup> It is undisputed that Mr Aven has never been subject to physical duress by any of Respondent's official and neither the conduct of Costa Rica be considered malicious or willful; and

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<sup>1132</sup> RLA-111, 16 .

<sup>1133</sup> Claimants' Memorial, paras. 482-484.

<sup>1134</sup> CLA-25, S.A.R.L. *Benvenuti & Bonfant v People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980.

<sup>1135</sup> CLA-85, *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

- The tribunal in *Al-Kharafi & Sons v. Libya* cannot be considered as a precedent because the dispute was resolved exclusively applying Libyan law and not public international law. More specifically, the tribunal based its award for moral damages by solely relying on the Libyan Civil Code and did not rely on any source of international law.<sup>1136</sup>
1107. Thus, neither *Benvenuti* nor *Al-Kharafi* reflect or contain any applicable standards under international law that the Tribunal could follow to decide on this claim.
1108. Claimants further argue that the "exceptional circumstances" test is not applicable to the compensation of moral damages but only to determine the form or degree of reparation due and quote an opinion of Borzu Sabahi.<sup>1137</sup> However, Claimants contradict themselves because *Desert Line v. Yemen*, in which they rely, applied the "exceptional circumstances test" to award intangible damages to the claimant in that case.
1109. Respondent reaffirms that, the "exceptional circumstances" test is the applicable legal standard for the determination of damages in investment arbitration. In establishing this test, the tribunal in *Lemire v Ukraine* analyzed the decisions in *Desert Line v Yemen*, the *Lusitania* cases and *Siag v Egypt*. Further, the *Lemire* test was also adopted by the tribunal in *Tza Yap Shum v Peru*, which expressly acknowledged that *Lemire* had established "*the international standard to determine which circumstances constitute grounds for moral damages.*"<sup>1138</sup>
1110. In both *Lemire* and *Tza Yap Shum*, the tribunals concluded that on the facts before them, the requirements under the "exceptional circumstances" test were not met by the claimants.
1111. Under *Lemire*, "both cause and effect [should be] grave or substantial." As to the cause, that is any adverse state action, the tribunal in *Lemire* understood that those are situations that "*contravene the norms according to which civilized nations are expected to act.*"<sup>1139</sup> In its Counter Memorial, Respondent has already submitted how Costa Rica's actions towards the enforcement of its environmental laws, acted as any other civilized nation would.

<sup>1136</sup> CLA-110, *Mohammed Abdulmohsen Al-Kharafi & Sons Co. v Libya and others*, In accordance with the Unified Agreement for the Investment of Arab Capital in the Arab States, Final Arbitral Award, 22 March 2013.

<sup>1137</sup> Claimants' Memorial, para. 486.

<sup>1138</sup> RLA-82, *Mr Tza Yap Shum v The Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 281.

<sup>1139</sup> CLA-102, *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, para. 333.

1112. Claimants also oppose Respondent's reference to *Europe Cement*.<sup>1140</sup> Respondent acknowledges that the facts of that case were different from Mr Aven's situation but Respondent never intended to apply those facts to Mr Aven's case as Claimants suggest. Respondent referenced the reasoning of the tribunal in *Europe Cement* to show how the tribunal in that case embraced the "exceptional circumstances" test to address a moral damages claim in an investor-state arbitration and how it considered physical duress as one of few grounds to justify an award for moral damages.<sup>1141</sup>

**1. Costa Rica's actions do not qualify as "exceptional circumstances"**

1113. None of the "situations" faced by Mr Aven can be considered to meet the criteria set out in *Lemire* or any other case where the investor was awarded moral damages such as *Desert Line*, where the tribunal specifically awarded moral damages because (i) the investor was exposed to physical duress and (ii) Yemen's breach of the treaty was considered malicious.<sup>1142</sup> The holding in *Desert Line* has also been considered to require that the conduct of the state is egregious because of the Tribunal's finding that the state's actions were malicious and fault-based.<sup>1143</sup> While Claimants rely on *Desert Line*, they have not proved that Costa Rica's conduct was *malicious*.

1114. Respondent's treatment of Mr Aven was reasonable, rational and legitimate. In paragraph 427 of their Reply Memorial, Claimants' list the following actions as the alleged Respondent's actions that should justify a finding for moral damages in favor of Mr Aven:

"[Mr Aven] 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."

1115. As explained by Mr Martínez and Judge Chinchilla,<sup>1144</sup> the prosecutor had no duty to challenge the permits before the administrative seats because that is out of his scope of authority.

"[T]he 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."

1116. Judge Chinchilla has confirmed that Mr Martínez had plenty of elements to prove the intent of Mr Aven to commit the crime he was accused of. Further, the judge of the intermediate stage, agreed with Mr Martínez and allowed the case to trial. In any event, this is a decision that only a criminal law judge of Costa Rica can decide on and has not done so yet.

