

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

----- x
 In the Matter of Arbitration :
 Between: :
 :
 DAVID AVEN, et al., :
 : UNCITRAL Case No.
 Claimants, : UNCT/15/3
 :
 and :
 :
 THE REPUBLIC OF COSTA RICA, :
 :
 Respondent. :

----- x Volume 1

HEARING ON JURISDICTION AND MERITS

December 5, 2016

The World Bank
700 18th Street, N.W.
J Building
Conference Room JB 1-080
Washington, D.C.

The hearing in the above-entitled matter came on,
pursuant to notice, at 9:03 a.m., before:

MR. EDUARDO SIQUEIROS T., President

MR. C. MARK BAKER, Co-Arbitrator

PROF. PEDRO NIKKEN, Co-Arbitrator

ALSO PRESENT:

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Secretary to the Tribunal

MS. SUSANNE SCHWALB
Assistant to the Tribunal

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APPEARANCES (continued):

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C O N T E N T S

	PAGE
PRELIMINARY MATTERS.....	8
OPENING ARGUMENTS	
On BEHALF OF CLAIMANTS:	
By Mr. Burn.....	18
By Dr. Weiler.....	68
By Mr. Burn.....	121
ON BEHALF OF RESPONDENT:	
By Mr. Leathley.....	156
By Mr. Bouchenaki.....	188
By Mr. Leathley.....	201

P R O C E E D I N G S

1
2 PRESIDENT SIQUEIROS: Good morning. It
3 appears we all are now ready to commence.

4 Would like to greet everyone to the first day
5 of the hearing in the case, David Aven, et al. v. The
6 Republic of Costa Rica, UNCITRAL Case Number
7 UNCT/15/3.

8 I am accompanied by my co-arbitrators, Pedro
9 Nikken and C. Mark Baker, and I would ask first the
10 parties to introduce themselves, and I should--before
11 proceeding with that, I should also advise the Parties
12 that representatives from the United States of America
13 are present, and we appreciate the presence of both
14 Patrick W. Pearsall and Nicole C. Thornton in the
15 room.

16 I also appreciate the presence of the
17 interpreters and the court reporters. And Francisco
18 Grob, the Secretary of the Tribunal.

19 So, I would ask Claimants to introduce who is
20 present today at the Hearing, please.

21 MR. BURN: Yes, sir. Welcome to the beginning
22 of the Hearing. Thank you for your initiation of the

1 Proceedings. My name is George Burn. I am from the
2 law firm of Vinson & Elkins. I appear on behalf of
3 the Claimants in these proceedings.

4 Immediately--working down the table,
5 immediately to my right is our co-counsel, not of
6 Vinson & Elkins, Dr. Todd Weiler from London, Ontario,
7 in Canada.

8 Then there is Louise Woods, Robert Landicho,
9 and Peter Danysh, all of Vinson & Elkins.

10 Then we have from the Costa Rican law firm of
11 Batalla Salto Luna, Raul Guevara, Roger Guevara,
12 Herman Duarte and Esteban De La Cruz; and then we have
13 one of the witnesses, Manuel Ventura. And I can't see
14 beyond.

15 From Vinson & Elkins, we have Jerome Hoyle.

16 Behind us we have another one of the
17 witnesses, Nestor Morera. And just behind me, working
18 hard, also from Vinson & Elkins, is Ms. Carolina
19 Abreo-Carrillo.

20 PRESIDENT SIQUEIROS: Thank you very much, Mr.
21 Burn.

22 On Respondent's side, Mr. Leathley?

1 MR. LEATHLEY: Thank you, sir, yes. Myself,
2 Christian Leathley, behalf of Respondent.

3 I will do my best also to work down the table,
4 to the extent I can see everyone.

5 To my left, I have Amal Bouchenaki from
6 Herbert Smith Freehills; Daniela Paez, also from
7 Herbert Smith Freehills; Lucila Marchini, Elena Ponte,
8 and Mike Kerns, again, all from Herbert Smith
9 Freehills.

10 And then if you'll excuse me, so, I'm going to
11 read out the rest because I can't actually see in
12 which order appears.

13 But on behalf of COMEX, we have Adriana
14 González, Arianna Arce, Marisol Montero, and Francinie
15 Obando; and then also in the room we have present Mr.
16 Luis Martínez, Ms. Hazel Díaz, Mónica Vargas, and
17 Judge Rosaura Chinchilla.

18 PRESIDENT SIQUEIROS: Okay. Thank you, sir.
19 Anyone else in the room who has not been yet
20 introduced?

21 Yes. Okay.

22 MR. BURN: Before--sorry to interrupt. Just

1 at the back, I thought that--we do have a couple of
2 the other Claimants. We have Sam Aven, I think, and
3 we have Jeff Shioleno at the back.

4 I think that's it, sir.

5 PRESIDENT SIQUEIROS: Thank you very much.

6 So, if there are any issues that you would
7 like to address with the Tribunal before we actually
8 start with the proceedings, now is perhaps the time.

9 I would ask you, Mr. Burn, on behalf of
10 Claimants, whether you would like to address any
11 issues before we commence.

12 MR. BURN: Just a couple of small matters,
13 sir.

14 There are a couple of documentary items that I
15 need to address, and there is some--Dr. Weiler will be
16 speaking to some additional international law
17 authorities that we wish to put before you.

18 So, if I can just speak to the documentary
19 matters, these are--there's a file, copies of which
20 are behind me, which I will hand up shortly. There's
21 a lot of paper here. But almost all of it is actually
22 the legal authorities' items, to which I refer.

1 We've also included copies of the slides to
2 which we will speak during our opening submissions.
3 But there are a couple of documents in there that we
4 just need to speak to.

5 I won't put them before you now, but I'm very
6 happy to, if that's required.

7 You will recall in the last exchange on
8 documents that the Tribunal gave permission for some
9 additional documents to be produced by the Claimants.
10 One of those was an item that we had not at that point
11 received, but we anticipated receiving it. We had
12 given it the exhibit number in advance, C-295.

13 We have now got that document. There is a
14 slight wrinkle, confusion, in this, in that the
15 Respondent inserted a document which it chose to give
16 the "C" number to. I frankly have no objection to
17 them introducing the document, but it's not a
18 Claimants' exhibit, and it's not the exhibit that we
19 anticipated receiving.

20 I can point the Tribunal to points of forensic
21 detail in terms of the cadastral plan numbers that
22 were to be covered. I'm not sure it's really relevant

1 for current purposes, but suffice to say, there is a
2 one-page letter dated the 29th of November from the
3 Municipality of Parrita, which we would introduce,
4 having been given permission to submit C-295; this is
5 C-295.

6 PRESIDENT SIQUEIROS: So, this is not the one
7 that naturally was a document that Respondents
8 volunteered to be C-295; but you're actually going to
9 introduce the actual C-295 that you wish to make part
10 of the record.

11 MR. BURN: Correct, sir. Correct.

12 There is also a further document that we've
13 located--this is a document dated the 10th of April,
14 2008.

15 This is something that was found on
16 Municipality files very recently. I think
17 taking--properly--it properly was covered by several
18 of the document production orders, in fact.

19 I don't seek to make a point about that, but
20 it's something--again, it's a one-page letter that is,
21 we say, responsive to a document production request
22 the Respondent ought to have provided to us. It comes

1 from their files.

2 Again, we would seek permission on this
3 occasion to add that to the files.

4 And then finally, there's just a tidying-up
5 matter. There's a document of the Respondents that
6 was unclear. There's been a certain amount of
7 discussion, exchanges, around the clarity of a
8 particular document.

9 This is R-367. We have a clearer copy of it,
10 and we just seek to hand it up. It's already
11 exhibited, it's already before you; we just have the
12 clearer copy to put before you.

13 And so, those three documents, a replacement
14 of something that's unclear in its form before you
15 already; one additional document that we say ought to
16 have been disclosed in the first place and is a very
17 short document; and C-295.

18 PRESIDENT SIQUEIROS: Okay.

19 Mr. Leathley?

20 MR. LEATHLEY: Thank you, sir.

21 Of course, we are very happy to look at these
22 documents. We think it would have been appropriate to

1 send these in advance of today, particularly C-295,
2 which is a document that was being discussed over two
3 weeks ago.

4 Very happy, of course, to look at the 10th of
5 April document. We think it's appropriate if we're
6 being--it's suggested that we should have disclosed
7 something we haven't. I think we ought to have a look
8 at that first before it ends up in the Tribunal's
9 hands.

10 And similarly so on the legal authorities.
11 Absolutely no problem with them being submitted, but I
12 would ask, sir, that we have the right to respond in
13 our post hearing brief. This is additional legal
14 argument on behalf of the Claimants' case that should
15 have been made in their two substantial submissions so
16 far. It is not our claim; it is their claim.

17 And so, sir, I would only ask that we have an
18 opportunity to respond as much as we need to in the
19 post hearing briefs.

20 PRESIDENT SIQUEIROS: Yes. Before these
21 documents are submitted to the Tribunal, I would ask
22 you to share with Respondent, and if there is any

1 objection on the part of Respondent, the Tribunal will
2 decide.

3 So, do I understand also that these legal
4 authorities that you wish to incorporate are in
5 addition to those that you have already incorporated
6 in the past?

7 MR. BURN: That's right. They arise--just to
8 be clear, from new legal arguments that are developed
9 in the Rejoinder. So, there's a natural sort of path
10 that we've had to follow, and it's taken us to these
11 additional materials.

12 There is, of course, no regime. Unlike with
13 documentary exhibits, there is no regime around this;
14 and, of course, we as counsel are obliged, actually,
15 to make sure that all of the relevant legal materials
16 are before the Tribunal.

17 PRESIDENT SIQUEIROS: Right.

18 MR. BURN: But in terms of Mr. Leathley's
19 observations, we have no objection to him having an
20 opportunity to look at the--the three documents
21 that--to which we referred. I have no objection to
22 him being given proper opportunity to--in this Hearing

1 and after--to reflect on the legal authorities that
2 are put forward.

3 PRESIDENT SIQUEIROS: That's fine.

4 Pedro, do you have any questions?

5 Mark?

6 Okay. So, if the parties are ready to
7 proceed, then I would ask Mr. Burn to make a
8 presentation on behalf of Claimants.

9 MR. BURN: Thank you, sir.

10 Just bear with me for one minute, because we
11 had pushed everything into one file. I'm now going to
12 be taking out the hard copies of the slides in order
13 that--I'm not contaminating matters and Mr. Leathley
14 has a chance to consider the other materials before
15 they--they come up.

16 PRESIDENT SIQUEIROS: Sure.

17 MR. BURN: If I could just ask for copies to
18 be provided of the PowerPoint slides. You will get
19 two sets: There's a set that--to which I will speak
20 and a set to which Dr. Weiler will speak.

21 Just take a few minutes while the papers are
22 extracted.

1 PRESIDENT SIQUEIROS: Sure. Take your time.

2 MR. BURN: Thank you.

3 (Off the record.)

4 MR. BURN: And just to be clear, so we will be
5 distributing soft copies as well, probably in USB--on
6 USB drives for everybody's ease of use. There are a
7 couple of animations in the presentation which are
8 much easier to access, to understand, in the soft-copy
9 form.

10 Perhaps I should begin--I will, first of all,
11 address some preliminary matters relating to the
12 substance of the case before summarizing the factual
13 issues relating to the Claimants' claims.

14 I'll then hand over to Dr. Weiler, who will
15 address issues relating to the--the international law
16 basis of the claims before you; and then finally, I
17 will deal with certain matters relating to some of the
18 arguments in defense that have been put by the
19 Respondent.

20 We appreciate the opportunity to speak to you.
21 We are, of course, here to provide any assistance to
22 the Tribunal that may be required. So, please do let

1 me know or let Dr. Weiler know if anything comes up
2 that requires further elucidation, further attention.

3 The intention is to introduce and summarize
4 the arguments that you've had to date in the written
5 pleadings and in the evidence, and to make clear what
6 is going to be covered on the Claimants' side during
7 the course of this Hearing.

8 Now, if you take--first of all, I just want to
9 speak to what we say this case is about and what it is
10 not about, because from our point of view, there are
11 some lines of argument that have been presented by the
12 Respondent that seem to confuse and mislead, really,
13 what the case is about.

14 We would say that this case is--is really
15 about the Respondent's conduct measured against the
16 standards in the DR-CAFTA.

17 The Respondent would have us believe that this
18 is a case that deals with claims of important
19 sensitive wetlands and forests on the Claimants'
20 property in 2016, rather than at the time that they
21 were being looked at; namely, at 2011.

22 The Respondent would have us believe that if

1 it can prove that wetlands exist or some component of
2 wetlands exist on the site today, in 2016, the Costa
3 Rican authorities were entitled in 2011 to shut down
4 the Claimants' fully permitted project without a
5 hearing and without a final administrative
6 determination of the existence of wetlands.

7 The Respondent would have you believe that
8 these temporary administrative injunctions could go on
9 forever, that they can be imposed on a whim and
10 without any final administrative determination.

11 And the Respondent would have us believe that
12 it could prosecute a foreign investor in criminal
13 proceedings on allegations of having impacted wetlands
14 without having determined whether wetlands existed.

15 It's this post hoc, after-the-fact analysis
16 presented by the Respondent that we attack. And we
17 attack it because this is the only basis on which the
18 Respondent can credibly present any defense; but it is
19 a false defense, to raise matters now that have
20 nothing to do with the situation in Costa Rica, in the
21 area of the project, five years ago.

22 It is also not about the various side shows

1 and personalized attacks that the Respondent has
2 brought to the fore.

3 This case has always been about the
4 Respondent's conduct, egregious conduct, in relation
5 to the investors and in violation of the standards
6 imposed by the DR-CAFTA Treaty.

7 This case is about the Claimants, each of
8 David Aven, Samuel Aven, Carolyn and Eric Park,
9 Jeffrey Shiolen, David Janney, and Roger Raguso and
10 their friends and their family and their employees and
11 their colleagues. These individuals invested their
12 resources and their efforts over a period of years in
13 the Las Olas Project.

14 This is a situation which they saw as a
15 genuine opportunity to develop a project that would be
16 of economic benefit for them, of course; but it would
17 also assist in the Esterillos Oeste community in terms
18 of generating jobs and economic prospects and
19 improving the social infrastructure.

20 If it weren't for the Respondent's
21 unsubstantiated measures that were taken against the
22 Claimants, Las Olas would be, today, a thriving

1 vacation and retirement community, just as various
2 other sites in the area are.

3 Instead, the Respondent took a series of
4 actions in violation of Costa Rican law and in
5 violation of the DR-CAFTA, indefinitely enjoining the
6 Claimants' development project. And that occurred
7 without any semblance of process afforded to the
8 Claimants.

9 The Respondent chose to aggravate that
10 situation by bringing baseless and abusive criminal
11 proceedings against the two people most actively
12 involved with the development of the Las Olas Project;
13 namely, David Aven and Jovan Damjanac.

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

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

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

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

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

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

1 correct, whether those assertions are fair or not.

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

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

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

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

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

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

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

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

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

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

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

21 Now, having drawn your attention to the
22 numerous people from whom you will hear nothing, I now

1 want to go and set out to you what this case is really
2 about.

3 This is a--it's not a particularly complex
4 case, to be honest. It's a permit cancellation case.
5 It's a case in which a group of foreign investors, in
6 compliance with local law, developed a project from
7 desktop concept to construction, carefully,
8 thoroughly, properly. They applied for and obtained
9 all of the permits, and we'll--I'll go to those
10 permits shortly--that they needed to acquire. They
11 were very careful about this. They took proper expert
12 advice at every stage, and they did what they ought to
13 have done.

14 So, this was a--this project was a--as I say,
15 fully permitted. It was a--what's called a horizontal
16 condominium development in Esterillos Oeste with a
17 beach concession attached to it. It was to be built
18 on 37 hectares of land that had previously been used
19 as cow pasture.

20 The land had great potential for development
21 because of its unique topography and its views of the
22 Pacific Ocean and because it fronted a new main

1 highway from San Jose to Manuel Antonio, a significant
2 tourist attraction on the Pacific coast. This is a
3 great position. This is a perfect position. And as I
4 will show to you, there have been other developments
5 around the area that have successfully been brought to
6 fruition.

7 You will hear from--before I do that, just a
8 very quick video, just--that is--this is Exhibit C-60,
9 but you can see some of the very advantageous beach
10 position of the sites. And this is an excellent
11 beach, as you can see, in its own right. But behind
12 this beach, you have the site, which we will see in
13 plan form shortly.

14 But for the target market, mainly North
15 Americans, perhaps older people looking for a
16 retirement home or a holiday home, also Europeans,
17 also locals, this was a very nice position to be in.
18 And it's not--it's in an area of Costa Rica which has
19 had some tourist development but not--by no means was
20 it fully developed as a location for tourism.

21 You will hear testimony from Mr. David Aven,
22 who first went to Costa Rica with another of the

1 investors, Mr. David Janney, in the year 2000.

2 You will hear testimony from another of the
3 investors, Mr. Jeffrey Shiolen, who also was there in
4 the early days, looking at--exploring the project
5 and--and developing it.

6 David Aven will explain how the initial
7 investment in Las Olas came about, including the
8 identities and participation of the other investors
9 and formation of the relevant Enterprises.

10 As is set out in Exhibit C-4, which is
11 captioned on the screen, the respective shares in the
12 Enterprises are divided up as follows: Mr. David Aven
13 holds 23 percent; Mr. Samuel Aven, 44 percent;
14 Ms. Carolyn Park, 10 percent; Eric Park, another
15 10 percent; Jeffrey Shiolen, 2 percent; David Janney,
16 1 percent; and Mr. Roger Raguso, 5 percent.

17 Each of the Claimants has standing to bring
18 claims in these proceedings. They are all U.S.
19 citizens.

20 The Respondent's specious attempt to cast
21 aspersions on David Aven's nationality is
22 unsubstantiated and should roundly be rejected.

1 Contrary to the Respondent's baseless assertion,
2 Mr. David Aven was not born in Italy. He was born in
3 the United States, in Pennsylvania.

4 The Enterprises include various
5 corporations--and we'll go into some of the ownership
6 and how those corporations work within the ownership
7 structure shortly.

8 Together, the--these Enterprises own shares in
9 the lots that make up the Las Olas Project with the
10 exception of the concession.

11 Now, if you look at the plan on screen, what
12 you see is, the concession is the blue parcel down at
13 the southern end of the plan. Along the western edge,
14 you have shaded in pink what's come to be known as the
15 easements. In yellow and green in the top corners,
16 you have a couple of portions which would have, at a
17 later stage, been developed for commercial purposes.
18 And in the center is the real--the main part of the
19 development, what's called the condominium section.

20 And ownership was arranged carefully with
21 respect to the--these different sections, and this
22 will be developed, and has been developed already, in

1 the pleadings.

2 As to the ownership of the concession, the
3 company that holds it is called La Canícula. The
4 shares were held in trust by a Costa Rican entity on
5 behalf of the Claimants for a time and in trust by a
6 Costa Rican national for a time.

7 And in April of 2002, we see there was a share
8 and--a sale and purchase agreement whereby David Aven
9 acquired the totality of the shares in La Canícula
10 from its sole shareholder before that, Mr. Monge. 16
11 percent of the shares in Inversiones Cotsco
12 from--were acquired from Pacific Condo Park, the other
13 84 percent being owned by La Canícula. This is
14 Exhibit C-8.

15 As owners, Mr. David Aven currently
16 owns--holds title to 49 percent of La Canícula, and
17 his acquaintance, Ms. Paula Murillo, a Costa Rican
18 national, owns the other 51 percent. But both of them
19 hold those interests for the group of investors that
20 hold--holds it in trust for the group of investors in
21 accordance with the shares I've already outlined with
22 reference to Exhibit C-4.

1 For the Tribunal's reference, details of the
2 initial acquisition of the parcels of land make up
3 Las Olas are found in the Memorial from Paragraphs 31
4 to 40 and in the Reply Memorial from Paragraphs 339 to
5 347.