<sup>1140</sup> Claimants' Reply Memorial, paras. 435-236.

<sup>1141</sup> RLA-27, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, paras 177-181..

<sup>1142</sup> **CLA-85**, paras. 284-291.

<sup>1143</sup> *Id.*, para. 290.

<sup>1144</sup> Expert Report of Rosaura Chinchilla, para. 45.

"The prosecutor nonetheless pursued his case [to challenge the permits]. Further, when all the witnesses had given evidence 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. In doing so, he gave himself a second chance at the case, and subjected Mr Aven to additional and unnecessary uncertainty and stress."

1117. Mr Martínez's decision not to waive the 10-day rule relied on valid case law and the representative of the Attorney General's Office further agreed. Judge Chinchilla has also confirmed that Mr Martínez decision was not capricious or arbitrary as Claimants allege.

"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."

1118. The INTERPOL notice was reasonable given that Mr Aven was being accused of committing a *"serious criminal offence"* as Claimants themselves admit. Judge Chinchilla has explained that under the INTERPOL Regulations, the criminal offense that Mr Aven is accused of, merited a request from the OATRI to INTERPOL to issue a red notice against Mr Aven.<sup>1145</sup>

1119. Finally, Respondent points to the recently issued award in *Pey Casado v Chile*, where the tribunal rejected the claimant's claims for moral damages, even when those involved *"treatment at the time of the coup d'état [including character assassination of Mr Pey Casado], his exile abroad, and a subsequent campaign of denigration."*<sup>1146</sup> Mr Aven's situation clearly falls short of any of these circumstances, where a tribunal denied any moral damages to the claimant.

## **2. Claimants have not submitted appropriate evidence to prove any moral damage caused to Mr Aven**

1120. Claimants allege that Respondent's actions have damaged Mr Aven's health and reputation.

1121. As to the first, Respondent denies the existence of any causation between its agencies' acts and any effects on Mr Aven's health. While Respondent may acknowledge that Mr Aven might have suffered from stress or anxiety arising out of the criminal trial and the INTERPOL notice, those are not attributable in any way to Costa Rica or any of its agencies. It was Mr Aven's own wrongdoing that caused him to be criminally prosecuted and his fleeing away from Costa Rica justified the issuance of the INTERPOL notice.

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<sup>1145</sup> Expert Report of Rosaura Chinchilla, para. 86.

<sup>1146</sup> **RLA-91**, *Victor Pey Casado and Foundation "Presidente Allende" v The Republic of Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016, paras. 241-243.

1122. Also, Mr Aven's evidentiary proof of his alleged mental and physical health is not capable in itself to support an award on moral damages. Mr Aven's self-serving recount of alleged mental anguish suffered later supported by his psychiatrist do not rise to the standard required under international law. As Claimants admit in paragraph 437 of their Reply Memorial, the tribunal in *Arif v. Moldova*, expressly dismissed the investor's claims for moral damages when the state's action had merely "*provoked stress and anxiety*."<sup>1147</sup>
1123. The tribunal in *Tza Yap Shum v Peru* disregarded a certification that the claimant suffered from hypertension two years after the alleged adverse state actions, holding that this fact was not serious enough to constitute support of a claim for moral damages.<sup>1148</sup> Similarly, Claimants have submitted a letter from Mr Cosma, who states that Mr Aven initiated treatment on June 23, 2013, also two years after the "shut down of the project," and that he experienced "*anxiety, felt restless, on edge, easily fatigued, had difficulties in concentrating and was not sleeping well*."<sup>1149</sup>
1124. Second, as to the alleged damages caused to Mr Aven's business reputation, tribunals have looked at the commercial reputation of the investor, prior to the alleged adverse state action, to award moral damages. Claimants have showed no proof of Mr Aven's business reputation or renown in the development of real estate projects but for Mr Aven's self-serving testimony.
1125. Finally, the Tribunal cannot consider Mr Aven's alleged Google missed opportunity as part of any compensation for moral damages. In his First Witness Statement, Mr Aven states that:
- "A company that I am associated with owns valuable rights to a very popular application for iPhone and android devices. I had an opportunity to form a partnership with Google and Facebook that would have resulted in millions of downloads of this application. The application is currently selling in the app stores for US \$19.99. Google and Facebook could have earned US\$ 4.00 on each sale and our company could have earned US\$ 12.00. Projections by Google indicated they could have sold 20 million downloads a year."<sup>1150</sup>
1126. The company Mr Aven is referring to is Litchfield Associates, one of the multiple businesses Mr Aven engaged in as an Italian national. In Claimants' second submission,

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<sup>1147</sup> RLA-28, *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 615.

<sup>1148</sup> RLA-82, *Mr Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, 11 July 2011, Award, para. 283-284.

<sup>1149</sup> C-270.

<sup>1150</sup> First Witness Statement of David Aven, para. 244.

Mr Valecourt explains that in the summer of 2012 he was approached by Mr Aven about an idea to partner up with Google to promote a Bible app.<sup>1151</sup>

1127. Mr Aven's expectations and projections of this alleged missed opportunity are totally exaggerated and overstated as explained by Dr Tim Hart:

"Samuel Aven, David Aven's brother, did not provide a witness statement for this arbitration. Samuel Aven is the Chairman of the Board of Litchfield Associates, a media company whose sole purpose was to make available digital downloads of the bible. **He signed an agreement dated 15 August 2015 with David Aven to promote the sale of the "YouBible App" on the Google Play platform.** I note that this agreement is suggesting that it would be a new deal with Google, yet the agreement is dated in August 2015 and the app was first available in Google Play on 6 March 2015, 5 months before the proposed deal. **I also note that it took just over one year of being available on the Google Play store for the app to achieve even 1,000 downloads, which is quite contrary to David Aven's statement that it would have a minimum of 40 million downloads a year. It is my opinion that this was an absurd expectation as there are hundreds of free versions of the Bible available on the Google Play store. I also note that the 20% commission David Aven was supposed to receive was not a special agreement, as Litchfield Associates offers the same deal to anyone who promotes the sale of their product on an independent website.**"<sup>1152</sup> (emphasis added)

1128. This is exactly why, loss profits claimed in moral damages contexts have been labeled as speculative in public international law.<sup>1153</sup> Claimants' intent to profit from a bogus deal must be dismissed.

1129. In conclusion, neither Respondent's conduct nor Mr Aven's alleged damages to his health and reputation support an award for moral damages.

#### D. Interest

1130. Claimants allege that the applicable interest rate would be 6.8% from May 2011 to July 2016.<sup>1154</sup> They suggest that they changed the calculation slightly to take into account both the expected increase in the value of the land and the opportunity cost of doing business.<sup>1155</sup> There is an inconsistency, however, in their prayer for relief, where they request post-award interest at the WACC rate calculated by Dr Abdala. Looking back at Table XI in Second Abdala Report, this figure is 7.6%, not 6.8%, contradicting themselves.

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<sup>1151</sup> Witness Statement of Ohryn Valecourt, para. 7.

<sup>1152</sup> Second Hart Report, para. 83.

<sup>1153</sup> **RLA-84**, Ingeborg Schwenzer, Moral Damages in International Investment Arbitration. in Stefan Michael Kroll, Loukas A. Mistelis, Pilar Perales Viscasillas and Vikki M. Rogers (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 425.

<sup>1154</sup> Claimants' Reply Memorial, para 444.

<sup>1155</sup> Claimants' Reply Memorial, para 443.

1131. Claimants keep requesting an interest rate which is inflated and inappropriate. As stated by Dr Hart:

"In my opinion, all three of the rates are inflated and inappropriate. As I expressed in my First Report, since the DR-CAFTA does not specify what interest rate should be applied in the event compensation is due to either party, I would recommend the 10-year U.S. Treasury Rate or the 6-month LIBOR+2%."<sup>1156</sup>

1132. As demonstrated by Dr Hart in his Second Report, the application of any of the rates proposed by Dr Abdala would artificially increase damages.<sup>1157</sup>

1133. In addition, Claimants are also requesting that they be granted post-award interest, at the 7.6% WACC calculated by Dr Abdala, accruing from the date of the award until payment is received.<sup>1158</sup> However, Dr Hart explains that he has never been involved in a case where the WACC was awarded as post-award interest, and thus finds this request inadequate.<sup>1159</sup> In effect, in *Tenaris v Venezuela*<sup>1160</sup> (where Claimants' expert served as the damages expert) the Tribunal rejected an interest based on WACC.

1134. Thus, Claimants should only be compensated for pre-award interest at the 10-year U.S. Treasury Rate or the 6-month LIBOR+2%.

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<sup>1156</sup> Second Hart Report, para. 214.

<sup>1157</sup> Second Hart Report, para. 215.

<sup>1158</sup> Claimants' Reply Memorial, Payer for relief (8)

<sup>1159</sup> Second Hart Report, para 216.

<sup>1160</sup> RLA-35.

## XI. RESPONDENT IS ENTITLED TO CLAIM THE RESTORATION OF THE LAND

1135. In its Counter Memorial, Respondent contends that Claimants undertook works that adversely impacted the Project Site, causing considerable environmental damage.<sup>1161</sup> Hence, Respondent requests the Tribunal to find that Claimants ought to repair the damages caused by their activity.<sup>1162</sup>
1136. Claimants are now trying to escape from their unquestionable liability arguing that the DR-CAFTA does not encompass counterclaims,<sup>1163</sup> and that in any event, Respondent failed to evidence that they caused damage to the Project Site.<sup>1164</sup>
1137. Conversely, Respondent submits that (A) Chapter 10 of the DR-CAFTA envisages for counterclaims raised by respondent States; and (B) Respondent has proved the existence of damages to the ecosystems on the Project Site. Therefore, Respondent is entitled to claim the restoration of the land which Claimants ought to repair.