6 You will hear from those intimately familiar
7 with the land and business of Las Olas, including
8 Mr. Aven and Mr. Damjanac.

9 Mr. Aven has explained that after completing a
10 marketing and land-planning study through a group
11 called Norton Consulting, which included a conceptual
12 design with luxury beach-front villas, mid-range
13 townhomes, smaller villas, and a beach club, him and
14 the other Claimants made the decision to develop the
15 project.

16 And this is at Exhibit C-30.

17 Mr. Aven and Mr. Damjanac will be able to
18 explain that the project was designed to take
19 advantage of the multiple--of multiple revenue
20 streams, including the sale of lots, the construction
21 of villas on the lots, mortgages, management fees,
22 rental of commercial space, and so on. There were

1 multiple ways of monetizing their investment.

2 After consideration of that marketing study,
3 the Claimants decided to move forward with the
4 development.

5 I've already described to you the different
6 zones. It doesn't come across particularly clearly on
7 this slide already, but I'm--I'm very happy to
8 describe to you the different zones within the site
9 further, if it assists.

10 But the Claimants at every step of the process
11 hired local experts and professionals who were
12 experienced, who were respected, who were
13 knowledgeable. Those experts assisted the investors
14 to obtain the requisite permits and to understand the
15 processes that were necessary.

16 And if we look here, we see the permitting
17 history summarized with respect to the condominium and
18 concession section, and you can see, by reference to
19 exhibits in the fourth column, you can see that all of
20 the relevant permits were obtained and are in
21 evidence. The only one there that does not have any
22 sort of reference is the construction permit in

1 relation to Villas La Canícula, and that's simply
2 because the Project had to close down before it got to
3 that stage.

4 You will hear testimony from Mr. Mauricio
5 Mussio Vargas Roldan from the architectural and real
6 estate development firm, Mussio Madrigal. That's the
7 firm that the investors hired to design the Las Olas
8 condominium project.

9 Mr. Mussio has already provided evidence to
10 explain that Las Olas was indeed fully permitted,
11 receiving everything that was needed, including the
12 Environmental Viability permits where those were
13 required, and construction permits from the
14 Municipality.

15 As regards what's called the easements,
16 Mr. Mussio has described each step he took to
17 require--to acquire the requisite environmental and
18 construction permits for the Las Olas site, including
19 the studies that he conducted at various stages.

20 You'll see in the chart, again, all of the
21 relevant permits with relation to the easements are
22 cross-referenced into the evidence.

1 You will hear from Mr. Esteban Bermudez of an
2 environment consultancy called DEPPAT in Costa Rica.
3 DEPPAT was hired by the Claimants after 2010 to act as
4 what's called the environmental regent for the
5 condominium section and to help obtain Environmental
6 Viability permits for the beach club and hotel.

7 Mr. Bermudez is intimately familiar with the
8 requirements to obtain environmental permits and
9 approvals. It is his everyday occupation to
10 understand that permitting process and to check on
11 compliance with permits through his role as an
12 environmental regent.

13 Mr. Bermudez has given evidence regarding the
14 Project's compliance with regard to Costa Rican laws
15 and he confirmed that he at no time observed evidence
16 of wetlands or forest on the project site.

17 You will hear from Mr. Minor Arce, who was
18 hired in 2010 after being contacted by Mr. Bermudez.
19 Mr. Arce's view as a specialist in forestry is that
20 the projected--the project proceeded in accordance
21 with Costa Rican forestry laws, as there was no forest
22 on the property in 2010 or 2011.

1 Mr. Arce is also very critical of the
2 methodology employed by the Respondent's own agencies
3 in determining the existence of a forest on site, and
4 he brings to bear rich experience in applying forestry
5 laws of Costa Rica.

6 In order to obtain all of the requisite
7 permits, the Claimants dealt with numerous branches of
8 the Respondent State. It's, therefore, significant to
9 have an understanding of the different agencies' roles
10 and their remit within the--the structures that apply
11 in Costa Rica.

12 MINAE is the Ministry of the Environment and
13 Energy of Costa Rica. SINAC is the National System of
14 Conservation Areas and sits within the Ministry,
15 MINAE.

16 Among other responsibilities, SINAC
17 administers the country's national parks, its
18 conservation areas, and protected areas. SINAC is
19 also responsible for demarcating wetlands.

20 You'll hear of an agency called ACOPAC. This
21 is the regional branch of SINAC that is responsible
22 for the Central Pacific Coast region of Costa Rica.

1 SETENA is the National Technical Environmental
2 Secretariat. Although it sits within the ambit of the
3 Ministry of Environment, it is in fact what's called a
4 deconcentrated or autonomous body that operates
5 without interference from the Ministry. Its primary
6 roles and responsibilities include the approval and
7 issuance of environmental permits that are required
8 for developments, such as the condominium project at
9 Las Olas, and the investigation of environmental
10 complaints.

11 INTA is the National Institute for Innovation
12 Transfer in Agricultural Technology. INTA is
13 responsible, as I mentioned previously, for
14 classifying soils in Costa Rica according to the
15 applicable land use methodology.

16 INTA sits not within the ambit of the--of
17 MINAE but within the ambit of the Ministry of
18 Agriculture.

19 The TAA is the Environmental Administrative
20 Court. It's an autonomous body that sits within the
21 Ministry of Environment and hears matters relating to
22 breaches of environmental regulations. Its final

1 judgments are binding and bring the administrative
2 process to an end, although those decisions are
3 reviewable in the constitutional chamber or in the
4 administrative court.

5 And finally, the Municipality of Parrita, it
6 is, like any Municipality in Costa Rica, an autonomous
7 body separate from central government. It's empowered
8 to elaborate and approve zoning plans and to issue
9 land use certificates, construction permits, and
10 commercial licenses.

11 Defensoría de los Habitantes, the Defensoria,
12 is effectively an ombudsman-type structure. It sits
13 within the legislature, interestingly. Its role is to
14 initiate investigations into the actions of public
15 servants. It cannot make binding judgments, as such,
16 but it can issue nonbinding recommendations. And you
17 will certainly hear from Ms. Díaz on that matter.

18 So, this case is really about the failure of
19 certain Costa Rican government agencies to afford the
20 Claimants and their investments due process under
21 Costa Rican law and the protections afforded by the
22 DR-CAFTA Treaty.

1 It is not about any lack of respect for
2 environmental law on the part of this group of
3 American investors. Much as the Respondent would like
4 to dress it up as something in that vein, the
5 investors absolutely respected the environmental laws
6 that applied in Costa Rica. Indeed, from a purely
7 commercial point of view, it was to their advantage
8 that Costa Rica has a very good reputation for
9 environmental protection.

10 They--they were going to be building in order
11 to sell to clients and customers who wanted to go
12 somewhere, not that was wall-to-wall concrete, but
13 that had a lovely ambience.

14 They had no reason to dislike the
15 environmental regime that applies and for which
16 Costa Rica is so admired.

17 But what we actually see in this case, when
18 the documents are carefully examined, is not the
19 good-faith proper application of Costa Rican
20 environmental laws. What we see is the arbitrary and
21 sometimes corrupt use by a few individuals and a
22 couple of agencies of those powers.

1 Many of the agencies of the Costa Rican State
2 confirmed that there was nothing that the Claimants
3 were doing that was wrong. There's only a couple of
4 them that have brought situation into disrepute, and
5 that is why we're here. Not because the Claimants
6 disregard or challenge or ignore the environmental
7 laws that exist in Costa Rica. They just seek the
8 proper, consistent, and reasonable application of
9 those laws.

10 As Mr. Aven and Mr. Damjanac explain in
11 relation to what really caused their project to be
12 closed down after some years of everything moving
13 perfectly well, it all seemed to go wrong in relation
14 to Mr. Bucelato.

15 Mr. Bucelato is a neighbor who lived very
16 close to Las Olas; and frankly, he had a vendetta
17 against the Claimants. It is speculation, but
18 Mr. Aven understands that Mr. Bucelato had wanted to
19 acquire the site himself. He didn't manage to acquire
20 it, and since that time, he's looked for opportunities
21 to attack it.

22 As the Tribunal will have seen from the

1 evidence in the record, Mr. Bucelato adopted a
2 concerted and organized strategy directed at multiple
3 State institutions. He took significant steps to
4 undermine the project, all facilitated by the
5 continued failures of certain branches of the
6 Costa Rican State to afford investors their rights.

7 Mr. Bucelato lodged unsubstantiated complaints
8 against the investors and the project with numerous
9 Costa Rican agencies, including the TAA, the
10 Defensoria, the Municipality, and with SINAC. Those
11 complaints were disseminated and reproduced by various
12 Government agencies including Municipality and SINAC
13 without adequate verification and without affording
14 the Claimants the opportunity to present their case.

15 After the Claimants invested in the
16 development of the property, almost exclusively at the
17 behest of this disgruntled neighbor, the project was
18 suspended with three separate government agencies
19 issuing injunctions and criminal charges being filed.

20 What started as a simple complaint by
21 Mr. Bucelato snowballed into a messy government
22 shutdown, two criminal trials, and the ruination of a

1 multimillion-dollar development project.

2 Initially, Mr. Bucelato's complaints were
3 rejected. He failed. He failed to show that there
4 were forests and wetlands on site and through relevant
5 competent agencies rejected those propositions. But
6 in early 2011, there was a shift, and he had more
7 success with his efforts of attacking the project.

8 Mr. Bucelato's initial complaints to the
9 Municipality alleged the unlawful backfilling of
10 wetlands in July of 2010, and that led to the
11 environmental department, through Ms. Mónica Vargas,
12 conducting site inspections and referring the matter
13 to various agencies which, in turn, began their own
14 investigations during the summer of 2010.

15 The evidence, such as it was, that was
16 presented in support of these complaints, was never
17 properly tested, and the--the complaints were allowed
18 to snowball, all without input or notice--input from
19 or notice to the Claimants.

20 There were several investigations going on at
21 SINAC and SETENA in 2010, although, much to
22 Mr. Bucelato's disappointment, those did not result in

1 any negative findings against Las Olas or the
2 Claimants. In fact, in September of 2010, SETENA
3 issued a resolution dismissing his complaint once and
4 for all.

5 But early in 2011, when Mr. Bucelato's
6 complaints about alleged wetlands and forests had not
7 had the desired effect, he renewed his campaign. This
8 time, his allegations extended to include reference to
9 an allegedly forged document that he accused the
10 Claimants of submitting to the record of SETENA in
11 order to secure Environmental Viability for the
12 condominium section.

13 In reality, as the Claimants have discovered
14 during the course of this Arbitration, that allegedly
15 forged document around which the Respondent has made a
16 lot of submissions during the course of this
17 Arbitration, had, in fact, been put onto SETENA's
18 record by none other than Mr. Bucelato himself on the
19 day after that document was created.

20 Plainly, if there is anything suspicious about
21 that document--and we don't know whether it is
22 authentic or forged--but if there are any questions to

1 ask about that, the first person to ask is
2 Mr. Bucelato, the person whom the record shows put it
3 onto SETENA's file.

4 Refer you to this document, which is at
5 Exhibit C-245. It's a little difficult to read the
6 manuscript there. But what you see is on the 28th of
7 May 2008, Mr. Steven Allen Bucelato is recorded as
8 having put the document onto the file at SETENA.

9 And this is the document that gave rise to a
10 campaign against Las Olas. This is the document that
11 was used to prosecute Mr. Damjanac and Mr. Aven; and
12 yet, in the Respondent's own files on the reverse side
13 of the letter, there is this stamp confirming who put
14 the document on the file. Mr. Bucelato's campaign
15 against Las Olas crystalized when, on the 7th of March
16 2011, he attended the Municipality's office with his
17 lawyer, Mr. Jimenez; an environmental consultant, Mr.
18 "Carmiolo," whom he and other neighbors at
19 Las Olas--neighbors of Las Olas had hired to further
20 their campaign against the project.

21 He met in that meeting on the 7th of March
22 2011 with Mr. Nelson Masis Campos and Mr. Marvin Mora

1 Chinchilla.

2 The contents of that meeting were recorded in
3 a very short two-paragraph letter, Exhibit R-74, that
4 was addressed to the Municipal Council by Mr. Masis.

5 A careful analysis of the relevant documents
6 shows that based on this letter alone, and the one
7 meeting to which this letter in turn refers, one
8 disgruntled neighbor, whose complaints SETENA had
9 already rejected, the municipal council took the
10 extreme measure of ordering that the mayor suspend all
11 existing construction permits for Las Olas and refrain
12 from granting any new permits.

13 The council's order was made without affording
14 the Claimants an opportunity to defend their position
15 and in total disregard of SETENA's previous findings.

16 The Respondent will no doubt attempt to
17 justify the Municipality's action by reference to
18 SETENA's resolution of the 13th of April 2011, which
19 temporarily suspended the EV for the condominium
20 section and the criminal court's injunctions of the
21 30th of November 2011.

22 But the simple truth is this: At the time of

1 the Municipality's order on the 8th of March 2011,
2 there was no legal basis on which to do so.

3 The Respondent will probably also point to the
4 SINAC report of 3rd January 2011, which found a
5 possibility of wetlands on the project site as being
6 supportive of the municipality's decision to suspend
7 all construction permits. This would also be wrong.

8 The SINAC report was inconclusive on the
9 question of wetlands. It clearly showed that SINAC
10 had, at Ms. Vargas's direction, taken up
11 Mr. Bucelato's complaint and was in the process of
12 making a determination.

13 In that regard, any attempt by the Respondent
14 to suggest that the Municipality could or did rely on
15 it at that stage is misplaced.

16 The minutes of the municipal council meeting
17 at which the decision was taken to suspend the
18 construction permits make no reference to the SINAC
19 report, only to correspondence. The SINAC report of
20 3rd January 2011 was not addressed to the
21 Municipality, and according to Ms. Vargas, had been
22 presented by Mr. Bucelato at the 7 March 2011 meeting,

1 only a day before the council's decision.

2 Accordingly, any suggestion that the
3 Municipality was entitled to rely on an inconclusive
4 report that was not addressed to it or that its
5 council members had in a 24-hour period properly
6 considered and digested its content must be rejected.

7 The SINAC report actually implicates the
8 Municipality in installing drainage pipes on or near
9 the property which allegedly drained an alleged
10 wetland.

11 Nonetheless, the Municipality took drastic
12 action against the Project, crippling it, effectively,
13 and depriving the Claimants of all rights in their
14 investment.

15 And it's not just the Claimants who say so.
16 You will have seen the statement, although you will
17 not hear from them at this hearing, of Mr. Jorge
18 Antonia Briceño Vega, the internal auditor for the
19 Municipality of Parrita at this time. Mr. Briceño
20 identified the unlawful nature of the Municipality's
21 shutdown of the project and at the time brought it to
22 the attention of the Municipal Council and the Mayor.

1 On learning of the allegations against
2 Las Olas, as was his duty, Mr. Briceño, conducted his
3 own independent review of the Municipality's files.
4 He also wrote to the TAA to request details of the
5 three complaints that had by that time been filed
6 against the Project: one by Mr. Bucelato, one by SINAC
7 and one by Ms. Vargas.

8 He learned that the Municipality was listed as
9 a claimant in the proceedings at the TAA. Even though
10 Ms. Vargas, in filing a complaint, had acted of her
11 own accord. So, these slides show that distinction.

12 There is no indication of the Municipality's
13 expressed knowledge or consent, and upon discovering
14 this, the fact--on discovering this and the fact that
15 the TAA's request that Ms. Vargas confirm the
16 Municipality's willingness to be named as a claimant
17 in these proceedings had gone unanswered.

18 So, Mr. Briceño wrote to the Municipal Council
19 and to the Mayor on the 29th of October 2012.

20 And this is Document C-283. And he warned the
21 Municipality that they would be--could be liable for
22 damages to an affected third party caused by the

1 pending lawsuit, and he recommended either that the
2 Municipality withdraw as a named party in the
3 proceedings or that it confirm to the TAA that it
4 accepted its position as the named party in the
5 proceedings.

6 So, you can see here this is Ms. Vargas
7 confirming that "I have been"--"Since 2009 I have been
8 managing the complaint about the filling of an area of
9 land." So, she's confirming that she did this of her
10 own accord. And here you have Mr. Briceño saying the
11 nullification must be considered since it was not done
12 with any legal basis. And he indicated that the
13 matter needed to be transferred, and he made various
14 recommendations as to how to correct the state of
15 affairs that had been created by what he considered to
16 be the unlawful acts of the Municipality.

17 So, on the 5th of November 2012, having
18 completed that review, Mr. Briceño wrote his letter to
19 the Municipal Council. He concluded that its decision
20 to suspend all permits for Las Olas was unlawful and
21 without legal administrative basis because it was only
22 taken on the basis of comments made by Mr. Bucelato

1 and his representatives in the presence of Municipal
2 officials. That's the 7 March 2011 meeting and
3 subsequent letter that I've taken you to.

4 Mr. Briceño warned of the need for caution
5 when taking--taking actions with potential civil,
6 administrative and criminal consequences in view of
7 the potential for affected parties such as the
8 Claimants to sue for damages.

9 He noted the Municipality's failure to give
10 effect to SETENA's resolution of 15 November 2011,
11 which is the resolution by which SETENA reinstated the
12 Environmental Viability. So, you'll recall it
13 suspended in April 2011 the EV, and then by November
14 of 2011, having investigated everything, it said okay.
15 It reinstated the EV for the Condominium--for the
16 Condominium Section of the project.

17 Mr. Briceño, as you can see, made three
18 recommendations to the Municipal Council. Only one of
19 those recommendations as of today's date has been
20 partly and belatedly implemented.

21 You can see on this slide Mr. Briceño in his
22 statement indicating that as of April 2013, none of

1 those recommendations had been adopted.

2 He said that the 7 March 2011 order to suspend
3 permits should be rescinded because it had no legal
4 basis. He said that the Municipality should
5 immediately take steps to implement SETENA resolution,
6 the SETENA resolution of 15 November 2011.

7 And he said that an interdisciplinary
8 commission should be constituted in order to conduct a
9 study of the supposedly affected site and determine
10 who owns the land.

11 Now, we understand that such an
12 interdisciplinary commission was established briefly
13 but without any input from the Claimants at all.

14 But very shortly after it was formed its work
15 was suspended as the Commission decided that the case
16 was too complex to pursue.

17 Looking at the relevant agency actions,
18 undoubtedly the Respondent will point to the 30th of
19 November 2011 criminal injunction issued against
20 construction at Las Olas as support for the
21 Municipality's suspension of construction permits.
22 However, that really must be seen for what it is.

1 It's another attempt after the event to justify
2 unlawful actions taken six months earlier.

3 The Respondent misstates its own law in order
4 to make its position on these violations. But the
5 violations are crystal clear. Mr. Luis Ortiz, an
6 expert on Costa Rican public law, has confirmed that
7 the Respondent's agencies violated Costa Rican law on
8 injunctions.

9 Mr. Ortiz explains that once an injunction has
10 been notified, an administrative proceeding or
11 judicial review must be initiated within 15 days or
12 otherwise be reversed. Failure to initiate that
13 administrative action is a violation of fundamental
14 due process in Costa Rica because it amounts to a
15 final administrative penalty without following the
16 required legal proceedings.

17 This all--this applies to all administrative
18 bodies as the Constitutional Chamber of Costa Rica has
19 definitively held and as the Public Administration Act
20 describes.

21 Mr. Ortiz has also confirmed that the
22 Respondent's agencies have violated the Estoppel Rule.

1 Mr. Ortiz explains that under Costa Rican law
2 an administrative body may not annul, revoke or
3 suspend indefinitely an act or resolution that has
4 granted rights to third parties, such as an EV,
5 without following the proper procedure for judicial
6 review. No such procedure was followed in this case.

7 Mr. Ortiz explains that an EV grants
8 subjective rights, to beneficiaries, according to the
9 jurisprudence of the Constitutional Chamber.

10 Mr. Julio Jurado himself--this is the
11 Attorney--current Attorney General of the Respondent
12 State--has gone on record agreeing that in order to
13 nullify an EV, an administrative procedure or judicial
14 review is necessary. That statement contradicts the
15 evidence he's given in these proceedings.

16 In addition to the laws on injunctions and the
17 estoppel rules that have been violated, the Respondent
18 has also violated the Costa Rican Doctrines of
19 Legitimate Expectations and Good Faith.

20 Pursuant to those principles in Costa Rican
21 law, an investor must be able to rely upon
22 administrative agencies' representations that affirm

1 the legality of the investment. This provides
2 stability in the system and that the Investors' rights
3 will not be arbitrarily revoked.

4 The evidence will also show that the
5 Respondent failed to follow its own law in its
6 investigations and conclusions regarding the Las Olas
7 Project. It's telling that the Respondent completely
8 failed to submit a witness statement from any
9 individual of SETENA, SINAC, and INTA, amongst others.

10 We submit that that decision was made because
11 these agencies would reject the Respondent's rewriting
12 of Costa Rican environmental law and Costa Rican
13 environmental procedure. Instead of presenting these
14 critical witnesses to you, the Respondent builds a
15 smokescreen of personalized attacks of irrelevant
16 arguments and unsubstantiated accusations.

17 So, the Respondent's own agency, SINAC,
18 confirmed that the Claimants' proposed works for the
19 Concession and Condominium Section did not fall within
20 a Wildlife Protected Area. That's in 2006 in
21 reference to the Concession. And in 2008 for the
22 Condominium Section. Hence, SETENA subsequently

1 issued the EVs for those sections.

2 SETENA confirmed the condition of the site
3 both before and after it issued Environmental
4 Viability by performing site inspections. It wasn't
5 purely a desk exercise. They, being experts, went on
6 the site and inspected it.

7 On one of these site inspections, in
8 August 2010, the--the visit was made with a specific
9 purpose of investigating Mr. Bucelato's environmental
10 complaints. On that occasion, SETENA confirmed that
11 there was no evidence of wetlands, earthworks or
12 bodies of water and that the site consisted of
13 pastureland and dispersed trees.

14 So, what you see on the screen now is the
15 September 1st, 2010, resolution. And you can see very
16 clear that they have indicated precisely that there
17 was no problem on the site.

18 ARBITRATOR BAKER: Mr. Burn, I--with greatest
19 respect, I hate to intervene on your flow, but it's
20 such a good time.

21 Could you also briefly address in your Opening
22 the Respondent's suggestion that somehow the

1 applications being divided as they were presented to
2 the various agencies was incorrect. They make quite a
3 deal out of that point. And I haven't heard you say
4 anything about that yet. Thank you.

5 MR. BURN: Correct. Thank you, sir. We will
6 indeed address that.

7 Now, under the Estoppel Rule and the
8 Legitimate Expectations Doctrine in Costa Rican law,
9 an investor is entitled to rely upon the
10 determinations to which I've drawn attention.

11 If the Respondent wished to challenge these
12 permits, it could and should have initiated a court
13 action, process in order to seek the formal revocation
14 of those permits. What it could not do is institute
15 the extraordinary measure of enjoining the Project
16 without a hearing, essentially indefinitely, in
17 violation of Costa Rican law.

18 What the Respondent had to do was to ignore
19 the repeated find--in order to get to the position
20 they take, what the Respondent must do is to ignore
21 the repeated findings of no wetlands that both SINAC
22 and SETENA had found throughout the life of the

1 Project.

2 In July 2010, Mr. Manfredi and Mr. Bogantes of
3 SINAC inspected the site and confirmed there were no
4 wetlands to be found. SETENA received a report
5 reaffirming no wetlands in August 2010, confirming its
6 findings in 2008 when it visited the site in advance
7 of issuing the EV for the Condominium.

8 On August the 27th, 2010, Mr. Bogantes again
9 issued a letter confirming to Ms. Diaz and the
10 Defensoría, that there would be no damage to the
11 environment and no wetlands at Las Olas.

12 September 2010, as I've already referenced,
13 SETENA dismissed Mr. Bucelato's complaint and said
14 there were no wetlands on-site.

15 The Respondent is also faced with substantial
16 evidence from its own agencies and from external
17 experts disproving the 2011 determination of wetlands
18 by SINAC and by the Municipality. None of that is
19 surprising because, as previously explained, the
20 injunctions were based on unsubstantiated, shoddy
21 accusations from Mr. Bucelato and nothing more.

22 On May the 15th, 2011, INTA received a report

1 at the request of SINAC. SINAC contacted INTA in the
2 hopes that INTA would confirm that wetland soils were
3 on the property in order to substantiate or bear out
4 its hasty and erroneous claim that there were wetlands
5 on the property. INTA, however, concluded that the
6 soil data they collected did not support a finding of
7 wetlands.

8 And then on November the 15th, 2011, SETENA
9 reconfirmed the Environmental Viability of the
10 Condominium Section, rejecting the assertions that the
11 original EV had been improperly issued.

12 In December 2011, an environmental consultant
13 called INGEOFOR confirmed that there was no forest on
14 the site at the time and that the land had
15 historically been used as cow pasture.

16 In November 2012, jumping forward almost a
17 year, the Municipality finally recognized the effect
18 of the SETENA resolution of November 2011,
19 reconfirming the Environmental Viability for the
20 Condominium Section. But it failed to take any steps
21 to lift its prior shutdown notice. In any event, this
22 was not done until more than a year and a half

1 after--after it was issued and certainly not within
2 the 15 days required by law to institute a final
3 administrative action.

4 In contrast to the Respondent's complete lack
5 of witness testimony regarding SETENA, SINAC and the
6 other agencies to which I've referred, the Claimants'
7 expert, Mr. Gerardo Barboza Jimenez, a lifelong
8 government employee and former official at SINAC, has
9 explained that SINAC's determination of a wetland in
10 2011 was not based on the criteria prescribed in Costa
11 Rican law.

12 As Mr. Barboza and others explained, the
13 tripartite definition found in Executive Decree 35803
14 dated 26 April, 2010, is the official procedure of the
15 government of Costa Rica to establish the
16 identification, classification and conservation of
17 wetlands as of 2011. That tripartite definition--so
18 in order to identify wetlands, these three things, all
19 of them, must be shown: hydric soil, hydric conditions
20 and hydrophytic vegetation.

21 Now, those are specific and those bear a
22 specific technical meaning which the experts have

1 explored and we say drive the conclusion that--that
2 there was never any question of there being wetlands
3 on-site.

4 Mr. Barboza analyzed the various reports
5 issued by SINAC in reversing its findings of no
6 wetlands one year before. In particular, Mr. Barboza
7 outlines the applicable law as an expert in the field
8 regarding technical guidelines to be used when
9 delimitating and locating wetland ecosystems, and he
10 notes that if all three factors, to which I refer, are
11 not present, it cannot be a finding of wetland.

12 Mr. Barboza determined that soil sampling was
13 absolutely required in any determination of a wetland
14 under Costa Rican law.

15 Mr. Barboza also explained that the relevant
16 law for the classification of wetlands--wetland soil
17 is Decree Number 23214-MAG-MIRENEM.

18 Mr. Barboza dissects all of those reports and
19 deals with their faulty assertions regarding wetlands.

20 For instance, in SINAC's March 18, 2011,
21 report, the area it reported as wetland was not, in
22 fact, located on the Las Olas site at all.

1 I'm not sure if this is the right slide,
2 actually. Apologies. I think we've moved one of the
3 slides to the wrong place in the presentation.

4 But the point here is that the relevant
5 portion of the land in which supposed wetlands were
6 identified is using the data that was provided by that
7 expert, not even on the site. And there is data
8 showing that. And, in fact, the Respondent's own
9 expert, Mr. Erwin, accepts that proposition.

10 The forestry expert hired by the Claimants,
11 Mr. Minor Arce, has testified that the determination
12 in 2011 that there were forests on the Claimants' site
13 was also not in accordance with Costa Rican law.

14 Mr. Arce found that MINAE used a completely
15 subjective methodology for determining the sampling
16 areas for its study and failed to define the
17 parameters to be evaluated when determining the
18 existence of a forest in accordance with Article 3(d),
19 Forestry Rule 7575. You'll find that in
20 Exhibit C-170.

21 And, again, these are precise technical
22 matters. But in order for a forest to be said to

1 exist in Costa Rican law, certain criteria must be
2 met.

3 A forest is defined in the forestry law as
4 being "an area which occupies an area of two or more
5 hectares characterized by the presence of mature trees
6 of different ages, species and varied size, with one
7 or more canopies covering more than 70 percent of the
8 surface and where there are 60 trees per hectare of 15
9 or more centimeters in diameter measured at the height
10 of an adult's breast."

11 So, it's a multi-faceted, comprehensive
12 definition of what a forest would be.

13 And Mr. Arce is very careful in his
14 application of the relevant tests. He described in
15 the 2010 report the Las Olas property as not
16 containing any forest that falls within that
17 definition.

18 He explained that the definition of a forest,
19 which was implemented by Executive Decree Number
20 25721, by MINAE, was--was not in this case implemented
21 by MINAE. Rather, MINAE stated in its report that all
22 it needed to analyze is the number of trees. And as

1 Mr. Arce makes clear, that is wrong as a matter of
2 Costa Rican law. I've read out the definition of a
3 forest which has multiple facets and requirements.

4 Methodologically he's very critical of the
5 MINAE 2011 report saying that it did not use a proper
6 random sampling methodology thereby skewing its data.

7 So, when one looks at the--the proposition
8 that there was a forest on-site, one can see through
9 the evidence of--of an expert in the field that there
10 is no question of there having been a forest on-site.

11 This case is also about the baseless abuse of
12 the--of the Costa Rican criminal justice system in
13 respect to Mr. Aven and Mr. Damjanac.

14 The environmental prosecutor, Mr. Luis
15 Martínez Zúñiga, began a criminal investigation based
16 on little more than unsupported conclusory accusations
17 leveled at Mr. Aven by a disgruntled neighbor.

18 It's shocking that Mr. Martínez was willing to
19 criminally prosecute someone with so little evidence
20 in support of his case, but it is incomprehensible
21 that he did so in the face of numerous government
22 agencies' reports confirming that the Las Olas Project

1 was compliant with Costa Rican law.

2 It defies logic that Mr. Martínez himself
3 actually commissioned one of these reports, the INTA
4 report, but refused to accept or acknowledge its
5 conclusions.

6 The Claimants' witness Mr. Nestor Morera, an
7 experienced Costa Rican criminal attorney, has
8 explained the irregularities of the first trial and
9 the nature of the Prosecution's conduct and charges.

10 Mr. Morera explains that Mr. Martinez had the
11 burden to prove Mr. Aven actually intended to commit
12 the crimes of filling and draining a wetland and the
13 felling of trees.

14 Given the existence of reports and permits,
15 all confirming at the time before the criminal
16 proceedings that everything was in order, on what
17 basis can intent ever be found? It was hopeless.

18 By the time Mr. Aven was charged, multiple
19 government agencies were in disagreement as to whether
20 wetlands or a forest even existed on the site.
21 Mr. Martínez, despite this level of disagreement, took
22 it upon himself to decide not only that such

1 conditions did exist, but that Mr. Aven intended to
2 cause harm to those conditions. This is a massive
3 abuse of prosecutorial discretion.

4 The deficiencies in Mr. Martínez's case were
5 borne out by the criminal trial of Mr. Aven. And that
6 trial being replete with contradictory and blatantly
7 incorrect statements made by the Prosecution's
8 witnesses, including Mr. Bucelato and Mr. Bogantes.

9 It was for that reason that Mr. Martínez made
10 the decision to exploit an obscure rule of criminal
11 procedure in order to keep the plate spinning and to
12 get a second chance at Mr. Aven's case after
13 committing detrimental mistakes in the first trial.

14 Unfortunately, Mr. Aven was unable to appear
15 at the second trial as he left Costa Rica after
16 numerous threats and a shooting suffered by him and
17 Mr. Shioleno that left Mr. Aven's car riddled with
18 bullet holes.

19 On screen you can see some of the harassing
20 and racist emails that were sent to Mr. Aven, and here
21 we see some of the pictures of the car and the damage
22 done to it in the shooting incident.

1 Shockingly, even these extraordinary
2 circumstances didn't stop the Respondent from seeking
3 and temporarily obtaining an INTERPOL Red Notice
4 against Mr. Aven for alleged crimes that if proven
5 would have resulted in a fine with no prison time.

6 Mr. Aven's name has since been removed from
7 the INTERPOL Red List, but that did little to correct
8 the reputational harm and severe stress caused to
9 Mr. Aven, both of which he suffers to this day.

10 The Respondent's expert on Costa Rican
11 criminal law, Rosaura Chinchilla, will likely tell you
12 that Mr. Martínez's conduct was completely legitimate
13 and the imposition of the Red Notice is entirely fair.
14 Both the evidentiary record and Costa Rican law tell a
15 very different story.

16 The regulatory and environmental issues
17 relating to Las Olas were not the proper subject of a
18 criminal proceeding and should have been dealt with
19 through the administrative process.

20 Mr. Martínez's zealous--overzealous and
21 unprofessional techniques were arbitrary and
22 discriminatory and left Mr. Aven with no reason to

1 believe that the Costa Rican criminal justice system
2 could treat him fairly.

3 At this point I'm going to hand over to
4 Dr. Weiler in order that he can address you on matters
5 of international law. I will come back to you, as I
6 indicated, in order to address some of the defenses
7 that the Respondent raises. I will incorporate into
8 that the--addressing the point Mr. Baker raises.

9 PRESIDENT SIQUEIROS: Could we take a five- to
10 ten-minute break?

11 MR. BURN: Sorry. Yes. Actually, Dr. Weiler
12 had suggested that to me before and I forgot. So,
13 yes.

14 PRESIDENT SIQUEIROS: Thank you.

15 MR. BURN: Is it 10 minutes or 5 minutes, sir?

16 SECRETARY GROB: 7.

17 PRESIDENT SIQUEIROS: Why don't we take a
18 7-minute break.

19 (Brief recess.)

20 PRESIDENT SIQUEIROS: Mr. Weiler and Mr. Burn,
21 if you'd like to proceed whenever you're ready.

22 DR. WEILER: Thank you, Mr. President.

1 So, we have some very large, thick and
2 voluminous pleadings before you. So, there is an
3 awful lot of material I think that we could cover, but
4 what I'm going to try to do with the time I have is
5 choose what we believe are the--the highlights in
6 terms of the legal issues. If there's anything I
7 don't cover, please let me know, and I will cover it
8 for you.

9 This first slide is meant more as a summary,
10 almost a road map of where I plan to go. It seemed to
11 me, as I was writing this draft last night, that a
12 theme that came up was that there really was a
13 contrasting difference in approach between the two
14 parties.

15 And it started with looking at Paragraph 438
16 of the Counter-Memorial where the Respondent
17 criticized the Claimants for providing too detailed an
18 explanation of the applicable rules of customary
19 international law for treaty interpretation. They
20 said it was trite--trite law.

21 What's interesting about that observation is
22 that I think that it's symptomatic of the fundamental

1 difference between the parties when it comes to
2 interpretation of the Treaty.

3 Whereas the claimants have taken pains to
4 actually explain how their interpretation of each
5 relevant provision is consistent with the applicable
6 rules and the applicable orthodoxy of public
7 international law, the Respondent rarely references
8 them.

9 And on the rare occasions when the Respondent
10 does mention them, it seems to have been more in a
11 declarative manner. In other words, it doesn't
12 actually explain how the interpretation it proposes
13 was consistent with the rules.

14 Examples can be found at Counter-Memorial
15 Paragraphs 451 and 626 as well as the Rejoinder
16 memorial at Paragraphs 129 and 873. So, what the
17 Respondent seems to prefer is what I've--what I would
18 call fiat declarations. Fiat money is definitely a
19 good thing but--from governments, but fiat
20 declarations, I think, are less desirable.

21 It also engages in two particular stratagems.
22 One is to try to establish a false dichotomy between

1 investment protection and environmental protection,
2 where we would suggest that there--there need not be
3 one. And, also, that it seems to desire to turn the
4 arbitration on its head and actually turn these
5 proceedings into international proceedings on the
6 application of domestic law.

7 That comes out in slides later that I discuss
8 with regard to admissibility. So, I have a theory
9 about treaty interpretation. It's expressed in this
10 first paragraph. I think it's--it could probably be
11 expressed as a mathematical formula. The likelihood
12 that a party may misrecollect the original intended
13 meaning of a treaty provision usually rises in direct
14 proportion to the desire it has to see a live dispute
15 under that treaty decided in its favor.

16 And that potential, I would submit, is--is
17 only enhanced when one of the parties is a party to
18 the treaty and the other is not, which means--it
19 behooves the tribunal to ensure a fair result by being
20 scrupulous in the manner in which it applies the
21 orthodox approach to international law interpretation.

22 In this regard, I came across Campbell

1 McLachlan's warning about that. This is a--one of the
2 legal authorities. Campbell wrote a chapter in a--I'm
3 sorry, not a chapter--an article in a--a very famous
4 article or increasingly famous article on
5 Article 31(3)(c) of the Vienna Convention. It's very
6 thoughtful, and I thought that it was appropriate to
7 include. It was almost opportunistic that I was able
8 to find a quotation that I think suited.

9 So, obviously, tribunals are only going to be
10 called upon to interpret a treaty within the context
11 of a contentious dispute. And that is always going to
12 bring up the problem of intertemporality.

13 Imputing intent to treaty parties, I think, is
14 perilous at the best of times. There are many
15 examples in the Counter-Memorial and Rejoinder where
16 there are imputed references to the parties' alleged
17 intent, and many of them appear to have been
18 exclusively grounded in a binary assumption that the
19 Respondent knows what the treaty was really meant to
20 say and the Claimants don't. Examples include
21 Paragraphs 437, 442 to 443, 446, 454 to 455, 623 to
22 627, and 631 of the Counter-Memorial and

1 Paragraphs 11, 14, 42, 57, 62 to 63, 69, 880, 1139,
2 and 1146 of the Rejoinder.

3 There is a lot of declaration in there about
4 what was truly intended that's not backed up by a
5 proper orthodox analysis under the Vienna Convention
6 approach.

7 So, one of the ways in which we noted that
8 there seemed to be a disagreement between the parties
9 and interpretation had to do with the role of NAFTA
10 provisions. The example here that I've used is the
11 controversy between the parties over Article 1112 of
12 the NAFTA and its identical counterparts, Article 10.2
13 of the DR-CAFTA.

14 Now, the Claimants explain what we believe to
15 be a consistent and compelling interpretive approach
16 that has been taken to Article 1112. And it reflects
17 the Public International Law Doctrine that relates to
18 the concept of incompatibility with regard to treaty
19 interpretation. And that can be found in our Reply
20 Memorial at Paragraphs 53 to 57.

21 Now, the Respondent disagrees. And it has a
22 number of reasons why with regard to this particular

1 provision, why it thinks that the fact that an
2 identical provision in the NAFTA should not be
3 guiding.

4 And the first one is, of course, to ignore the
5 fact that the NAFTA was a direct precursor for the
6 model text. And this is an important factor, which in
7 a few moments I'll demonstrate Costa Rica once also
8 accepted. And that's that every chapter of the
9 DR-CAFTA was an American proposal, and the vast
10 majority were based on American models. So, it is
11 useful, we submit, to refer to American treaty
12 practice when one tries to understand the
13 interpretation of a provision.

14 It also claims to construe Article 11--I'm
15 sorry--Article 10.2 differently on the basis that to
16 do so--to do so--I'm sorry--to take the Claimants'
17 position would be to treat it in express contradiction
18 with the text of 17.2 of the CAFTA. I commend you to
19 read that in your own time and ponder how on earth an
20 express contradiction or even an implied contradiction
21 exists. I can't see it.