### A. Chapter 10 of DR-CAFTA envisages for counterclaims by respondent States

1138. Claimants allege that DR-CAFTA do not contemplate counter-claims In this sense, they contend that from the reading of Article 10.26 DR-CAFTA, particularly paragraphs 1 and 8, it could be inferred that "...a claimant-investor cannot also be construed as a 'respondent'"<sup>1165</sup> and that "[i]t is thus impossible for a 'respondent'...to be anything other than a host State."<sup>1166</sup>
1139. It is striking how Claimants are so brave to assert that from said paragraphs it should be interpreted that counterclaims are not allowed under the Treaty, when a careful reading demonstrates that they are encompassed by DR-CAFTA. It is pertinent then to focus on the wording of these provisions.
1140. Article 10.26.1. sets forth that:
- "Where a tribunal makes a final award **against a respondent**, the tribunal may award, separately or in combination, only:
- (a) monetary damages and any applicable interest;
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

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<sup>1161</sup> Counter-Memorial, paras. 647-655.

<sup>1162</sup> Id., paras. 656-658, 661-662.

<sup>1163</sup> Claimants' Reply Memorial, paras. 446-448.

<sup>1164</sup> Id., para. 449.

<sup>1165</sup> Id., para. 446.

<sup>1166</sup> Id., para. 447.

A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules." (emphasis added)

1141. In turn, Article 10.26.8 provides that:

"If the **respondent fails to abide by or comply with a final award**, on delivery of a request by the Party of the claimant, a panel shall be established under Article 20.6 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) in accordance with Article 20.13 (Initial Report), a recommendation that the respondent abide by or comply with the final award." (emphasis added)

1142. None of the paragraphs abovementioned qualifies the "respondent" as the investor or the host State. If the intention of the DR-CAFTA Parties would have been to completely exclude counterclaims by host States, they would have replaced the "respondent" as the "host State." In this regard, it has to be stressed that in cases of counterclaims, the roles of the parties to the proceedings are swapped since the counterclaim is raised as an independent claim, and not as a defense.<sup>1167</sup> Then, the respondent role could be perfectly played by both the investor and the host State. In addition, "the Party of the claimant" is not conclusive to consider that it refers only to the investor.

1143. Thus, the "respondent" in Article 10.26.1 can effortlessly reflect both the investor and the host State. Claimants' allegation that *"the Tribunal would be bereft of the necessary authority to award the contrived restitution"* has no legal basis, because much to the contrary, the wording of Article 10.26.1 does not exclude counterclaims.

1144. Article 10.20.7 of the DR-CAFTA also supports the Tribunal jurisdiction to entertain the counterclaim brought by Respondent.

1145. Claimants consider that Article 10.20.7 "...does not 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."<sup>1168</sup>

1146. Claimants explained in their Reply what would be the purpose of the clause, however, they did not advance any argument on Respondent's position that its counterclaim does not fall in the exception of the Treaty. Indeed, if the parties to the DR-CAFTA decided to include an

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<sup>1167</sup> **RLA-79**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Counterclaims), Order of 17 December 1996, ICJ Rep. 1997, 256, para 27.

<sup>1168</sup> Claimants' Reply Memorial, para. 448.

express provision dealing with the kind of claims that are excluded, it can logically be inferred that counterclaims which do not fall within the exception are within the jurisdiction of the Tribunal.

1147. Furthermore, reasons of procedural economy and efficiency justify the jurisdiction of the Tribunal on counterclaims. In this sense, it has been considered that in rejecting counterclaims, tribunals:

"[...] perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law."<sup>1169</sup>

1148. In sum, there are no grounded objections as to the jurisdiction of this Tribunal to decide the counterclaim submitted by Respondent, since the text of the DR-CAFTA authorizes such claims

**B. Respondent has proved the existence of damages to the ecosystems on the Project Site**

1149. Claimants merely contend that "*Respondent has failed to show (beyond mere assertion by Mr Erwin in his Expert Report) that the Claimants have caused damage to the environment*" and that "*[...] Respondent has made no attempt to explain how any of the allegedly detrimental activities...can be attributed to the Claimants' actions, nor it has evidenced the alleged environmental harm as a result.*"<sup>1170</sup>

1150. Much to the contrary, the First and Second KECE Reports speak from themselves as to damage caused to the Project Site by Claimants.