22 A similar claim is that, more generally,

1 because the DR-CAFTA allegedly addresses environmental
2 issues in some more meaningful form that, therefore,
3 that's another reason that one should disregard the
4 fact that a treaty provision that has to do with
5 conflict between chapters should be interpreted
6 differently because it just so happens we have an
7 environmental measure here.

8 I would suggest that that's--that's a
9 non sequitur. The final one is that Claimants--I'm
10 sorry--the claim is inaccurate--the inaccurate claim
11 that previous interpretations were made in these cases
12 but that these cases that the Claimants have cited,
13 that they weren't environmental in nature. And I
14 think that if someone were to tell Martin Hunter and
15 the rest of the Myers Tribunal that their case wasn't
16 environmental, that they would probably be surprised.

17 So, examples that demonstrate the relevance of
18 NAFTA provisions for DR-CAFTA interpretation are
19 actually fairly common. Some of them can be found,
20 for example, in the Respondent's Reply Memorial--I'm
21 sorry--the Respondent's Memorial on Jurisdiction and
22 Counter-Memorial on the merits in the Spence v. Costa

1 Rica case, for example, at Paragraph 198 where it
2 actually relies on Article 1112 with respect to
3 Article 10.2.

4 And, also, you could find--oh, no. You'll
5 have to strike that last statement. I've just--I've
6 misread my bullet points. So, I've put them in proper
7 order. So, the first example would be the United
8 States submission in this case at Note 1 where it
9 relies on practice with respect to Article 1110--1112
10 of the NAFTA to construe Article 10.2 of this treaty.

11 The next example is actually the one
12 where--the Respondent's Memorial on Jurisdiction and
13 Counter-Memorial in the Spence case at Paragraph 198.
14 There they relied on Article 11.05 in construing
15 DR-CAFTA Article 10.5.

16 And Costa Rica's reply on jurisdiction and
17 Rejoinder on the merits in the Spence case at
18 Paragraph 162 where they referred to NAFTA
19 Article 1116(2) in order to construe DR-CAFTA
20 Article 10.18(1).

21 And other examples--two other examples--Pac
22 Rim Cayman and El Salvador, Decision on Jurisdiction,

1 Paragraph 4.4. The resemblance between Articles
2 10.12(2) of the DR-CAFTA and 1113(1) of the NAFTA.
3 And then, finally, Railroad Development Corporation v.
4 Guatemala. First Decision on Jurisdiction at
5 Paragraphs 19 and 55 to 74 generally.

6 The Respondent argues that Article 10.18(2) of
7 the CAFTA is modeled after Article 1121 of the NAFTA.
8 The tribunal agrees with the Respondent and says it is
9 evident that CAFTA Article 10.18 and NAFTA Article
10 1121 have the same general rationale and purpose.

11 And this brings me to the--one of the basic
12 reasons why we've given you some new legal
13 authorities. It involved a Friday night gift from
14 the--our friends at the Government of the United
15 States in which the US submission referred to its
16 previous submission in the Spence v. Costa Rica case.
17 That caused me to go back and look at that submission.
18 And then I thought I better look at Costa Rica's
19 response to that submission, which took place in its
20 post-hearing brief.

21 And it was in that document, Costa Rica's
22 post-hearing brief in the Spence case where it

1 commented on the submissions of Nicaragua and the US
2 that I discovered a reference to summary documents
3 upon which Costa Rica relied as de facto travaux for
4 NAFTA--for CAFTA--for the DR-CAFTA.

5 And I couldn't find the summary documents very
6 easily. The links didn't work anymore. But I--I was
7 creative and diligent, and I was able to discover
8 them. I found them online mostly using the--that
9 Wayback Machine, the one that lets you go back and
10 look at previous versions.

11 And in doing that, I did discover, first,
12 these--these summaries. And from reading these
13 summaries, I realized that this wasn't just a summary
14 that was prepared of the negotiations of the CAFTA
15 generally. This was actually a COMEX Production.
16 This was actually a summary that appears on the SICE
17 website but which is actually Costa Rica's
18 contemporaneous understanding of the conclusion of
19 each of the CAFTA negotiation sessions.

20 And I also found one other document when I was
21 there. And that's actually a document which--I
22 promised myself not to try to say something in

1 Spanish. So, I'll just say what I think it would be
2 in English, which is an explanatory document for the
3 entire treaty. It was issued in 2004, again, by the
4 government of Costa Rica. Of course, it's not
5 uncommon for a government to issue an explanatory text
6 which accompanies the adoption of the treaty in
7 domestic law. So, we've got that too.

8 So, those are the--the legal authorities that
9 I'm going to be referring to now for the next few
10 minutes. So, the reason that I think that's relevant
11 is that it goes to the dispute that the parties have
12 over these three particular issues, object, and
13 purpose of the two chapters and the meaning of those
14 two provisions.

15 So, we turn to that first slide. And what--I
16 think you'll be getting the--since you'll be getting
17 the online version, it will be a bit easier because
18 you can pinch in and zoom and--whereas, these are--it
19 may be kind of hard to read the printout of
20 this--because I don't think--yeah. You can't--can't
21 zoom it in. But that's okay because it's in Spanish
22 anyway. So, I wouldn't be reading it to you.

1 But the gist of these particular versions
2 is--is rather revealing. So, what's the object and
3 purpose of these chapters? Well, the crux of the
4 Respondent's case here is that the parties added
5 Chapter 17. And when they did so, they fundamentally
6 altered the gravity of Article 10, basically,
7 subjugating investment protection objectives to
8 environmental objectives.

9 Now, our position has always been that the two
10 chapters actually serve complementary but different
11 purposes. And they involve different obligations and
12 approaches. Fortunately, Costa Rica's contemporaneous
13 documentation seems to confirm our approach.

14 Chapter 17 was intended to promote better
15 policy making in the fields of sustainable development
16 and environmental protection. And it was focused on
17 capacity building through intergovernmental
18 cooperation. Its provisions were meant to foster
19 procedural fairness, transparency, and participation
20 in decision-making. And it was a political imperative
21 of the US government that these environmental concerns
22 appear to be addressed.

1 Now, as these documents indicate, the only
2 obligation that can be subjected to dispute settlement
3 or that was intended to be subjected to dispute
4 settlement in a state-to-state format concern the
5 practice of lowering one's standards to attract trade
6 or investment.

7 Of course, we don't have anything like that
8 here. That's--we--we--the Claimants don't actually
9 challenge the validity of any law or regulation. This
10 case is about enforcement.

11 In its 2004 explanation document, Costa Rica
12 itself notes that the kind of mischief at which
13 Chapter 17 was aimed really would involve the adoption
14 of the measure of general application. And that would
15 foster sustained and consistent programs of
16 underenforcement. And you see that language of
17 "sustained and consistent underenforcement." This is
18 the nature of the measure that this chapter is
19 supposed to avoid.

20 And, again, we don't even have a general
21 measure at issue, much less one which is designed to,
22 for a long period of time, foster sustained and

1 consistent underenforcement of any environmental
2 regulation.

3 I also note on this page an interesting
4 section on procedural guarantees where it indicates
5 that the parties provide their citizens--are to
6 provide their citizens with a series of procedural
7 safeguards with regard to environmental measures and
8 their enforcement.

9 On to the next slide, again, the summaries
10 that are prepared by the Costa Rican officials of each
11 negotiating round, they confirm this approach as well.
12 Here we have the summary for the notes of the second
13 round. This is when the chapter was first proposed by
14 the US negotiators, as well as the fourth round, which
15 recorded the initial reaction of the parties to it.
16 And by "the parties," I mean the other parties apart
17 from the US.

18 Now, this case, of course, again, it involves
19 a targeted and specific maladministration and
20 enforcement. It's not about a general measure adopted
21 to boost trade or investments systemically by any kind
22 of perpetual lax enforcement. I think it's also

1 interesting to note how comparatively early the
2 parties agreed on investment disciplines, which
3 obviously were valuable to the parties in their own
4 right. And there's no hint that the parties had any
5 desire to subjugate them to some sort of undefined or
6 undefinable class of environmental policy
7 prerogatives.

8 Rather, investment disciplines were solidified
9 by the fourth round with even reservations done by the
10 sixth round. In contrast, the parties were still
11 haggling over what the breadth and depth of their
12 commitments under Chapter 17 would be, which, of
13 course, involved commitments regarding
14 capacity-building and cooperation and consultation
15 right until the final rounds.

16 The title of this slide comes from our friends
17 at the United States, Paragraph 8 of their submission.
18 Of course, any reasonable survey of Chapter 17 in
19 relation to the facts of our case points to a single
20 provision as being most relevant for your
21 consideration. And that's the procedural provision.

22 Article 17.3, I've highlighted the key points.

1 Now, as the explanation that was provided in 2004 by
2 Costa Rica indicates it was well understood that
3 decision-making under environmental policy measures
4 would be held to an international standard of review,
5 and it would stipulate terms of compliance that are
6 strikingly similar to those found in Article 10.5.

7 The highlighted provisions here of the second
8 page, which is, I think, page 105, mentions that it
9 includes measures that have to do with permitting and
10 licenses.

11 So, it seems to us that at the very least, if
12 the tribunal is going to have regard to the provisions
13 of Chapter 17, as both the Respondent and United
14 States suggests, as a contextual guide to construing
15 Articles 10.5 and 10.7, the manifest result should be
16 to reinforce the Respondent's duty according to a
17 court of due process and transparency in administering
18 environmental policy rather than supplying some sort
19 of nebulous justification for what we consider to have
20 been slipshod, unjust, or procedurally unsound
21 enforcement.

22 And to be clear, the Claimants' position in

1 Article 10.2 has remained as unambiguous as the
2 language of the treaty text itself and has remained
3 consistent throughout. Article 10.2 only applies to
4 those rare occasions in which achieving compliance
5 with the Chapter 10 provision would necessitate
6 noncompliance with another provision of the agreement.
7 And any party to the treaty potentially faced with
8 such circumstances is, of course, obligated under the
9 general principle of good faith in international law
10 to take all available steps to avoid such conflict.

11 And it certainly doesn't mean that if two
12 provisions from different chapters are addressed to
13 the same or similar persons or interests, that only
14 one could be used or somehow construed to trump the
15 other; rather, as the US confirms in this case at
16 Paragraph 6 of its submission, "The mere coverage of a
17 particular matter or issue by a chapter other than
18 Chapter 10 does not necessarily remove the relevant
19 matter or issue from the scope of Chapter 10 in the
20 absence of an inconsistency."

21 An inconsistency is a useful term to keep in
22 mind. Another word, of course, is the customary

1 international law term that seems to be more favored,
2 which is incompatibility. And while we don't see the
3 word "incompatibility" in our friend's submissions, we
4 do see the word "incompatibility" in their
5 contemporaneous understanding of what Article 10.2 was
6 supposed to mean. And that's what's highlighted in
7 these two exhibits.

8 So, to be clear, our friends use this term
9 "incompatibility" in describing not only Article 10.2
10 but also Article 10.11, which we submit is only
11 appropriate because on its face this provision
12 confirms that there is nothing inherent in investment
13 protection that would damage environmental protection.

14 It accordingly assures a reader that any
15 actions that can be undertaken in furtherance of
16 environmental policy purposes are legitimate just so
17 long as environmental policy is not used as some sort
18 of convenient excuse for harming foreign investors.
19 That, of course, would be incompatible with the rights
20 granted under Chapter 10.

21 With that, I move on to applicable law. And,
22 in this regard, I just want to remind the tribunal

1 that in this case, relying on Article 10.16, we have
2 two bases for standing. And both were claimed in the
3 Notice of Arbitration.

4 Paragraph (1)(A) requires the Investor to
5 state its case in this regard. When one provides
6 one's Notice of Arbitration, one needs to specify how
7 the responding party has actually breached its
8 obligations under Chapter 10, Part A.

9 And with regard to Paragraph (2), it also
10 stipulates that the same investor must have already
11 90 days earlier or no less than the 90--no fewer than
12 90 days earlier had to specify the "legal and factual
13 basis for each claim." So, in order to appear before
14 you, the Claimants basically had to set out the issues
15 in dispute.

16 And we submit that they did so and that
17 they're very straightforward. Did the Respondent
18 breach Articles 10.5 or 10.7? And, if so, what's the
19 amount of compensation owing?

20 Now, again, while it may be a little trite, in
21 light of the Respondent's attempt to turn the
22 proceedings into some sort of commission of inquiry

1 into its allegations of Claimants' noncompliance with
2 municipal law, I think it's important to recall that
3 the Tribunal's agenda is dictated by the operation of
4 the provisions you see here.

5 The Claimants are responsible for defining the
6 issues in dispute. And the Tribunal decides those
7 issues in dispute in accordance with the agreement and
8 applicable rules of international law. It's not--in
9 other words, it's not for the Respondent to define the
10 issues in dispute. That's the Claimants' prerogative,
11 and it's the Tribunal's responsibility to decide them.

12 Now, how do they decide them? Well, the
13 Tribunal decides them with regard to applicable rules
14 of international law. Well, what would those be?
15 Again, at the risk of sounding trite, how does one
16 figure out what international law is? Well, what one
17 does is one has recourse to the orthodox sources of
18 international law. They're reflected since 1945 in
19 Article 38 of the ICJ statute. We all know them. We
20 can--custom, treaty, principles.

21 Well, what kind of custom are we talking
22 about? Well, we're clearly talking about applicable

1 rules of treaty interpretation, jus cogens norms.
2 Another example might be elements of the minimum
3 standard of treatment or perhaps rules governing
4 compensation for expropriation. Those are all
5 examples of customary rules that are applicable.

6 What about treaty rules? Well, with treaty
7 rules, it's really got to be specific obligations owed
8 as between Costa Rica and the USA that are relevant to
9 the treaty obligations upon which the claims are
10 founded.

11 And I would submit that if you review the many
12 citations to treaties to which Costa Rica is a party
13 and the provisions found therein, that none of them
14 actually have any specific application to the facts of
15 this case.

16 And, again, when I say "the facts of this
17 case," I'm talking about the measures that Claimants
18 allege have resulted in a breach. Unless a treaty
19 provision addresses that kind of measure directly,
20 it's not going to be relevant.

21 And, of course, principles--that means general
22 principles of international law. And I think it might

1 be useful here for a moment to remind yourselves of
2 the subsidiary sources of international law.

3 Obviously, you know, again, we can probably all say it
4 in our sleep--the adjudicative decisions and also the
5 most highly qualified publicist--the writing of those
6 publicists.

7 And, of course, they don't constitute law in
8 and of themselves. And as we know, adjudicative
9 decisions are going to inevitably vary in quality.
10 But to be clear, today, especially in our digital
11 world, we have far more places to publish on law than
12 we used to.

13 So, there's an awful lot of law journals out
14 there, and there's an awful lot of place--a lot of
15 room for a lot of people to write something about
16 whatever the favored topic is. And I would strongly
17 argue that just because you get yourself published
18 doesn't make your--doesn't make you one of the highly
19 qualified publicists that are referred to in this
20 orthodoxy.

21 And unfortunately, there are many examples in
22 our friend's submissions of citations to legal

1 writings which clearly were not authored by highly
2 qualified publicists. And as a result, they cannot be
3 authoritative sources of any international law.
4 Applicable law, of course, also does not include
5 municipal law. Laws of Costa Rica, for a various
6 simple reason of logic, can't possibly be the
7 governing law because they're the evidence. You can't
8 have law which is simultaneously both evidence in a
9 proceeding and the governing law of it.

10 And in this regard, I'm thinking of Paragraph
11 68 of the Rejoinder where Respondent states that it is
12 its contention that these principles stem from
13 international law and Costa Rican law, which under
14 Article 10.22 DR-CAFTA constitutes the law that the
15 tribunal should apply in deciding the dispute.

16 We submit that's wrong. Municipal law is not
17 applicable law under Article 10.22. It makes no
18 mention of the laws of the host state. So, it's not
19 open to a tribunal to consider them. And that only
20 makes sense again because, again, a measure can't be
21 simultaneously both evidence and substantive law.

22 We think the Respondent is doing this because

1 it's seeking a forum for allegations that it's
2 contrived against the claimants based on its own
3 municipal rules. But this hearing is to determine
4 whether Costa Rica complied with its CAFTA
5 obligations. So, its laws are not applicable here.
6 They do not govern. In this forum the municipal law
7 of Costa Rica must only be regarded as evidence.

8 For example, the laws of Costa Rica may serve
9 as evidence that informs the Tribunal's analysis of
10 legitimate expectations under Article 10.5.

11 As regards other treaties, again, there's no
12 serious effort to demonstrate how any of these other
13 treaties have obligations that would authorize, much
14 less require, Respondent to engage in the measures
15 that we allege breach its Chapter 10 obligations.

16 I also note that at Paragraphs 975 and 976 of
17 the Rejoinder, there seems to be a tentative reference
18 to English law as well, suggesting that it may be
19 useful to--or applicable in some way with regard to
20 the burden of proof for establishing allegations of
21 bad faith or bribery; and needless to say, English law
22 is, again, not relevant in this proceeding as a matter

1 of substantive law, which brings me to the
2 Respondent's principles defense.

3 Now, Respondent has admitted in its Rejoinder
4 that--at Paragraph 68, that there--it's not actually
5 suggesting that any of the three environmental law
6 principles to which it has referred constitute general
7 principles of law.

8 So, we're happy to see that. So, that takes
9 care of one of the--the categories, general principles
10 of law. So, the other two, of course, are treaty and
11 custom.

12 So, where do we find evidence of these
13 principles?

14 Well, the first two principles with respect to
15 preventative--the preventative principle, with regard
16 to that principle, we don't really see anything new in
17 the Rejoinder. We see some citation to Mr.
18 Jurado; but we also see a couple of references to
19 environmental law book chapters, one comparative and
20 one municipal.

21 There's an argument that the preventative
22 principle is the highest form or the flip side of the

1 precautionary principle. Other than that, there's no
2 effort to demonstrate how this preventative principle
3 would apply in the--in the current case.

4 Nonregression similarly, there's really no
5 effort made to actually provide either evidence of
6 custom or evidence of applicable Treaty that would
7 source that principle. So, that pretty much leaves us
8 with the precautionary principle.

9 And with regard to the precautionary
10 principle, or as Philippe Sands refers to it--can be
11 referred to as the principle or an approach. The
12 question is whether or not it is customary or it is
13 otherwise applicable because it can be found in
14 treaties to which the various CAFTA members are a
15 party.

16 Well, at Paragraph 73 to 75 of the Rejoinder,
17 we see citations to the Convention on Biological
18 Diversity, the Rio Declaration and the UN Framework
19 Convention on Climate Change. But none of these
20 treaties, much less the provisions cited in them, have
21 anything whatsoever to do with the conduct of the
22 Claimants. They breached their CAFTA rights. So,

1 treaty's out. Well, what about custom?

2 Well, there you will find the attempt at
3 Paragraph 76 to 78 of the Rejoinder, and we'd first
4 note that no effort is actually made to demonstrate
5 that precaution--as some sort of principle forms part
6 of the customary law of investment protection.

7 And in this regard, I refer you to the Grand
8 River Arbitration. In that case, if you look at the
9 Award, which we've provided to you, if you look at
10 Paragraphs 68 and 197 of the Award, it refers to two
11 places in which the United States stated that relevant
12 rules of international law can't override treaty
13 language.

14 So, that's obviously going to be relevant when
15 we're talking about the notion that precaution should
16 be used to reinterpret what Article 10.5 means.

17 The Tribunal, though, went even further in
18 stating at Paragraphs 218 to 219, Quote: The more
19 important question is whether the asserted legal
20 protections are imported into the minimum standard of
21 protection owed to foreign investments under customary
22 and international law and thus under Article 1105.

1 The Tribunal concludes that it has not been
2 shown that they are. As the basis of fair and
3 equitable treatment standard of Article 1105, the
4 customary standard of protection of alien investors
5 investments does not incorporate other legal
6 protections that may be provided investors or classes
7 of investors under other sources of law.