1151. First, KECE detailed the works that were performed by Claimants on the Project Site that adversely affected the Las Olas Ecosystem by terracing, draining and refilling wetlands, and by cutting trees from the forest,<sup>1171</sup> all of which have a great impact on the Project Site, causing considerable environmental harm.<sup>1172</sup> If it were not for Costa Rica, acting under the precautionary principle, timely suspending the project, the damage would have been irreparable.

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<sup>1169</sup> **RLA-99**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Separate Opinion of Michael Reisman, 28 November 2011.

<sup>1170</sup> Claimants' Reply Memorial, para. 449.

<sup>1171</sup> First KECE Report, Section IV.

<sup>1172</sup> *Id.*, paras. 69-70.

1152. Claimants knew in advance that there were wetland conditions in the Project Site<sup>1173</sup> and that it was a forested area.<sup>1174</sup> If these were the conditions before Claimants initiated their development, and after the activities conducted by them the experts found that wetlands were drilled and filled, and the forest were felled, it is crystal clear that said damage was due to the activity of Claimants. Who else but Claimants, who owned (part) of the property, did that damage?

"[C]learing of forest, terracing hill slopes, constructing roads, excavating drainage ditches, installing culverts and inlet structures and the construction of one single-family residence in a filled wetland."<sup>1175</sup>

1153. As if the abovementioned findings alone do not suffice, also described how Wetland No. 1 has been impacted and proposes the correct measures that need to be undertaken to restore it back to its original physical conditions.

1154. Claimants insist in an alleged lack of evidence, and that Respondent is making sweeping allegations.<sup>1176</sup> Nevertheless, Respondent reaffirms that there is not more conclusive proof than the findings on the actual conditions of the Project Site.

1155. Since Claimants did not advance any argument regarding the reparation approach under international law nor the Restoration plan, Respondent stands by the arguments developed in this regard in its Counter Memorial.<sup>1177</sup>

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<sup>1173</sup> R-11, Geological Hydrogeological Survey prepared by Roberto Protti, Geotest (*Estudio Geológico Hidrogeológico Formulario D1*), July 2007.

<sup>1174</sup> First KECE Report, para. 52.

<sup>1175</sup> Id., Exhibit C.

<sup>1176</sup> Claimants' Reply Memorial, para. 449.

<sup>1177</sup> Counter-Memorial, paras. 661-662., 657-659.

## **XII. PRAYER FOR RELIEF**

1156. Based on the above, Costa Rica respectfully requests that the Tribunal:

1. Declare that Mr Aven's lacks of standing on the grounds of nationality precludes the Tribunal from seizing jurisdiction of this arbitration vis-à-vis Mr Aven and thereby prevent Mr Aven from seeking redress under the Treaty;
2. Declare that the Tribunal has no jurisdiction over the properties that Claimants do not own on the basis that they do not qualify as a covered investment under DR-CAFTA;
3. Declare that the Tribunal has no jurisdiction over the Concession or the Concession site;
4. Declare that Claimants' claims are inadmissible on the basis of the illegalities enunciated herein and thereby prevents Claimants from seeking redress under the Treaty;

In the alternative,

5. Dismiss all the claims in their entirety and declare that there is no basis of liability accruing to Respondent as a result of:
  - 5.1. Any claim of violation by Costa Rica of DR-CAFTA Articles 10.5 and 10.7;
  - 5.2. Any claim that Claimants suffered losses for which Costa Rica could be liable; or
  - 5.3. Any claim for the Tribunal's interfere with Mr Aven's ongoing criminal trial before the courts in Costa Rica;
6. Furthermore, declare that Claimants have caused environmental harm to Costa Rica;
7. Order Claimants to pay Respondent damages in lieu of the reparation of the environmental damage Claimants caused to the Las Olas Ecosystem;
8. Order that Claimants pay Respondent all costs associated with these proceedings, including arbitration costs and all professional fees and disbursements, as well as the fees of the arbitral tribunal; and

In the alternative, and where appropriate,

9. Reject as inflated and unsupported, Claimants' valuation of their alleged losses, as well as Claimants' methodology as to the interest rate that would apply to any monetary award that might be issued by this Tribunal; and
  10. Grant such relief that the Tribunal may deem just and appropriate.
1157. Respondent reserves its right to amend or otherwise supplement or modify its defense, counterclaim, and arguments as necessary, until the proceedings are declared closed.