8 To hold otherwise would make Article 11.05 a
9 vehicle for generally litigating claims based on an
10 alleged--any alleged infraction of domestic or
11 international law and thereby unduly circumvent the
12 object and purpose of the Treaty.

13 In that case, as Claimants' counsel, I had
14 argued under both the equivalent of the applicable law
15 provision in the NAFTA and under Vienna Convention
16 Article 31(3)(c) that customary international law
17 norms that had to do with the sovereign rights of
18 native peoples should be relevant in that case because
19 all of the Claimants were native peoples.

20 Unfortunately, the Tribunal told me that I was
21 wrong, and I would submit that the reasoning that the
22 Tribunal demonstrates is not restricted to telling the

1 Claimants that a minimum standard provision needs to
2 remain narrow. I think that also applies in the
3 context of telling a Respondent that it--I'm
4 sorry--telling a Claimant that it can't get any
5 broader. It should be applied in the same manner, the
6 logic applies in the same manner, to a Respondent who
7 wants to more--wants to narrow it based on some sort
8 of other applicable--or allegedly applicable source of
9 law.

10 Now, very quickly, with regard to the two
11 paragraphs where the attempt is made to say that the
12 precautionary principle is custom, a reference is made
13 to Professor Crawford. It says that
14 Professor Crawford, quote, "in no uncertain terms made
15 X statement."

16 Well, it turns out that the book referred to
17 was actually edited by Professor Crawford, and the
18 chapter was written by someone named Gerhard Hafner
19 and someone named Isabelle Buffard. So, we don't
20 really know what his definitive views are with regard
21 to--there's another quote there, another quote that
22 seems to be a double negative.

1 It says, "The practice of various
2 international Tribunals confirms that to this day, it
3 cannot be said without doubt that there exists a
4 customary international law rule."

5 Cannot be said without doubt; that's a double
6 negative. The--the Respondent seems to think that it
7 actually says the opposite.

8 Otherwise, there's a quotation of--of 1997
9 article by two young environmental lawyers who
10 are--seem quite convinced back then that, indeed, it
11 had crystalized into custom.

12 Again, the other source is referred to as--a
13 book by Professor Sands. Here, the Respondent makes
14 note of the fact that there was a newer edition, but
15 the newer edition doesn't help them. In fact, in the
16 same provision--in the same section quoted by the
17 Respondent, we don't know if it's Sands again, because
18 it's actually--Sands is one of the editors, and they
19 don't delineate who the authors of each chapter are.
20 But whoever this author is says a precautionary
21 principle or approach has now received widespread
22 support in the international community, but where

1 is--what does the principle mean? And what status
2 does it have in international law? There is no clear
3 and uniform understanding of the meaning of the
4 precautionary principle.

5 So, there is nothing, we would submit, in the
6 record that suggests that even this principle of
7 precaution can somehow be transformed into applicable
8 law by proving its value is custom, because even if it
9 is emerging custom, what the "it" is is by no means
10 clear. And the treaties, again, also don't provide
11 any--any guidance.

12 And with that, I'm going to move over to
13 nationality. And I don't think I have to spend too
14 much time here. There's basically three reasons why
15 we submit that the Respondent's objection is utterly
16 inadmissible. The first one is very clear from
17 the--from the text you have right there.

18 Respondent's been focusing on that first
19 paragraph, but look at the second paragraph. The
20 second paragraph defines "national" as someone who has
21 the nationality of a Party. That can't be a national
22 of Italy because it defines "national" as meaning a

1 national of a Party.

2 And, of course, that makes perfect sense when
3 we look at what the applicable customary and
4 international law on dominant and effective
5 nationality is with regard to the Doctrine of
6 Diplomatic Protection Practice.

7 As we've described in our Memorial, we
8 referred to ILC draft articles under Diplomatic
9 Protection Article 6 that it is not possible for a
10 Respondent State to challenge the claim--the espoused
11 claim of another State on the basis that the
12 individual is a dual national of some third party.

13 And then finally, if we even are to accept
14 that we can engage in an argument over whether or not
15 Italian dual nationality is relevant, the response
16 approach is actually relying on another case in which
17 I was involved, Champion Trading, although I wasn't
18 involved at this--at this preliminary level. I came
19 in after. Although I'm obviously quite familiar with
20 it.

21 And in that case--Number 1, the case can't be
22 possibly relevant because Champion Trading was an

1 ICSID case and under Articles 25, 27 of the ICSID
2 Convention and Articles 29 and 33 of the ICSID
3 Arbitration Rules, espousal of claims and all of the
4 rules associated are out.

5 So, it's a *lex specialis*. It doesn't
6 contemplate this language. And that most likely
7 explains why the original Claimants' counsel was
8 unsuccessful in trying to demonstrate that dominant
9 and effective nationality as a standard should be used
10 in that case. And admittedly, they--they had a great
11 case on dominant and effective, because the three boys
12 had never even been to Egypt. They were names of like
13 Chip and David and--I don't know, Mitch. Like
14 the--and they were born and raised in Connecticut. I
15 mean, they had no connection with Egypt. So, I can
16 see why they went that way, but the Tribunal said no,
17 you can't go that way.

18 Oddly enough, though, the Tribunal, it didn't
19 actually apply the correct law. It didn't apply the
20 law of Egypt, which would have--which was correctly
21 applied in another case called *Siag v. Egypt*.

22 But instead they cobbled together this

1 idiosyncratic test in which they counted the occasions
2 on which the Claimants, or rather since they were all
3 minors at the time, somebody else had described them
4 either as Egyptians or had used some sort of Egyptian
5 identity document. That's not the approach that is
6 acceptable either under customary law or even arguably
7 under ICSID law, and ICSID law itself is not relevant
8 to this case.

9 So, in this regard, though, if we do not want
10 to talk about dominant and effect of nationality, even
11 though we submit it is not relevant because the
12 argument is not he's also a Costa Rican national, it's
13 that's he's also an Italian, which is not relevant,
14 here we have the factors that need to be considered.
15 His habitual residence is in Tampa. That's where he
16 voted. Born in New Castle, Pennsylvania. He attended
17 Baylor. I'm sure one of our arbitrators would agree
18 with that choice of college.

19 All of the friends and relatives are located
20 in the United States; no connection to Italy. All--no
21 investments or bank accounts in Italy.

22 I mean, there is no indication that this

1 man--I mean, he's only been to Italy three or four
2 times. I don't even know if he likes pasta.

3 If we were, though, however, to even indulge
4 for a moment in the Champion Trading approach, we've
5 got that covered too. There's lots of examples, as
6 George has already shown you the slide. We've got
7 lots of examples that cover that off too. Dave Aven
8 is an American, identifies as an American and uses
9 American documents.

10 So, that moves us to the second issue on
11 jurisdiction, which is standing; and that's proof of
12 investors and investments.

13 And here is where I wanted to just stress that
14 the Claimants have made claims both as investors under
15 Paragraph 1(a) and on behalf of a series of investment
16 Enterprises under Paragraph 1(b). And there's a lot
17 of case law that we can provide to you, some of
18 which--which was new and therefore you've been--you've
19 just recently been in receipt of--that demonstrates
20 that when we talk about these tests based on the NAFTA
21 model, you have to prove ownership or control of an
22 investment to be able to establish that you are an

1 investor with an investment and control is de facto;
2 it's not de jure. I mean, of course, de jure control
3 is fine. You can prove your connection that way; but
4 a Respondent State has been unsuccessful when it
5 attempts to use de jure control as a defense to a
6 demonstration of de facto control.

7 I'd also point out the Tribunals are reluctant
8 to go down this road with regard to
9 jurisdictional--tactical arguments based on
10 jurisdiction.

11 There's lots of examples of them. I think
12 since we're going to give you the slides, I don't
13 include the notes, so, I'll just very quickly name the
14 cases: De facto control cases, examples are
15 international Thunderbird Gaming v. Mexico; Myers
16 versus Canada; Perenco Ecuador versus Ecuador;
17 SwemBalt versus Latvia; Sedelmayer v. Russia.

18 And cases in which an allegation of
19 noncompliance with applicable municipal law has been
20 overridden by a Tribunal mindful of the objects and
21 purpose of the treaty include Sedelmayer, Perenco and
22 Swembalt; and other cases involving overriding or

1 rejecting a claim by a--by a Respondent of a failure
2 to some other--some other sort of failure to prove
3 control. Myers versus Canada--or Thunderbird Gaming
4 versus Mexico. Myers was an easy one to do because
5 that was one of my first cases, so, I always remember
6 it.

7 Early on we made the claim on behalf of
8 Myers Inc., U.S., for the--the Enterprise was Myers
9 Canada. We got into the details of it. It turns out
10 that the four brothers who owned Myers U.S.A., they
11 actually invested directly in Myers Canada, which
12 means technically, Myers U.S.A. didn't actually have a
13 direct investment in Canada.

14 Martin Hunter and his colleagues realized that
15 that would--not--that the--the vast majority of the
16 evidence on the record showed that that would make no
17 sense to dismiss on those grounds because it was clear
18 that there was one older brother, Dana Myers, who ran
19 everything. And they were executives of both
20 companies.

21 And so, de facto control was more than
22 established. And that's why, in that case, it went

1 that way and the jurisdictional objection was
2 dismissed.

3 Now, with regard to the Respondent's
4 jurisdictional objections, I think before--just before
5 we get there, it's just important to recall that the
6 Claimants' position on the nature and quality of their
7 investment hasn't changed, and that's why I've decided
8 to just remind you of the Paragraph 17 to 20 of the
9 Notice of Arbitration. They demonstrate that the
10 investors from the very start realized that for
11 jurisdictional purposes, they would cite a litany of
12 examples of how they could prove that they had
13 investments; but the primary focus of their investment
14 was, and always has remained, a project. And that
15 project had at least two major components: One was a
16 condo development; the other was a hotel.

17 And that is what we talk about. And that's
18 what our clients talk about when they say they lost
19 their investment. When they say they "lost their
20 investment," they don't say, well, I had cadastral
21 plain Lot Number X5000, and that was my investment.
22 And I also--I think I had some sort of IP rights,

1 and--they don't delineate them. Their investment was
2 in a project. And that project is what was taken from
3 them.

4 Now, in this regard, the Respondent has two
5 objectives--I'm sorry, two objections, neither of
6 which have any merit. The one is to try to break out
7 the notion of--of property rights and land and suggest
8 that because the Claimants no longer owned all of the
9 lots directly as of the time the arbitration was
10 commenced that they somehow have overstated their
11 claim.

12 But, of course, that makes no sense. They
13 were--their whole project was designed to sell lots.
14 So, the only way that this evidence that apparently
15 the Respondent worked so hard to find is relevant in
16 this case would be that it demonstrates that the
17 Claimants were very good early on at selling lots.
18 And it demonstrates that this was going to be a
19 successful investment, had it not been killed.

20 It also could demonstrate--it could provide
21 the valuations for both--for both parties with a little
22 bit more information if it turns out that there's

1 certain lots were not properly accounted for. Well,
2 that's great. The valuator will be able to refine
3 their numbers.

4 The other objection is also spurious, and the
5 evidence on the record, which includes now a more--the
6 more recent documents that we submitted to you,
7 demonstrates there's just no merit to it. The
8 suggestion was that perhaps at some point in time,
9 David Aven may have owned too much of the investment.
10 It's an odd objection, but it's, nonetheless, untrue.
11 It turns out that the record demonstrates that
12 the--even the 49 percent ownership restriction had
13 always been complied with.

14 So, we submit that there is no validity in
15 that--in either of those arguments.

16 The next one is a--is a fuzzier one, and this
17 objection is with regard to the compliance of the laws
18 of the host state. And, originally, it seemed that
19 the plan was to rely on a group of cases that actually
20 had to do with the construction of a compliance with
21 local law clause.

22 Now, we submit in our Memorial that the

1 historical purpose of such clauses actually had to do
2 with limiting jurisdiction to post investment--I'm
3 sorry, post establishment cases; but be that as it
4 may, the bottom line is these jurisdictional cases
5 just really weren't relevant, and Respondent, I think,
6 realized that and therefore reformulated the objection
7 to make it really just one of admissibility.

8 But the problem of doing that is, of course,
9 there's now no really underpinning or logical
10 underpinning for their theory. They basically just
11 say by fiat, well, you have to be in compliance with
12 local law. But that doesn't make sense. If this case
13 is intended to be about whether Claimants have proved
14 a breach of this Treaty because enforcement was
15 inappropriate, one cannot rely on that same
16 enforcement as the basis for an admissibility claim,
17 because one would never get to the merits.

18 Again, just to make sure--in case I'm not
19 being clear, if one claims that enforcement action is
20 the breach, you're never going to get to that if you
21 have to somehow prove that the enforcement action,
22 which most likely found you not in compliance--that

1 you were actually in compliance.

2 We just don't--you--don't--you put the cart
3 before the horse that way. You--you can never get to
4 merits if you have to prove admissibility on the
5 grounds that the laws you're complaining about, that
6 they actually were valid.

7 So, fundamental theories--fundamental errors,
8 sorry, in this theory of inadmissibility. The first
9 one is, as I already mentioned, there's just this bald
10 proposition that a treaty protection should never be
11 extended to an investment which doesn't qualify as
12 lawful.

13 There's no source for that. That's just a
14 fiat declaration.

15 And I think what it would permit is the
16 interposition of a preliminary stage in which the
17 Respondent would be afforded an opportunity to engage
18 in a post hoc effort to troll for any potentially
19 disqualifying evidence of alleged investor
20 noncompliance with the host state law and the
21 substance of which would lie within the exclusive
22 domain of that Respondent. So, it just can't possibly

1 work.

2 With regard to my point, too, there, I think
3 that in the vast majority of cases, you'll see in some
4 respect, they are going to want to involve allegations
5 that breach in conduct involves enforcement of law or
6 regulation, not necessarily the rule itself. And that
7 would be stymied.

8 The final point is, again, there is no basis
9 in the actual text of Chapter 17 or in the text of
10 Chapter 10 for some sort of--or even, again, in
11 some--by means of some sort of applicable rule of
12 international law that would justify actually
13 overriding the explicit language of Articles 10.5 or
14 10.7.

15 There is no general environmental trump theory
16 that actually fits with the orthodox approach to
17 international law treaty interpretation.

18 And we're almost done now. I say that because
19 I'm not sure whether I'm saying that to myself or to
20 you. But we're almost done.

21 I notice that there seemed to be some
22 agreement between the Parties with regard to

1 legitimate expectations. The first point there I
2 think is what the Claimants would--how the Claimants
3 would phrase it, that it provides them with the means
4 to vindicate their rights if they were undertaken in
5 reasonable reliance on investment--on legitimate
6 expectations.

7 The second one is the paraphrasing of I think
8 what the Respondent's position is, that assessing the
9 legitimacy of an investor's expectation entails
10 objective analysis of her decisions which had to have
11 been made in good faith and both in light of
12 contemporary business conditions as well as the
13 overall regulatory environment.

14 And I also--the third point is something else
15 that I found in my friend's submissions. I think
16 we--we agree with it, that the Claimants--the
17 legitimate expectations did include a belief that
18 Costa Rican officials would engage in good-faith
19 enforcement of the country's rules. The problem is
20 that we disagree as to whether or not any of that
21 happened.

22 So, I should, though, mention Rejoinder

1 Paragraphs 852 to 856 where the Respondent made this
2 assertion that the Claimants had somehow relied on
3 Costa Rican estoppel law to define Article 10.5,
4 detriment of reliance claims.

5 I just wanted to make sure that there was no
6 misunderstanding, we didn't do that, and we
7 don't--we're not going to do that.

8 The point is that a DR-CAFTA breach occurred
9 because the Respondent failed to comply with
10 Costa Rican law as described by Mr. Ortiz, which
11 included the estoppel rule and Legitimate Expectations
12 Doctrine.

13 Now, the reason we submitted his observations
14 was in answer to the Respondent's claim that the
15 injunctive measures that we say breached its treaty
16 obligations were actually justified under Costa Rican
17 law.

18 So, we're responding to their claim that they
19 were justified by demonstrating that even under their
20 own law, they weren't.

21 Now, I think the Parties appear to agree that
22 evidence concerning how Costa Rica was ostensibly

1 supposed--Costa Rican law was ostensibly supposed to
2 work as well as how it actually worked--or
3 didn't--that that's relevant to Article 10.5 or 10.7
4 analyses.

5 I think that it--that that kind of evidence
6 certainly would contribute to an objective analysis of
7 the reasonableness of legitimate expectations or
8 investment-backed expectations, but again the original
9 reason for our providing Mr. Ortiz's expert testimony
10 was more a matter of establishing a causal link
11 between the Respondent's measures and its substantial
12 interference with the investors' ability to realize
13 their investment.

14 This is a quick point, a lot of text for a
15 quick point, but the Respondent makes much of the fact
16 that in this Treaty language, there appears to be a
17 connection between the obligations is not to deny
18 justice and the notion of exhaustion of local
19 remedies. Basically the responsible says that due
20 process is this concept which is exclusively connected
21 to denials of justice and that the Treaty makes that
22 clear; and therefore, any claims that--that Claimants

1 have made with regard to due process must fail because
2 they allegedly haven't exhausted their local remedies.
3 Although Professor Ortiz's evidence might suggest that
4 that's not quite true either.

5 But there's an implicit and historically false
6 assumption behind the Respondent's reasoning there,
7 and that's that the Doctrine of Denials of Justice is
8 actually restricted to measures that involve the
9 judicial branches of state. That's not what Jan
10 Paulsson says. And I would submit that he is a
11 learned publicist. That's not what Borchard or
12 Eagleton said. Again, I think they were learned
13 publicists. Unfortunately, to quickly give you their
14 three opinions in a nice short note, I had to give you
15 some pages of my book where I cited them.

16 I also recall how Article 10--17.3 on
17 Procedural Fairness expressly extends the obligation
18 under 17.3 to administrative proceedings, which the
19 Respondent's contemporary summary, which it cited
20 again as travaux again in the Spence case, explicitly
21 contemplated as regards to Application 2, licensing
22 and permitting decisions.

1 So, it seems to us that it's very clear that
2 since the Doctrine of Denial of Justice was never
3 limited to the judicial branch, it also follows that
4 there is no need to exhaust logical remedies if one is
5 not dealing directly with the challenge to a Court
6 decision, which is what the case law says with regard
7 to the need for exhaustion.

8 Okay. Two more slides. Did I lie? Three
9 more slides. I lied. Three more slides. Very
10 quickly.

11 So, the Respondent says that the bribery
12 allegations lack any relevance with regard to the
13 development. So, they're saying that we haven't
14 established some sort of causal relationship.

15 Well, we would just submit that even if that
16 were accurate, and we don't think it is, I think--we
17 think that the Respondent does still have to recognize
18 that if the Treaty does determine that any one
19 official did engage in some sort of bad-faith effort
20 like soliciting a bribe, that the act in and of itself
21 would be worthy of sanctions and moral damages would
22 be one of the options to do--to provide that sanction.

1 Next point with regard to the text--the test
2 for expropriation, we submit that there's this
3 confusion with regard to the notion of legality versus
4 illegality. The point we're trying to stress, which
5 doesn't seem to be coming through to the Respondent,
6 at least, is that a treaty is international law. If
7 you do not comply with a treaty, the act of
8 noncompliance is, per se, illegal.

9 If the Treaty Provision 10.7(1) and 10.7(2)
10 say one must provide compensation for expropriation
11 and one does not do that, the act is illegal under
12 international law. Thereof, there is no point in
13 trying to reach back in time to a point when
14 expropriation itself was not so clearly defined in
15 customary law and when the concept of legality versus
16 illegality was used.

17 In other words, whenever you have an indirect
18 expropriation under a modern investment treaty, you
19 have an illegality because one does not allege
20 indirect expropriation unless one has failed to
21 be--have been paid for some act that has caused a
22 taking.

1 This point can be gone--can be addressed very
2 quickly. It's definitely inside baseball. If one
3 refers to the Respondents' comments on Claimants'
4 reference to sources with regard to the interpretation
5 of the Annex 10-C(4) of the Treaty, that's got to do
6 with the alleged--what--alleged--what the Respondent
7 would style as an exception to expropriation
8 obligations.

9 The sources--the Respondent suggests that the
10 sources are insufficient because they deal with BIT
11 practice, implying that they don't deal with CAFTA
12 practice. Well, Ken Vandavelde's book
13 actually--there's 36 pages on CAFTA in it. So, I
14 don't know--maybe we didn't provide the whole book and
15 they didn't get to go to Google Books where you could
16 enter in the word and you can actually find out how
17 many pages address CAFTA pretty quickly.

18 And with regard to the other one, well, Jeremy
19 Sharp is actually a--Patrick's previous--the boss, the
20 person who previously had Patrick's position. And
21 when he had that position, he wrote that book chapter,
22 which we've cited on U.S. practice.

1 Again, we would submit that that's a pretty
2 good source when it comes to United States' practice
3 with regard to the CAFTA. And with regard to the
4 exception itself, this notion of the exception--again,
5 I should mention, Respondent's--all of Respondent's
6 arguments, whether it be about Annex 10-C(4) or
7 whether it be about 10.2--or 10.22, they all seem to
8 come back to this general idea that because it
9 involves the environment and because there's an
10 environmental chapter, regardless of what the text
11 actually says, therefore, there must be a really
12 strong exception.

13 It's--I'm sorry that I'm phrasing it so
14 vaguely, but that's because that's how the Respondent
15 has phrased it. And argues that the text of the
16 agreement supports that claim, but Article--Chapter 17
17 of the CAFTA does not give one any indication that
18 Annex 10-C(4) should be interpreted somehow more
19 strictly or austerely when an environmental policy's
20 involved.

21 And if one were to accept this premise, that
22 because there is a chapter on environment in this

1 Treaty, therefore, one must construe the investment
2 obligations in a different manner, well, let's just
3 think about that from a reductio ad absurdum point of
4 view. Well, what that would mean, therefore, is that
5 the CAFTA investment provisions would be super-charged
6 as regards to protection for intellectual property
7 because there's an intellectual property chapter. And
8 it would be super-charged for e-commerce because
9 there's an e-commerce chapter. It would be
10 super-charged for financial services and for
11 transparency because there's chapters on that too.

12 We would submit that that kind of approach is
13 not consistent with orthodox international law on
14 treaty interpretation.

15 Final point, I think I've already made it
16 once, so, I don't think I need to make it very much
17 more than we already have. But just to refer to the
18 Rejoinder at Paragraphs 10.23 to 10.37, the Respondent
19 seems to be fond of trying to parse out the rights
20 that are claimed as investments for the purposes of
21 jurisdiction when it comes to evaluation of the
22 merits.

1 Tribunals need to be practical, I would
2 submit, when it comes to trying to interpret a treaty
3 provision where the Claimants allege they essentially
4 lost everything because of the State's conduct.

5 And "everything" means the sum total of their
6 investment in the country. In one word, that's the
7 Las Olas Project. Parsing that into individual titles
8 and individual property rights that may be connected
9 to specific licenses does not aid the cause of
10 determining whether the Claimants have a meritorious
11 case.

12 At the end of the day, the way the Tribunal
13 does that is it looks at the practical matter set
14 before it in the evidentiary record and queries as a
15 result of the actions alleged by the Claimant,
16 has--have the Claimants lost the ability or been
17 substantially deprived of the ability to enjoy the
18 fruits of their investment. And their investment, of
19 course, again, is maintenance of the Las Olas Project.

20 And with, that I will return to George. Thank
21 you.

22 MR. BURN: So, do you have any questions for

1 Dr. Weiler at this stage?

2 PRESIDENT SIQUEIROS: No.

3 MR. BURN: Just keeping an eye on the time,
4 we've been--we've taken about two-and-a-half hours to
5 date with a 15-minute break in the middle, and
6 probably need about 40 minutes to finish off. I'm
7 mindful of the various court reporters and
8 interpreters. I'm happy to rise for five minutes if
9 it would help. We'll obviously be finishing before
10 lunch, and whether we have a break now or not, but
11 I'll leave to you, sir.

12 PRESIDENT SIQUEIROS: Mr. Baker has a
13 commitment at 12:30, so if you do not believe that we
14 are ready to conclude right before 12:30, then we
15 should break at some point.

16 MR. BURN: Okay. Well, on that basis, I will
17 continue now, and we'll see where we get to. Maybe
18 we'll finish everything then.

19 There is a lot of evidence in the record
20 relating to the physical state of the site at
21 Las Olas. As we've made clear already, there is a
22 very important distinction to be drawn between the

1 state of the site in 2011, when the--most of the acts
2 of which we claim happened, and the state of the site
3 today.

4 We've engaged with the Respondent's attempt to
5 introduce analyses relating to the environmental
6 qualities of the site, not because we actually think
7 it's necessary. Arguably, we should not have--need
8 not have brought forward technical analyses at all of
9 our own; but because our primary submission is it's
10 just not relevant. But we have engaged, and I think
11 it's fair to say authoritatively have established that
12 there are fundamental misunderstandings of the
13 environmental quality of the site.

14 And on the slide in front of you, you can see
15 Mr. Erwin actually makes the point himself: "The
16 current site conditions provide a poor point of
17 reference for such comparison."

18 Well, quite.

19 And I'm hoping this is going to work.

20 Okay. This is an animated slide, and when you
21 have these animated slides in soft copy, you're very
22 welcome to use the slide as--at the bottom of the

1 screen at your leisure. But what you'll see is that
2 the time that the Claimants purchased the property,
3 the land was indeed a cow pasture. So, actually,
4 we're starting a little before that. So, you'll see
5 the date at the bottom there is 1997.

6 These images are all in evidence, just to be
7 very clear. The quality of that first one is not
8 fantastic, but as we slide across into 2002, you can
9 see that this--you can see why it is said this is
10 former cow pastureland. This is--you don't see large
11 concentrations of trees. You see open space,
12 dispersed trees, a road meandering through the middle
13 of the site, and so on. This is cow pastureland.

14 And then as we move forward into 2005--again,
15 it's pretty similar. And then as it moves forward to
16 2008, I think that one is--'09? I'm corrected--you
17 can see, actually, around the edges of the site. You
18 can see some of the neighboring developments starting
19 to pop up. So, this is 2005.

20 By 2009, over on the west-hand--west side and
21 on the south side, there's been construction work.
22 Because other people have been developing their

1 projects. But, again, you don't see the vegetation
2 there that you see is still fairly dispersed. And
3 this is relevant when you come to hear the evidence of
4 Mr. Minor Arce.

5 Now, by 2012, you can see there's been work
6 on-site, which is why some of that southern end looks
7 a bit clearer. There has been some vegetation that
8 has built up, but when you compare that with the 2002,
9 you can see there's more that's grown. But these are
10 not--you can see, they're not mature trees. We're not
11 talking about old trees.

12 By 2012, there are more trees that you can
13 observe; but those have--those are grown in a very
14 short period. So, it's no surprise when Mr. Arce
15 says, yeah, of course, these aren't forests. These
16 are not mature trees. These are young trees that come
17 all over the place, that they're not--there's nothing
18 particularly special.

19 So, when he's applying the criteria of the
20 Forestry Law 7575, he's looking for these features.
21 And quite rightly, as you can see in front of you, he
22 saying, well, it doesn't meet the criteria.

1 And as we just push on, you can see--so, by
2 this point, 2013, everything stops. The vegetation
3 grows. No surprise there. It grows. Nothing's there
4 to stop it. But when you get to 2016, yes, you do see
5 there's some areas where there's less vegetation. The
6 Claimants haven't been doing any of this. This is the
7 squatters who have been--who are allowed to be on the
8 property for over a year. So, that's--that's really
9 what's going on in terms of the vegetation on-site.

10 Now, when we look at soil analysis, there's
11 some fairly rudimentary difficulties with the
12 Respondent's experts' position. And there are
13 technical terms at play here: Hydromorphic is a wide
14 group of soils, and it has a certain amount of water
15 in it.

16 And what you see in Dr. Baillie's analysis
17 which takes up the most part of that slide in front of
18 you is he's saying that, okay, poorly drained; that's
19 one type of hydromorphic soil. And the water table
20 comes right up to the top and you can see imperfectly
21 drained, and the water table is halfway down.

22 And the point he's making is, in the left--on

1 the left-hand side, the soil is permanently wet. So,
2 this is the type of soil one might start to think of
3 as potential wetland soil. But there are other types
4 of hydromorphic soils, the imperfectly drained ones,
5 which is different. And it's relevant the way you
6 find the water table as well. So, you see, Dr.
7 Baillie draws the line midway down that diagram, but
8 over on the right-hand side, you see the green roots
9 cross-section from their site visits.

10 And the point at which the water table arises
11 on that one is--if you look very carefully at the
12 left-hand side of the image, there is a 1. That is 1
13 meter from the surface. That is where the water table
14 is.

15 What matters is whether the water table is at
16 the surface or at least within 15 centimeters of the
17 surface. One meter, you're not going to have hydric
18 soil. You might have hydromorphic soil, but you're
19 not going to have hydric soil.

20 So, just to continue it, you can see again,
21 Dr. Baillie is drawing out the distinction, the first
22 two makes the point I've just made. The first two

1 cross-sections, he's saying, that first one, the water
2 table is up to the surface. That's why there's no
3 dotted blue line. That's a hydric soil.

4 The second one, the water table 10 centimeters
5 below the surface. Again, that's a hydric soil.

6 Therefore, you're in the territory of thinking about
7 wetlands.

8 Not hydric but still hydromorphic, he--he puts
9 that at 20 centimeters, but it could be anything.

10 And, again, you've got the--the green roots
11 cross-section on the right-hand side.

12 So, this is a--on the technical issues before
13 you, it's a very important point to bear in mind, that
14 the--in order to establish whether or not there was a
15 wetland either at the time--2010, 2011, 2012--or now,
16 one has to find hydric soil. Hydromorphic soil is not
17 enough. And some of the Respondent's experts
18 appear--I'm not saying they are--but appear to be a
19 little confused on that point. And it is when Dr.
20 Baillie addresses you, he will--I invite you to
21 interrogate him on this point because it is very
22 clear: Must be hydric. That's the point.

1 Wetlands are protected because they are
2 special environments because of the hydrophytic
3 vegetation, the type of plant life that--that appears
4 there, the type of general conditions, the hydrophytic
5 conditions that apply generally, is a lot of water
6 around, and what is the nature of the soil.

7 Otherwise, you can just go anywhere where there's a
8 bit of standing water and say, that's been standing
9 for a while, it must be a wetland. No. There is
10 something specific and special and technical to--to
11 deal with in that regard.

12 The experts who worked on the project at the
13 time were aware of that. The Government officials
14 from SETENA, from INTA who looked at it were also
15 aware of that. That's why they made their findings.
16 And Dr. Baillie and Drs. Calvo and Langstroth
17 understand that. Mr. Barboza understands that. He
18 was working on--on the project at the time.

19 So, it--this is--and if they--if the
20 Respondent can't prove the right soils on-site at the
21 time, then that's the end of the debate. Now, they
22 try to keep it alive by talking about what the soils

1 are like today, and we engage with that. And there is
2 something to discuss around that.

3 Now, this slide is another one which is--can
4 be manipulated, and shows how Mr. Erwin's analysis
5 has--it compares Mr. Erwin's analysis, his final
6 analysis, with the analyses of Drs. Calvo and
7 Langstroth and Dr. Baillie.

8 And this first slide--this is actually
9 Mr. Erwin's second attempt at understanding wetlands
10 on the site. There's another site that might be--have
11 the opportunity to take you to that shows that he had
12 virtually half the site covered with what he projected
13 would be wetlands. But on rebuttal, he had to revisit
14 his analysis and came up with a much more modest
15 assessment of issues. We still say it's not correct,
16 but it's a much, much more modest assessment.

17 And--and so, you can see, that's what he thinks
18 when--once he's at the second go, is the point.

19 Now, when Drs. Calvo and Langstroth look at
20 it, you can see these green-shaded areas. They say,
21 yes, that there are some potential areas of potential
22 sensitivity, and they identify those, much more

1 modest, as you can see. And looking at it through the
2 prism of soil analysis, you can see Dr. Baillie
3 is--takes virtually the same view as Drs. Calvo and
4 Langstroth. And you can see the dark-blue shaded
5 areas where he identifies it.

6 Now, those areas on the site were identified
7 at the time by Mr. Mussio as being potential areas of
8 significance that all design and construction work
9 needed to take into account.

10 So, this isn't a problem for us that--there
11 are some areas where there is some potential wetlands.
12 It would be a problem if it were correct, that this
13 represented the wetland areas on the site. But we say
14 methodologically, Mr. Erwin is a long way from being
15 convincing, much better to rely on Erm, E-R-M, Calvo,
16 Langstroth, and Baillie.

17 But the point about all of this is, it was
18 known at the time. It was taken into account in the
19 design work. You can ask Mr. Mussio about it, and he
20 will confirm. This was understood at the time.

21 So, there's no--there's no difficulty. This
22 is another distraction.

1 I think I've really made this--probably killed
2 this point now, that we really need to have in mind
3 what was happening at the time.

4 Now, this is the one I mentioned before that
5 compares--just so, you understand Mr. Erwin's
6 evidence, where he started in his first report. And
7 you can just--just enormous quantities of the site, a
8 vast proportion of the site covered by alleged
9 wetlands, and then he changed to that.

10 And you can see that the green roots report
11 that was put--submitted with the Rejoinder, so, this
12 the new experts--these are the new experts that
13 appeared in the second round from the Respondent.
14 They only actually provide data for that highlighted
15 portion.

16 So, they--even at best, and we say there are
17 problems with their analysis as well. But even at
18 best, all they can tell you about is that small
19 portion of the site.

20 Now, you have seen this slide already, and
21 this is also where we address the points that
22 Mr. Baker raised around fragmentation.

1 Just one second.

2 Before I turn to this--what we're not saying
3 is we're not saying that there should be some sort of
4 weakening or dilution of the protections afforded
5 under domestic environmental laws, as our friends on
6 the opposite side of the room would have you believe.
7 The Respondent invokes Chapter 17 of the DR-CAFTA
8 Treaty, and Dr. Weiler has addressed the difficulties
9 with the legal points that are made in respect to
10 Chapter 17 by the Respondent.

11 But it is said that the promotion of
12 investments should not weaken or reduce protections
13 afforded under domestic or environmental law. That
14 doesn't help the Respondent at all. Because if we're
15 right, then we will have shown--we will have proved to
16 your satisfaction that the Respondent misused domestic
17 environmental law.

18 So, attempting to use Chapter 17 of the--of
19 the CAFTA as a protection just doesn't work.

20 The nonregression principle, which is put
21 against us, doesn't apply because we don't argue for
22 the modification of environmental law; we're happy

1 with the environmental law as it stands.

2 We're--that's not a problem. We complied with it, as
3 it stood.

4 So, the nonregression principle just has--it's
5 another--has--it's another red herring here. If we
6 were challenging the environmental laws, maybe there
7 would be a debate to be had; but we aren't, and there
8 isn't.

9 More fundamental on Costa Rica's case, the
10 Respondent appears to be saying that it was within its
11 rights to deny any and all process the Claimants if
12 they had established wetlands existed on the site
13 today. And they use the precautionary principle
14 as--as the basis for that argument, and we say that's
15 wrong.

16 The Respondent would have you believe that
17 Costa Rican environmental laws allow the Government to
18 shut down a fully permitted project without a hearing,
19 a fair hearing, and based on the unsubstantiated
20 complaints of one neighbor and the supposed
21 precautionary principle, and we say that's false. And
22 we say that's false because we point to Mr. Ortiz, and

1 we say that his evidence shows that the precautionary
2 principle that Costa Rica invokes does not give a
3 blank check to the State to conduct itself outside of
4 its own administrative rules and procedures that apply
5 to all Government agencies, even those agencies
6 enforcing environmental regulations.

7 Mr. Ortiz can and will fully rebut the false
8 recounting of Costa Rican law on this. He will deal
9 with the points made by Mr. Jurado.

10 Mr. Jurado's assertion that the Environmental
11 Viability does not create lasting effects is, we say,
12 simply wrong as a matter of Costa Rican law. And we
13 invite the Tribunal to listen to Mr. Ortiz on that.

14 I've already mentioned the 15-day rule for
15 dealing with the filing of interim measures and the
16 need for a main process. The argument that that does
17 not apply in the case of SINAC is frankly specious.
18 It's--it's just not correct.

19 There is no reason whatever to exclude SINAC
20 from that general rule, and the--Costa Rican
21 constitutional chamber has issued binding precedence
22 on this. This is also all set out in Mr. Ortiz's

1 analysis, and it doesn't matter if the issue relates
2 to the environment, to the protection of children, to
3 public health; the same rule applies. It's very
4 clear.

5 And if that rule is not respected, the interim
6 injunction acts as a sanction without due process;
7 that's what we've seen in this case. That is in
8 violation of Costa Rican law. It violates the
9 principle of good faith. It violates the estoppel
10 rule and the principle of legitimate expectations.

11 As we will have made clear in pleadings, but
12 we'll continue to make clear during this--this
13 Hearing, the Costa Rican Government violated its own
14 rules by illegally shutting down the project and
15 violated the provision of the DR-CAFTA and the
16 protections afforded to foreign investors.

17 The personality of the Claimants and their
18 consultants are not on trial. And, frankly, it does
19 no credit at all to the Respondent that some really
20 scurrilous material found its way into the Rejoinder.
21 More substantively, I won't dwell on some of the less
22 tasteful comments that have found its way into that

1 pleading, but more substantively the suggestion that
2 the Claimants buried documents is without foundation.

3 You'll have seen in the Rejoinder a lot is
4 made of the so-called Protti report, that somehow that
5 was hidden. Well, we invite the Tribunal to read that
6 report in order to understand what it actually says.
7 The Protti report does not prove conclusively the
8 existence of wetlands at Las Olas since 2007; does
9 nothing the sort.

10 As any reliable environmental expert would
11 tell you, that report is something of a much lower
12 level of significance. It was prepared by
13 hydrogeologists, so someone with a--in a different
14 specialist area, and it made no attempt to analyze the
15 Las Olas Project site for the presence of hydric
16 soils, hydric conditions, or hydric vegetation. The
17 Protti report was not commissioned to identify
18 wetlands and nothing in it implies a finding of
19 wetlands. You'll find that exhibit at R-11.

20 The context of that report--it was one of many
21 documents, hundreds of documents and reports, that
22 were filed with the D-1 application to SETENA. So,

1 the Claimants filed that Protti report.

2 It doesn't displace the other documents that
3 were filed with that application, all of which led
4 SETENA to include that there was no protected areas at
5 Las Olas.

6 SETENA is the competent agency. It's a
7 serious agency with--with experienced experts. They
8 looked at these matters at the time. They had all of
9 the papers, including the Protti report. They came to
10 very clear conclusions. There is nothing--there is no
11 wetlands. There is no forest on-site that requires
12 protection under these provisions of law.

13 That's why the "AC" (phonetic) of the
14 Environmental Viability permit, and frankly the
15 Respondent's attempts to undermine its own competent
16 agency ought to tell us a lot in terms of the issues
17 that are before you in this--in this case.

18 By way of conclusion, all that the Respondent
19 is seeking to do is to try and find in its desperate
20 attempts to avoid liability, try and find something,
21 anything, that will give it some hook on which to
22 establish some sort of defense. It's taken the Protti

1 report entirely out of context. It's misrepresented
2 what it actually says, what that report was for, and
3 has made a whole series of--of baseless allegations
4 based on it.