*Herbert Smith Freehills New York LLP*

**Herbert Smith Freehills New York LLP**

**MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA**

## ANNEX I: INDEX OF DEFINITIONS AND ABBREVIATIONS

- "**April 2009 DeGA Report**" means Respondent's Exhibit R-26, Inspection Report DeGA-049-2009 dated April 26, 2009
- "**Claimants' Reply Memorial**" means the Claimants' Reply Memorial dated August 5, 2016
- "**Classification of Land Methodology**" means Respondent's Exhibit R-401, the Official Methodology for the Classification of Land in the Country contained in Decree No. 20501-MAG-MIRENEM of May 5, 1991
- "**Counter Memorial**" means Respondent's Counter Memorial submitted on April 8, 2016
- "**Green Roots Report**" means the Soils Report submitted by Drs. Johan Perret and B.K. Singh on October 14, 2016
- "**Hernández Report**" means the Physical Environmental Protocol prepared by Mr Eduardo Hernández from Geoambiente S.A. which was submitted by Claimants as part of their D-1 Form
- "**Judicial Injunction**" means Claimants' Exhibit C-187, the criminal injunction issued by the criminal court of Quepos on November 30, 2011
- "**OATRI**" means the Office of Technical Assistance and International Affairs, part of the Bureau of the Prosecutor's Office of Costa Rica
- "**Second Abdala Report**" means the Damages Valuation of David Aven et al.'s Investments in Costa Rica; submitted by Dr Manuel Abdala of August 5, 2016
- "**Second Hart Report**" means the Damages Valuation of October 28, 2016; submitted by Dr Tim Hart of October 28, 2016
- "**Second KECE Report**" means the Expert Report submitted by Kevin Erwin Consulting Ecologist, Inc. of October 28, 2016
- "**SETENA Injunction**" means Claimants' Exhibit C-, the injunction issued by SETENA on
- "**Siel Siel Report**" means Appendix F of the Second KECE Report, submitted by Siel Siel S.A. of October 28, 2016

**ANNEX II: LIST OF THE LAS OLAS PROJECT PROPERTIES**

**A. Properties that Claimants wrongfully included as part of their alleged investment**

**1. Properties located on the Condominium site**

	<b>Property No.</b>	<b>Owner according to the Public Registry</b>	<b>Date of Inscription</b>	<b>Total Property Area (m<sup>2</sup>)</b>	<b>Exhibit</b>
1	P-1420836-2010	Maes Family Corp Sociedad de Responsabilidad Limitada	05/07/2010	739,14	R-392
2	P-1419602-2010	Las Olas y los Árboles Diez Sociedad de Responsabilidad Limitada	22/09/2010	900	R-392
3	P-1469410-2010	Las Olas Más Bellas Seis Sociedad de Responsabilidad Limitada	03/02/2011	718	R-392
4	P-1426019-2010	Puerata Aaul Al Mar Uno Sociedad de Responsabilidad Limitada	23/02/2011	673,82	R-392
5	P-1425913-2010	Three Oceans International Sociedad de Responsabilidad Limitada	01/04/2013	505	R-392
6	P-1426016-2010	Three Oceans International Sociedad de Responsabilidad Limitada	01/04/2013	505	R-392
7	P-1426763-2010	Three Oceans International Sociedad de Responsabilidad Limitada	01/04/2013	505	R-392
8	P-1426080-2010	Three Oceans International Sociedad de Responsabilidad Limitada	01/04/2013	510	R-392
9	P-1426079-2010	Three Oceans International Sociedad de Responsabilidad Limitada	01/04/2013	509	R-392
10	P-1426084-2010	Three Oceans International Sociedad de Responsabilidad Limitada	01/04/2013	508,69	R-392
11	P-1425993-2010	Three Oceans International Sociedad de Responsabilidad Limitada	30/05/2013	507,97	R-392
12	P-1425995-2010	Three Oceans International Sociedad de	30/05/2013	511,58	R-392

	Property No.	Owner according to the Public Registry	Date of Inscription	Total Property Area (m <sup>2</sup> )	Exhibit
		Responsabilidad Limitada			
13	P-1430641-2010	Three Oceans International Sociedad de Responsabilidad Limitada	30/05/2013	510,1	R-392
14	P-1427220-2010	Three Oceans International Sociedad de Responsabilidad Limitada	30/05/2013	720,11	R-392
15	P-1427219-2010	Three Oceans International Sociedad de Responsabilidad Limitada	30/05/2013	713,50	R-392
16	P-1426732-2010	Three Oceans International Sociedad de Responsabilidad Limitada	30/05/2013	602,75	R-392
17	P-1427221-2010	DW Blue Group Sociedad Anónima	29/05/2013	694,96	R-392
18	P-1427222-2010	DW Blue Group Sociedad Anónima	29/05/2013	615,87	R-392
19	P-1430271-2010	DW Blue Group Sociedad Anónima	29/05/2013	502,12	R-392
20	P-1427207-2010	Puerta Azul al Mar Uno Sociedad de Responsabilidad Limitada	28/03/2011	724,27	R-392
21	P-1427206-2010	Isla Maui Internacional Sociedad Anónima	24/06/2011	632	R-392
22	P-1427205-2010	Andata De La Playa Cero Uno Sociedad de Responsabilidad Limitada	06/06/2011	576,74	R-392
23	P-1425986-2010	DW Blue Group Sociedad Anónima	29/05/2013	614,45	R-392
24	P-1425987-2010	DW Blue Group Sociedad Anónima	29/05/2013	694,25	R-392
25	P-1425984-2010	DW Blue Group Sociedad Anónima	29/05/2013	686,71	R-392
26	P-1432587-2010	Laurence De Respino	17/03/2015	652	R-392
27	P-1432586-2010	The Dull's Investment Sociedad de Responsabilidad Limitada	14/03/2011	652	R-392
28	P-1431045-2010	Las Olas y Los Mangos Ocho Sociedad de Responsabilidad Limitada	21/11/2012	642	R-392