5 On fragmentation, it's--Mr. Baker will, of
6 course--had in mind the opinion of Mr. Ortiz, who
7 addressed these issues as matters of law at
8 Paragraphs 107 to--to 112 of his reports. In short,
9 as questions of law, there are processes around this.

10 It is perfectly true to say that--that one
11 does not have a completely free hand, but this type of
12 fragmentation is entirely consistent with Costa Rican
13 law and Costa Rican practice, especially where, as
14 here, there are different phases of construction.

15 This is what Mr. Ortiz is saying, where there
16 are different phases of work where parts of the land
17 are going to be or the development are going to be
18 released at different stages, which is exactly what
19 happens. And then there is--different rules apply.
20 Now, there are safeguards, and it should always be
21 borne in mind that SETENA retained competence to look
22 at all--all of these things.

1 It should also be borne in mind, looking at
2 what's on the screen, that this--I've already shown
3 you this. This is SETENA's 2010--September 2010
4 resolution. And the--it's very important to bear in
5 mind that SETENA clearly has already seen that this
6 construction work, the easements, has taken place.
7 They refer to the existence of roads 60 meters in
8 length and 6 meters in width. They can see. They
9 know that this work has been done. They have all of
10 the documentation before them.

11 So, even if we were not in a situation where
12 you--you had comfort in the form of Mr. Ortiz's
13 confirmation, even if you were not in a situation
14 where you had a very experienced architect in the form
15 of Mr. Mussio, who will--who does and will reiterate
16 that this is standard practice, that this is a
17 permissible way to organize construction work, you
18 actually have the safeguard of SETENA at the time
19 having made the clear observation, as you can see in
20 the document before you, that they knew that this
21 was--this work had been done with respect to the work
22 on the easements that--which is part of the

1 fragmentation, no issue is raised.

2 If there had been an issue, whether that issue
3 arose with SETENA or the Municipality, it's very
4 simple. A process can be brought against the
5 developer to review that, and, if necessary, to take
6 action against--so if anything had been done wrong,
7 the correct step was not that this--in 2016 in the
8 context of a CAFTA Arbitration to raise it in some
9 sort of attempt to defeat the Claimants' claims, but
10 actually have the time to use the administrative
11 procedures that were available.

12 That's the answer. And I hope that addresses
13 sufficiently, Mr. Baker, the points you need to make.

14 PRESIDENT SIQUEIROS: I'm trying to address
15 Mr. Baker's appointment. He advises that he still has
16 about ten minutes, and he could delay that commitment
17 for ten minutes.

18 Do you think you could continue for the
19 following ten minutes?

20 MR. BURN: Rushing a little, yes, I think I
21 can. So, yes, I'll make sure that Mr. Baker is still
22 in the room when I finish.

1 PRESIDENT SIQUEIROS: Thank you.

2 MR. BURN: All right.

3 The Claimants' contractors, people like
4 Mr. Mussio, are experts and professionals. And the
5 Claimants took an enormous amount of care to make sure
6 they had the right people and understood the
7 procedures and laws at different times. They hired
8 local lawyers, local architects, local building
9 contractors, local environmental experts, local
10 forestry engineers, all to get everything in order in
11 this regard.

12 The Respondent fails to substantiate
13 allegations that the investors continue to develop the
14 Las Olas sites after the Municipality shutdown.

15 The Respondent wrongly calls into question the
16 evidence of Mr. Bermudez. He will appear before you.
17 You can hear what he has to say to the suggestions
18 made against him. But he is another experienced
19 professional. He visited the site as environment
20 regent every two months in order to confirm the extent
21 and duration of works and to report back to SETENA.

22 The allegations of unlawful construction prior

1 to Ms. Vargas's so-called "site visits." I only call
2 it "so-called" because in her evidence she says she
3 didn't actually go on-site. She observed it from the
4 perimeters. But the allegations are unsubstantiated.

5 As the Claimants have explained in
6 submissions, they obtained construction permits
7 and--for the paved roads or easements. Ms. Vargas
8 actually saw those in 2007. And--however, those
9 construction permits, went back to the Municipality to
10 obtain copies from their records, the perfectly
11 understandable explanation came back that the records
12 were--a lot of records were lost during Hurricane Alma
13 in 2008, and so, they did not have the relevant
14 copies. But you will hear from the relevant people
15 confirming that they filed the relevant applications,
16 obtained the relevant paperwork.

17 As for the Respondent's allegation that works
18 began on the Condominium Section before construction
19 permits were issued, there's no evidence on record to
20 support that accusation. The Respondent refers to a
21 letter from the Claimants dated the 1st of June 2010,
22 notifying the agency that works had commenced, as they

1 were required to do, under the terms of the EV.

2 In reality, those works--I mean, if one is
3 being--going to be pedantic about it, I can explain
4 what the works were. They were just preparing the
5 site for construction activity. It really is as
6 simple as that. There's nothing mysterious in it.

7 As for the suggestion that the Claimants
8 continued construction after the shutdown in May 2011,
9 well, if one looks at the so-called "conclusive
10 proof," it--one can see quite clearly, there's an
11 enormous leap that the Tribunal is being invited to
12 take. In contrast with the evidence on this--from Mr.
13 Damjanac, Mr. Aven, and Mr. Bermudez, all of them
14 confirm that there were no further works.

15 The Respondent relies on a few unspecified
16 photographs of machinery on-site. There is no
17 indication of when those photographs were taken or
18 where they were taken on-site. And there's nothing in
19 those images that shows that those pieces of machinery
20 were actually doing anything.

21 As the claimants already explained, they
22 carried out routine maintenance on the site at that

1 stage only in order to prevent the site becoming
2 overgrown and unkempt. That is of no difficulty.

3 Ms. Vargas accused the Claimants of completing
4 works without construction permits before March of
5 2009. She bases her accusations solely on
6 observations taken from the property boundary with no
7 explanation as to what area of the site were
8 supposedly affected and no appreciation of the
9 different areas that make up the Las Olas site or the
10 different corporate ownership of each one.

11 Another example is the accusation of filling a
12 wetland, which is rooted almost entirely in the
13 baseless criminal complaint of Mr. Martinez. These
14 accusations have been taken up by Mr. Erwin in his
15 reports, and Mr. Erwin uncritically adopts some of
16 these unsubstantiated conclusions, apparently on the
17 basis of instructions.

18 Now, if we look at the slide here, we see
19 another problem with the Respondent's position. The
20 Respondent is simply not taking care to research some
21 of its more obtuse accusations. And sometimes, all it
22 takes is a very brief review of the record to show

1 that what these are. They're just straightforwardly
2 wrong.

3 So, in the case of illegal construction work
4 and the Respondent failed to acknowledge that certain
5 works have been undertaken by individuals who weren't
6 associated with--with the Claimants, after portions
7 had been sold to third parties.

8 So, for example, this document on the screen
9 is from the Respondent's own municipal records, and it
10 shows that the Municipality issued construction
11 permits for the building of a dwelling in the easement
12 to somebody called David Tory Lane Mills in 2010.
13 This is the house to which the Respondent and his
14 experts repeatedly refer as a basis for accusing the
15 Claimants of having wrongfully built on land. It's
16 not our land by this point. It belongs to David Tory
17 Lane Mills, and he's apparently got the permits that
18 he needed to have.

19 And another example is the--the point about
20 Mr. Aven's nationality. The suggestion, slightly
21 bizarre, made in the Rejoinder, that Mr. Aven was or
22 may not have been born in Italy. Well, the basis for

1 that assertion is completely absent.

2 I mean, Mr. Aven is perfectly willing to
3 provide a copy of his birth certificate, establishing
4 his place of birth. But it's points like this where
5 it--material is being put before you that is
6 perfectly--checking the record, it's perfectly
7 straightforward and will show you the truth.

8 But the--there are these points in the
9 Rejoinder in particular, but the--the statement of
10 defense as well that are difficult to--for the
11 Respondent to maintain, and that's being very kind.

12 There's a lengthy section in the Rejoinder
13 regarding Mr. Janney's bankruptcy proceedings and
14 material relating to personal relationships. None of
15 that's relevant. It's not relevant. I mean,
16 he--Mr. Janney will appear before you. If there are
17 questions relating to bankruptcy proceedings, he will
18 happily respond to those questions.

19 And the suggestion of indicia of fraud in the
20 investments lack any credibility. This is at
21 Rejoinder Paragraph 5.41. Through the use of multiple
22 Enterprises to channel the investment is not a red

1 flag. It's a perfectly standard structure for a
2 development and it's both common and acceptable
3 amongst real estate developers. There's no mystery in
4 that at all.

5 The sales conducted since the submission of
6 the Memorial do not indicate fraud as suggested
7 either. There's nothing surprising or untoward that
8 real estate developer selling lots, trying to mitigate
9 losses, or actually what Mr.--as Mr. Aven properly
10 describes, it was to--selling lots along the way in
11 order to use that as capital for the further
12 development. And that's--commercially, that's a
13 perfectly logical thing to do. There's no--nothing
14 mysterious or suspect in that.

15 The Claimants have complied at all times with
16 the Concession Agreement.

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

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

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

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

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

1 by the buyer and so on. And this date in that
2 document is 30th of April.

3 It--again, it's not really something that need
4 concern us for terribly long.

5 As Mr. Ortiz will explain, the Respondent's
6 submission regarding the expiration of trusts as a
7 matter of Costa Rican law are wrong. And, yes, the
8 trust agreement stipulated one-year period, but in
9 Costa Rican law, unless something has happened, the
10 trust would continue regardless of the expiration of
11 that year until some other acts.

12 The Respondent refers to Article 688 of the
13 commercial code. That doesn't apply here. The
14 relevant provision is Article 659. And that provision
15 establishes the legal ground for the extinction or
16 termination of trust agreements.

17 So, a reasonable trustee would keep the assets
18 in trust until he, she, or it receives instructions on
19 how to proceed. And that's the circumstance here.
20 So, there's no--it's not that it ceased to apply at
21 all.

22 And as previously explained, in 2005, Mr. Aven

1 transferred 51 percent of his beneficial ownership in
2 La Canícula to Ms. Paula Murillo, the acquaintance I
3 mentioned before. This was for local law compliance
4 purposes, perfectly standard practice. Nothing
5 mysterious about it at all.

6 So, the Claimants have at all times ensured
7 that a Costa Rican national held the requisite
8 51 percent of the shares in La Canícula and agreed to
9 assign all profits of La Canícula to the Claimants.

10 Again, by way of conclusion--and the Claimants
11 had--justifiably had very high hopes for the Las Olas
12 Project. They saw an opportunity to develop a
13 beautiful site in a great location in a country they
14 admired and of which they had great affection. They
15 wanted to develop something that would have great
16 economic benefit for them, but also, they saw the
17 possibility that others in the community would also
18 benefit.

19 Along the way, they spent a great deal of
20 time, money, and effort working alongside local
21 professionals, complying with local laws, proceeding
22 carefully; and they applied for and obtained the

1 relevant permits at all times.

2 They were well-placed by 2011 to benefit from
3 their venture. A lot of work had been done by that
4 point, millions of dollars had been spent, and they
5 had carefully put together a project that, by the way,
6 had also been able to withstand the global financial
7 crisis because they were very careful and didn't
8 put--put the project on a debt footing, so, they were
9 able to hibernate the project for a while after the
10 financial crisis hit and resume shortly after.

11 And for reasons that are very difficult to
12 understand for the Claimants, in 2011, everything went
13 south. Part of the story does appear to involve a
14 jealous neighbor, who, like a dog with a bone, would
15 not let go, and make these allegations of wetlands and
16 jaguars and flamingos and so on.

17 And he lobbied SETENA. He lobbied the TAA,
18 SINAC, MINAE, the local Municipality. He failed at
19 first with authoritative findings. He resorted to
20 allegations about a forged document in the record at
21 SETENA, a document that the Respondent's own records
22 show he himself put on the file.

1 Respondent cannot escape the reality that its
2 own agency in charge of issuing and administering EVs,
3 SETENA issued the relevant permits to Las Olas and
4 dismissed Mr. Bucelato's complaints, each time having
5 conducted its own inspection of the project site,
6 despite several opportunities to challenge the
7 Claimants about their alleged admissions and to
8 inspect the site firsthand. SETENA, nonetheless, was
9 happy for the project to proceed.

10 The Claimants would much preferred to have
11 seen their project realized, as they planned. They
12 committed their money and their time and their efforts
13 to that end. Their hope was always that the
14 development of Las Olas would be successful. But
15 having been defeated in that objective by illegitimate
16 acts of those acting for the respondent, they were
17 left with no choice but to hold the respondent to
18 account for the losses they've suffered.

19 Another part of the story, as we've seen,
20 involves the overzealous and unlawful prosecution of
21 Mr. Aven and Mr. Damjanac for crimes they could not
22 possibly have committed. The Respondent has had the

1 chance to correct the excesses of these few, but it
2 has passed up that chance. Worse, it chose to
3 aggravate the dispute and compounded the situation by
4 bringing these baseless, abusive criminal proceedings
5 against two people connected with the project.

6 And, finally, there's the abusive role of a
7 few corrupt MINAE officials who failed to follow the
8 applicable law and were selective in the information
9 they disseminated and chose to respect.

10 There's a reason why so many Costa Rican
11 witnesses have been willing to speak for the Claimants
12 in these proceedings. These people have given up
13 their time to travel to Washington to be here this
14 week because they are passionate about their country,
15 and they condemn the actions of a small number that
16 give their country a bad name.

17 And Mr. Briceño, the internal auditor of the
18 Municipality from 2010 to 2013, raised the alarm at
19 the time. Had the Municipality heeded his warnings,
20 perhaps the Claimants and the Respondent would not be
21 here today. The Respondent attempts to defend the
22 indefensible in these proceedings. It does so through

1 deliberate decisions not to offer up key individuals
2 for examination by way of example.

3 Finally, in regards to the application to
4 CAFTA, there is no justification for taking
5 international law into uncharted territories as the
6 Respondent would have you do with Article 17 of the
7 Treaty--Chapter 17 of the Treaty, and its exotic
8 interpretations of international law are, as
9 Dr. Weiler have shown quite clearly, not supported by
10 the text of the CAFTA.

11 And one final comment, we would observe that
12 any submissions the State Department of the United
13 States has adopted a conventional approach to Treaty
14 interpretation, and we would suggest the Tribunal do
15 the same.

16 Thank you.

17 PRESIDENT SIQUEIROS: Thank you, Mr. Burn.

18 I think we've gone a little bit over the three
19 hours allocated, which for the Tribunal's fine, and we
20 appreciate the Respondent not making an objection.

21 But Mr. Francisco Grob is, as we've indicated
22 in procedural order, taking time under the chess-clock

1 rule.

2 Do you have any questions from Claimant?

3 Then if none are at this point--unless

4 Respondent would like to make any suggestion

5 otherwise, or comment, I proceed that we break for

6 lunch, as had been contemplated, and we return one

7 hour from now, at quarter to 2:00.

8 Thank you.

9 (Whereupon, at 12:44 p.m., the Hearing was
10 adjourned until 1:58 p.m. the same day.)

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1 Amal Bouchenaki, who will be speaking to break up the
2 monotony of my voice, which hopefully doesn't arrive
3 too soon.

4 Members of the Tribunal, why are we here?
5 With the greatest respect to Claimants' counsel, this
6 claim is a monumental waste of time and resources.
7 This claim has no place before you and this kind of
8 case has no place being before an Investment Arbitral
9 Tribunal. And let me explain why and give you some
10 context.

11 This case is an ongoing--and I repeat--
12 "ongoing" domestic dispute currently before the Costa
13 Rican authorities. It has not finished. Therefore,
14 why on earth are we here? The property the Claimants'
15 owned from the start remains in their possession, the
16 disputes are ongoing, and domestic remedies have not
17 been exhausted. And above all--and this is absolutely
18 central to your deliberations and it's of relevance
19 this week--there are protected wetlands on the
20 property.

21 They admit this. They admit that they have
22 had--they would have a problem if the KECE report were

1 to be true to identify wetlands. Their words this
2 morning.

3 That incontrovertible fact has a very serious
4 set of consequences. Those consequences are both
5 civil, administrative, and criminal. And we offer no
6 apology for Costa Rica enforcing its laws, and there
7 is no basis to question the legitimacy and the rigor
8 by which Costa Rica can and should uphold its laws
9 balanced always against the right of the individual,
10 of course.

11 There is no basis to question the legitimacy
12 because the proceedings are ongoing. Therefore, how
13 can this Tribunal possibly second-guess the conduct of
14 the State when that State has not concluded those
15 processes.

16 In short, the Claimants have asked of you the
17 impossible. They're asking you to look at the case
18 today, a snapshot of a situation that is partially
19 completed, and conclude that the Republic of Costa
20 Rica has not violated international law. It has not.
21 This is a contorted proposition that they are putting
22 to you.

1 How would international law be credible and
2 how would investment arbitration legitimize itself if
3 partway through any domestic process an investment
4 Arbitral Tribunal were empowered to step in and judge
5 an incomplete process? To use US vernacular, this
6 dispute is not ripe.

7 Importantly, Claimants do not argue futility
8 and, importantly, Claimants do not allege denial of
9 justice. Although, as I'll explain and as we've heard
10 this morning, CAFTA obliges you to look at that
11 standard. It obliges them to look at that standard
12 denial of justice. Instead Claimants say there has
13 been a lack of due process and arbitrary conduct.
14 Neither position is correct.

15 There can be no lack of due process and denial
16 of justice if we are still in the midst of the
17 process. There can be no lack of due process when the
18 process upholds the very laws Claimants signed up to
19 when they invested in Costa Rica. There can be no
20 arbitrary conduct when the conduct of the State
21 justifiably seeks to protect wetlands that are now
22 definitively proven to exist on the Las Olas Project

1 site.

2 Of course, I will deal with these legal
3 questions a little later. But needless to say, we
4 welcome the intervention of the United States who
5 objectively has framed very important tests of
6 international law in their correct light; namely, in
7 accordance with customary international law.

8 Gentlemen, you've heard this morning from the
9 Claimants an array of facts and details, and I'm sure
10 you have dates swimming around in your head with
11 different institutional names, dates, events, and
12 seeming contradictions. And--and I'm sure you're
13 bracing yourselves for a week of witness testimony
14 that will no doubt delve into that detail.

15 And, certainly, Costa Rica has no alternative
16 in the pleadings phase. And we had no alternative but
17 to respond to the factual inaccuracies asserted by the
18 Claimants, and we apologize for their length.

19 But members of the Tribunal, this case is far
20 simpler. There are in existence today, as there were
21 in 2002 when the land was acquired, protected
22 ecosystems that can be characterized as wetlands. The

1 land is also home to a forest. Those ecosystems are
2 mandatorily entitled to be protected in accordance
3 with Costa Rican law and international law. That is
4 it.

5 And don't just take our word for it.
6 Claimants' very own experts testified that there are
7 wetlands on the site. We've seen that this morning.
8 This is a significant conclusion, which is the death
9 knell for their entire claim.

10 Costa Rica has observed and applied its own
11 laws. And while there have been changes in official
12 determination of the ecological status of the land,
13 Costa Rican law anticipates such change.

14 No State is prevented from enacting regulatory
15 action unless the conditions of an investment have
16 been petrified in a very clear way that international
17 law requires. Those limited circumstances simply do
18 not exist here. The United States' test helps frame
19 this very clearly. And we readily invite you to apply
20 the entire fact pattern to those standards.

21 Costa Rica has not expropriated anything.
22 What we have done is uphold our environmental laws.

1 Customary international law holds this Tribunal to
2 judge Costa Rica by reference to a very limited and
3 minimum standard of treatment. As the United States
4 has made clear, that includes the rejection of a
5 legitimate expectation standard for the breach of FET.

6 Even if legitimate expectations were
7 entertained by this Tribunal as a relevant standard,
8 which we do not accept, the objective--legitimate
9 expectations of the Claimants were those when they
10 invested in Costa Rica.

11 And this is where I want to start. Before I
12 do, I want to provide you with a route map as to where
13 I'm going to be going during my presentation.