**2. Properties located on the Easements and other lots site**

	<b>Property No.</b>	<b>Owner according to the Public Registry</b>	<b>Date of inscription</b>	<b>Total Property Area (m<sup>2</sup>)</b>	<b>Exhibit</b>
1	162482-000	Three Oceans International	04/07/2013	548.55	R-322
2	162483-000	Three Oceans International	04/07/2013	595.96	R-322
3	162484-000	Three Oceans International	04/07/2013	550	R-322
4	162485-000	Three Oceans International	04/07/2013	549.90	R-322
5	162486-000	Three Oceans International	04/07/2013	549.90	R-322
6	162487-000	Three Oceans International	04/07/2013	560.66	R-322
7	159552-000	Manuel Rojas	19/01/2012	520	R-322
8	159553-000	Sand Group Investments	29/04/2013	513.20	R-322
9	159554-000	Sand Group Investments	29/04/2013	513.20	R-322
10	159555-000	Samuel Bermúdez	20/01/2014	565.03	R-322
11	159556-000	Sand Group Investments	29/04/2013	582.54	R-322
12	159557-000	Soluciones Unicas Fiesta	08/05/2015	509.61	R-322
13	159558-000	Soluciones Unicas Fiesta	08/05/2015	509.24	R-322
14	159559-000	Soluciones Unicas Fiesta	08/05/2015	511.87	R-322
15	159607-000	Sand Group Investments	29/04/2013	504.11	R-322
16	159608-000	Sand Group Investments	29/04/2013	509.33	R-322
17	159609-000	Sand Group Investments	29/04/2013	550	R-322
18	159610-000	Famosos de visita en el trópico	28/01/2010	559.37	R-322
19	159611-000	Coastal life properties	26/04/2010	501.08	R-322
20	159612-000	Noelani Costa Can S.A.	11/05/2010	562.11	R-322
21	159847-000	Samuel Bermúdez	11/12/2013	545	R-322
22	159848-000	Las Olas Monos Tres	09/12/2010	514.43	R-322
23	159849-000	Las Olas y La Selva Cuatro	30/11/2010	445.19	R-322
24	159850-000	Bandera de Mar Dos	25/02/2011	537.21	R-322
25	159851-000	Bandera de Mar Dos	19/01/2015	613.98	R-322
26	159852-000	Rolando Solano Romero	12/05/2015	487.44	R-322
27	159853-000	Rolando Solano Romero	12/05/2015	550.91	R-322

	<b>Property No.</b>	<b>Owner according to the Public Registry</b>	<b>Date of inscription</b>	<b>Total Property Area (m<sup>2</sup>)</b>	<b>Exhibit</b>
28	159854-000	Rolando Solano Romero	12/05/2015	626.19	R-322
29	158408-000	Honorable Cartulario Nocturno	04/05/2012	819.88	R-322
30	158411-000	Vistas de Esterillos	02/07/2009	548.22	R-322
31	158412-000	CRG Group Holdings	11/01/2013	551.83	R-322
32	158413-000	CRG Group Holdings	11/01/2013	463.47	R-322
33	158414-000	Las Olas Limpias Cinco	13/08/2010	478.08	R-322
34	158415-000	Corazón de la tierra en Esterillos	07/05/2015	494.94	R-322
35	158360-000	Pozas tranquilas de Esterillos	02/10/2009	592.19	R-322
36	158361-000	LO Esterillos nueve	12/08/2010	544.53	R-322
37	158362-000	Leon & Mussio S.A.	11/12/2008	523.94	R-322
38	158363-000	Carosomu noventa y tres	21/05/08	550	R-322
39	158364-000	Paisajes de Esterillos	31/03/08	559.11	R-322
40	158365-000	Paisajes de Esterillos	31/03/08	470.69	R-322
41	158366-000	LO con guacamayas siete	02/09/10	489.90	R-322
42	158367-000	Las Olas beach resort	01/10/09	455.87	R-322

**B. Properties whose ownership changed since Claimants' Memorial**

	<b>Property No.</b>	<b>Owner according to the Public Registry</b>	<b>Date of inscription</b>	<b>Total Property Area (m<sup>2</sup>)</b>	<b>Exhibit</b>
43	162394-000	Luis Felipe Gutiérrez	09/09/2015	362	R-323
44	162395-000	Yessenia Venegas	22/06/2015	714.85	R-323
45	162396-000	Yessenia Venegas	16/03/2016	538.14	R-323
46	162399-000	Yessenia Venegas	16/03/2016	501.05	R-323
47	162400-000	Yessenia Venegas	07/05/2015	544.25	R-323
48	159930-000	Yessenia Venegas	08/05/2015	495.02	R-323
49	162480-000	Corazón de la tierra en esterillos	22/06/2015	537.53	R-323
50	156491-000	Costa Rica Dream Esterillos One S.A.	12/05/2016	1846.81	R-323

**C. Claimants' properties whose ownership was proved in Claimants' Memorial**

	<b>Property No.</b>	<b>Owner according to the Public Registry</b>	<b>Date of inscription</b>	<b>Total Property Area (m<sup>2</sup>)</b>	<b>Exhibit</b>
51	156477-000	Las Olas Lapas Uno	13/10/2010	27,809.60	C-5
52	156478-000	Iguanas de Esterillos Oeste	18/02/2008	7,239.04	C-5
53	162397-000	Mis Mejores Años Vividos	20/06/2008	669.13	C-5
54	162398-000	Mis Mejores Años Vividos	02/09/2008	656.96	C-5
55	159931-000	Mis Mejores Años Vividos	05/06/2008	510.58	C-5
56	159932-000	Mis Mejores Años Vividos	05/06/2008	510.58	C-5
57	159933-000	Mis Mejores Años Vividos	08/05/2008	573.74	C-5
58	159934-000	Mis Mejores Años Vividos	08/05/2008	542.35	C-5
59	159935-000	Mis Mejores Años Vividos	08/05/2008	512.82	C-5
60	159936-000	Mis Mejores Años Vividos	08/05/2008	512.82	C-5
61	159937-000	Mis Mejores Años Vividos	05/06/2008	527.24	C-5
62	162481-000	Mis Mejores Años Vividos	08/09/2008	548.55	C-5
63	159795-000	Cerros de Esterillos del Oeste	29/05/2008	458.94	C-5
64	159796-000	Cerros de Esterillos del Oeste	29/05/2008	491.17	C-5
65	159797-000	Cerros de Esterillos del Oeste	29/05/2008	503.64	C-5
66	159798-000	Cerros de Esterillos del Oeste	29/05/2008	583.94	C-5
67	159799-000	Cerros de Esterillos del Oeste	29/05/2008	540.90	C-5
68	159800-000	Cerros de Esterillos del Oeste	29/05/2008	501.73	C-5
69	159801-000	Cerros de Esterillos del Oeste	29/05/2008	501.73	C-5
70	159802-000	Cerros de Esterillos del Oeste	29/05/2008	524.46	C-5
71	158409-000	Mis Mejores Años Vividos	01/04/2008	566.69	C-5
72	158410-000	Mis Mejores Años Vividos	01/04/2008	545.38	C-5

**D. Claimants' properties whose ownership was proved in Claimants' Reply Memorial**

	<b>Property No.</b>	<b>Owner according to the Public Registry</b>	<b>Date of inscription</b>	<b>Total Property Area (m<sup>2</sup>)</b>	<b>Exhibit</b>
73	156479-000	Mis Mejores Años Vividos	08/05/2008	357.34	C-273
74	156480-000	Mis Mejores Años Vividos	29/02/2008	353.68	C-273
75	156481-000	Mis Mejores Años Vividos	17/06/2008	366.54	C-273
76	156482-000	Mis Mejores Años Vividos	03/03/2008	360.75	C-273
77	156483-000	Cerros de Esterillos del Oeste	15/02/2008	358.33	C-274
78	156484-000	Mis Mejores Años Vividos	03/03/2008	255.47	C-273
79	156485-000	Mis Mejores Años Vividos	13/02/2008	355.09	C-273
80	156486-000	Mis Mejores Años Vividos	13/03/2009	352.39	C-273
81	156487-000	Paisajes de Esterillos	13/03/2009	343.03	C-275

**E. Properties that Claimants admitted not owning**

	<b>Property No.</b>	<b>Owner according to the Public Registry</b>	<b>Date of inscription</b>	<b>Total Property Area (m<sup>2</sup>)</b>	<b>Exhibit</b>
82	156488-000	3101479152, S.A.	30/05/2008	538.27	N/A
83	156489-000	3-101-567250, S.A.	08/06/2009	545	N/A
84	156490-000	Sand Group Investments	29/04/2013	13,676.18	N/A