14 First, I want to set out precisely why we're
15 here. We're here to reconcile the protection of the
16 Costa Rican environment with the purported investment
17 made by the Claimants. It's easy to lose sight of
18 this in the midst of the debates over letters and
19 resolutions from agencies and funcionarios, but it is
20 imperative this Tribunal does not lose sight of this
21 reconciliation between investment and environment.

22 Second, I'm going to consider how the DR-CAFTA

1 that empowers you to preside over us today to hear our
2 submissions, both on jurisdictions and the merits,
3 also directs all parties investing in Costa Rica to
4 respect existing environmental laws.

5 This has been described in our pleadings as
6 the interaction between Chapter 10 and other chapters;
7 namely, Chapter 17, which exclusively deals with
8 environmental protection.

9 Third, I'll look at relevant principles of
10 Costa Rican and international law and the protection
11 of the environment. Fourth, I want to talk to the
12 issue of your jurisdiction, and with the greatest
13 respect to this honorable Tribunal, we believe that
14 you do not have jurisdiction to resolve these claims
15 for a number of reasons.

16 You can rest assured I'm not merely going to
17 repeat our submissions, but I will comment
18 specifically on the issues that we believe should
19 receive your particular attention.

20 Of course, I do not mention every point, and
21 so please don't suggest--please don't assume that if I
22 don't mention a point that we are in some way

1 conceding it.

2 Fifth, I want to look at the science of
3 wetlands. It is important you appreciate the science
4 so that it can be framed in the appropriate context of
5 the fact pattern and the law and the facts that you're
6 particularly going to hear this week.

7 And, sixth, I want to offer the proper
8 chronology of events. It's our firm belief that if
9 you fully understand the intricacies of what happened
10 and when, you will want to find in favor of Costa
11 Rica.

12 Seventh, I'll describe the trail of
13 illegalities, the illegal activities that have
14 occurred, all of which lead you to the single
15 conclusion that the DR-CAFTA contracting parties could
16 not have intended their invested protection regime to
17 extend to illegal conduct. I'll offer these remarks
18 in support of our position that Claimants' claims are
19 inadmissible under international law precisely because
20 of the numerous illegal activities undertaken by the
21 Claimants.

22 And, eighth, I'll provide an overview of the

1 applicable law. I will consider the relevant
2 standards of international law as well as Costa Rican
3 law.

4 One point of clarification arising out of this
5 morning. We do not say that Costa Rican law is an
6 applicable law. It is a fact. Costa Rican law is a
7 fact which has to be proven in this arbitration. But
8 it is a very important fact; and one, therefore, has
9 to understand how Costa Rican law should be applied to
10 focus properly on that involvement.

11 Customary international law is not a redundant
12 term. It forms the backbone of Chapter 10 for a very
13 specific reason. I'll consider the Claimants' case on
14 FET and legitimate expectations so as to show that
15 Costa Rica can more than meet their allegations of
16 this standard, if it were deemed applicable.

17 And I'll also analyze the Claimants' case on
18 the arbitrary conduct and due process if time permits.
19 With respect to expropriation, I will show how
20 tortured Claimants' analysis is of what investment
21 they say has been expropriated.

22 In relation to Costa Rican law, Claimants have

1 grotesquely misconstrued Costa Rican law at every
2 stage in these proceedings. Perhaps even more
3 disconcerting is how their witnesses of fact have
4 presumed to know Costa Rican law and in their error
5 mischaracterized events as being a violation of Costa
6 Rican law when they were not.

7 This, we fear, is the very reason we're all
8 here today. Mr. Aven and colleagues, either in their
9 arrogance or their delusion, have assumed their
10 appreciation of how a process should be conducted
11 renders any adverse decision against them to be a
12 violation of Costa Rican law and international law.

13 This fundamental flaw has led to the warped
14 construction that is Claimants' entire case. We would
15 have hoped Claimants' counsel would have filtered such
16 adventures, but it seems they have not. I'll do my
17 best to offer a structured description of the
18 pertinent areas of Costa Rican law relevant to your
19 deliberations.

20 Finally, during the course of the
21 presentation, I will introduce the cast of characters
22 that will be before you this week. This is relevant

1 for you to appreciate precisely how invested every
2 individual appearing on behalf of Claimants is in the
3 outcome of this claim. Some form of altruism was
4 communicated by Mr. Burn in his closing remarks. But
5 contrast that none of the witnesses of fact appearing
6 on behalf of Costa Rica have any financial gain to be
7 achieved from the outcome of this case.

8 Financial gain has not been alleged even in
9 the context of the individuals' roles, and so it begs
10 the question, what on earth could have motivated this
11 grand conspiracy that the Claimants allege? The idea
12 of a grand conspiracy on the part of the State is a
13 total fantasy.

14 This imbalance in the objectivity of the
15 witnesses of fact should not be underestimated since
16 the record has shown, and we will remind you, that
17 Claimants' witnesses have no compunction to
18 misrepresent the facts when it suits them. And in
19 this regard we include in your pack a table of all of
20 the inconsistencies that the Claimants have
21 illustrated during the course of this arbitration, and
22 I would encourage you to look at it in your spare

1 time.

2 First, let me turn to the environment. You're
3 already familiar with Costa Rica. And as we said in
4 our pleadings, it possesses 6 percent of the world's
5 biodiversity and .03 percent of the planet's emerged
6 lands. It hosts a hotbed of plants, animals, and
7 other forms of life, the mainstay of a huge tourist
8 industry which will only thrive if that environment is
9 protected. And Costa Rica does not boast an array of
10 many other natural resources and, therefore, the
11 protection of the environment is critical to the
12 social and economic well-being.

13 But when I recite lovely statistics like this,
14 it's very easy for your mind to slip into neutral and
15 to think, yes, we're all aware of the sensitivities of
16 ecosystems, but they have to be reconciled with the
17 development.

18 And I say this not to suggest any cynicism on
19 the part of the Tribunal or anyone else here. But,
20 rather, for so many, environmental protection is the
21 reaction, not the starting point. It's the bar to
22 progress rather than the cause for progress. And so,

1 I make a plea of central relevance to the legal tests
2 in play in this case. Irrespective of our personal
3 views of how environmental protection should be
4 framed, we ask the Tribunal to recall how important it
5 is to Costa Rica.

6 As the United States has submitted,
7 Chapter 17--I'm quoting now--Chapter 17. That's the
8 environmental chapter together with the preamble and
9 Article 10.11, serve to inform the interpretation of
10 other provisions of Chapter 10. This is relevant and
11 fatal even to Claimants' legitimate expectations, but
12 it's a central tenet of their FET case.

13 How the statute books of Costa Rica frame
14 environmental protection is the key question this
15 Tribunal should entertain. And the answer is
16 overwhelmingly in favor of a close and careful control
17 of development that in some way might harm the
18 ecosystems that exist in Costa Rica.

19 Now, I'd like to turn now to the issues of
20 Chapter 10 and Chapter 17. And we heard from
21 Mr. Weiler a great presentation on the orthodoxy of
22 international law only to turn immediately to NAFTA.

1 Gentlemen, we are here because of CAFTA, not NAFTA.

2 I said a moment ago that we're here to
3 reconcile the protection of the Costa Rican
4 environment with the purported investments made by
5 Claimants. This is not rhetoric. It is indicative of
6 the applicable law that guides this Tribunal.

7 This case is an environmental protection claim
8 that must be reconciled against Chapter 10 of CAFTA,
9 and my emphasis on that flow of environment versus
10 investment is intentional.

11 Claimants want you to believe that this is a
12 plain-vanilla Chapter 10 claim which does not require
13 you to look beyond Chapter 10 and any and all
14 international jurisprudence that is not contingent on
15 the application of customary international law.

16 Claimants would encourage an expansive
17 interpretation of Article 10.5 and urge you to
18 marginalize to the point of extinction the Costa Rican
19 environmental laws that should be closely observed.

20 The point is Chapter 10 does not allow you to
21 do that. Article 10.2 says, "In the event of an
22 inconsistency between this Chapter and another

1 Chapter, the other Chapter shall prevail to the extent
2 of the inconsistency."

3 And as the United States submitted,
4 Article 10.2 subordinates the provisions of Chapter 10
5 to the provisions in all other chapters of the
6 DR-CAFTA in cases where there is an inconsistency with
7 another chapter.

8 The question, therefore, is how should you
9 interpret Article 10.2, and is there an inconsistency?
10 Is it to be construed narrowly, Article 10.2, as the
11 Claimants want you to do? They argue that there has
12 to exist a clear inconsistency before weakening the
13 Chapter 10 protection which they say doesn't exist.

14 The Claimants are mistaken. The United States
15 argues that the mere coverage of a particular matter
16 or issue by a chapter other than Chapter 10 does not
17 necessarily remove the relevant matter or issue from
18 the scope of Chapter 10 in the absence of an
19 inconsistency. With respect, we disagree with where
20 that interpretation would take you. And I'm talking
21 about the United States' interpretation. And we
22 believe it displays some internal inconsistencies.

1 First, to construe narrowly Article 10.2
2 renders Chapter 17 redundant. The United States also
3 accepts this to some extent when in its final
4 paragraph of the December 2, 2016, letter refers to
5 the critical important DR--I'm sorry--the critical
6 importance that DR-CAFTA places on environmental
7 protection.

8 Chapter 17 is recognized by the United States
9 as preserving the policy space for the environment.
10 The US helpfully states--and I'm reading from their
11 letter--"These provisions demonstrate the Parties'
12 commitment to preserving policy discretion in the
13 adoption, application and enforcement of domestic laws
14 aimed at achieving a high level of environmental
15 protection."

16 However, to maintain that the mere existence
17 of Article 10.2 is to police inconsistencies that must
18 exist on the face of Chapter 17 is also to render
19 Article 10.2 redundant. We are confident the
20 signatories to DR-CAFTA did not intentionally draft
21 inconsistencies into Chapter 17. And if they did,
22 they would have been corrected or there would be

1 common knowledge by now.

2 Instead, Article 10.2's references to
3 inconsistencies is not to the drafting or
4 typographical errors that one is meant to find in
5 Chapter 17. It is to the practical application of
6 Chapter 17 depending on the State's implementation.

7 Second, by virtue of this first point, one has
8 to look at the specific provisions of Chapter 17 and
9 Article 17.1 and 17.2 in particular since they are the
10 precise source of the inconsistency when one considers
11 how Costa Rica has sought to progressively uphold
12 environmental protection.

13 I'm going to put Article 17.1 on the screen.
14 "Recognizing the right of each party to establish its
15 own levels of domestic environmental protection and
16 environmental development policies and priorities and
17 to adopt or modify accordingly its environmental laws
18 and policies"--and here's the emphasis--"each party
19 shall ensure that it's laws and policies provide for
20 and encourage high levels of environmental protection
21 and shall strive to continue to improve those laws and
22 policies."

1 I'm pausing here for a moment. This wording
2 invites investors to review Costa Rica's laws in order
3 to establish what rights Chapter 11--sorry--Chapter 17
4 really upholds. As a result, DR-CAFTA permits Costa
5 Rica to observe its own environmental protection laws
6 and trigger the safety valve that is Article 10.2.

7 As the United States submits, this Tribunal
8 does not have jurisdiction to import standards of
9 protection from Chapter 17, such as due process, but
10 it can and it must pay heed to how Chapter 17 operates
11 in exactly the same way this Tribunal is entitled to
12 interpret the entirety of DR-CAFTA in accordance with
13 the Vienna Convention and customary international law.

14 Another practical consequence of Article 10.2
15 is that this Tribunal, respectfully, would not have
16 the power or jurisdiction to render an award
17 effectively legislating counter to the laws and
18 procedures of Costa Rica that Claimants argue are so
19 egregiously offending the DR-CAFTA.

20 Article 17.2(1)(a) provides--and I'm reading
21 from the slide--"A party shall not fail to effectively
22 enforce its environmental laws, through a sustained or

1 recurring course of action or inaction, in a manner
2 affecting trade between the parties, after the date of
3 entry into force of this agreement."

4 17.2(1)(b) continues: "The Parties recognize
5 that each Party retains the right to exercise
6 discretion with respect to investigatory,
7 prosecutorial, regulatory, and compliance
8 matters"--and then it continues into the next
9 sentence. Sorry. Actually, let me finish the quote.
10 "And to make decisions regarding the allocation of
11 resources to enforcement with respect to other
12 environmental matters determined to have higher
13 priorities."

14 Accordingly, the parties understand that a
15 Party is in compliance with subparagraph (a) where a
16 course of action or inaction reflects a reasonable
17 exercise of discretion, or results from a bona fide
18 decision regarding the allocation of resources.

19 And here comes the closer, Article 17.22.
20 "The Parties recognize that it is inappropriate to
21 encourage trade or investment by weakening or reducing
22 the protections afforded in domestic and environmental

1 laws."

2 Herein lies the inconsistency. Chapter 17 and
3 the articles I read out show a clear support for
4 stringent environmental laws and the enforcement of
5 those laws. If a State did not enact such
6 legislation, that is its right. But Costa Rica has.

7 Consequently, the valve represented by Article
8 10.2 is opened and deference must be shown to Chapter
9 17 standards of enforcement. Article 10.2 is
10 informing you that if the environmental protection
11 regulation or the enforcement of such was to be
12 curtailed in some way in order to bend to the
13 standards of Chapter 10, that would in and of itself
14 be a violation of Chapter 17.

15 In short, in the event of a competition
16 between Chapter 10 and Chapter 17, 10.2 decides the
17 winner. The winner is the environment.

18 The third reason Claimants are mistaken is
19 because of their reliance on NAFTA authorities. It's
20 totally misplaced. One need only consult the actual
21 authorities they rely on to see how and why. NAFTA is
22 not CAFTA. Of course, NAFTA occurred before CAFTA.

1 And, of course, the United States is a party to both.
2 But CAFTA is not an embodiment of only United States
3 policy. It is the result of a multinational
4 negotiation.

5 They've also referred this morning [Members
6 of] the Tribunal to an explanatory note. There are no
7 travaux préparatoires for the DR-CAFTA. And this
8 explanatory note was a document that was prepared for
9 civil society groups. It was prepared to help them
10 understand certain aspects of CAFTA. But what they
11 notably did not include in their green highlighting,
12 on whichever slide I'm afraid it was, they don't
13 include some of the paragraphs that continue to
14 explain precisely the points I've been making and
15 reflect precisely the same standards that Chapter 17
16 embodies.

17 We do not believe that that document gets them
18 anywhere. They're also not de facto travaux
19 préparatoires. This was a circular to civil society
20 groups.

21 The fourth and final reason Claimants are
22 mistaken is the wording contained in Article 10.11.

1 It is entitled "Investment and Environment." This
2 provides, "Nothing in this chapter, Chapter 10, shall
3 be construed to prevent a party from adopting,
4 maintaining or enforcing any measures otherwise
5 consistent with this chapter that it considers
6 appropriate to ensure that investment activity in its
7 territory is undertaken in a manner sensitive to
8 environmental concerns."

9 Members of the Tribunal, this is highlighting
10 environmental concerns in Chapter 10. This is fatal
11 to Claimants. It essentially provides another
12 explicit sign within Chapter 10 to this Tribunal to
13 ensure that environmental enforcement by the State
14 that it considers is appropriate be respected.

15 This means Costa Rica can take the steps it
16 considers appropriate to ensure the investment is
17 sensitive to the environment. The environment is of
18 paramount importance. And put another way, investor
19 protection bends to the respect of environmental
20 protection.

21 So, what does this mean? It means that when
22 construing the standards of protection contained in

1 Chapter 10, respectfully, you should defer to the
2 environmental protections.

3 And the measures of enforcement undertaken in
4 accordance with--in accordance with Costa Rican law.

5 The measures adopted by Costa Rica cannot be
6 criticized for breaching standards of Chapter 10 while
7 they fall within the discretionary environmental
8 powers recognized expressly by Chapter 17.

9 And, finally, by this measure and by virtue of
10 Annex 10-B, this is--cites customary international
11 law. The precautionary and preventive principles will
12 apply wholesale. And it's those principles I'd like
13 to turn to now.

14 You will have read about the precautionary and
15 preventive principles, and I'd like to provide a brief
16 overview of the following principles. They're not
17 padding. These are real principles with enforceable
18 rights at civil, administrative, and criminal levels.
19 They consist of the precautionary principle,
20 preventive, the principle of impartiality of
21 environmental protection, the irreducibility of an
22 ecosystem, and the principle of nonregression.

1 These are all principles recognized by Costa
2 Rican law and international law. In fact, the
3 precautionary principle is one of the most prominent
4 standards of international environmental law. We
5 cover them extensively in our Rejoinder, and they're
6 in Paragraphs 65 and 118.

7 I'd like to briefly remind the Tribunal of the
8 content, at least the first one or two. First, they
9 completely define the enforcement rights or, rather,
10 obligations of the State when it comes to protecting
11 the environment, such that a hair-trigger sensitivity
12 towards protecting Costa Rican wetlands and forests is
13 the appropriate method of responding to the first sign
14 of harm. This is also known as the "better safe than
15 sorry" effect integral to sustainability principles.

16 Once the principle is invoked, it immediately
17 reverses the burden of proof onto the party that is
18 potentially causing the harm--here the Claimants. And
19 yet in this arbitration, Claimants have had to be
20 dragged kicking and screaming to offer any attempt to
21 assess their impact, and to date they have shown
22 absolutely no evidence that they have not impacted the

1 land.

2 Their testimony is utterly lacking in this
3 regard. While Costa Rica's experts seriously assess
4 the impact, Mr. Burn this morning said they had to
5 respond to that point. Well, yes, indeed they had to
6 respond.

7 The precautionary principle is contained in
8 numerous places in Costa Rican law, Article 99 of the
9 Organic Environment Law, and Articles 11, 45, and 54
10 of the Biodiversity Law. Second, these principles are
11 consistent with the burden of proof that Claimants
12 were under when they applied for their Environmental
13 Viability--we're going to see it probably a number of
14 times, EVs we may refer to--and the construction
15 permits.

16 That burden of proof on the Claimants is
17 embodied in Costa Rican law in express terms,
18 Article 109 of the Biodiversity Law.

19 These principles would be made a mockery of if
20 Claimants could willfully ignore the red flags
21 indicating wetland, arguing, as they have, to refill
22 wetlands and potentially destroy them beyond repair.

1 As a result, Claimants are expected by Costa
2 Rican law to assume the responsibility of going to all
3 the necessary lengths to ensure such ecosystems are
4 identified and protected. Mr. Burn's description of
5 what Claimants purportedly undertook is merely a
6 reflection of the studies undertaken that were all
7 premised on--and we do believe concealment and
8 deception.

9 So imperative are these principles that it is
10 important for me to summarize their precise legal
11 content so as to leave you no doubt as to their
12 application to the facts of this case. And let's
13 start with the precautionary principle. The starting
14 point to confirm that the precautionary principle does
15 need to be applied by Costa Rican authorities and this
16 Tribunal is Article 17.12(1). That's of CAFTA. This
17 expressly allows the application of environmental
18 agreements to which Costa Rica is a party.

19 Costa Rica is a member of more than 30
20 multilateral environmental agreements; many of those
21 enshrine the precautionary principle as a key standard
22 to be complied with. The precautionary principle also

1 forms a part of customary international law and,
2 therefore, can certainly fill the gaps that CAFTA
3 might leave.

4 Leading commentators take the view that it is
5 crystallized into a normal, customary international
6 law. As such, it should be applied under the mandate
7 of Article 10.2(2). We do refer you to Philippe
8 Sands' writing, which we believe, despite a
9 double-negative, is crystal clear. An additional
10 basis for the principles application is Article 17.1
11 to 17.3. Those articles clearly provide that Costa
12 Rican environmental law is entirely applicable.

13 And for the reasons already explained, the
14 Tribunal must also apply this by virtue of 10.2,
15 although these principles apply independently of your
16 conclusion regarding the interpretation of 10.2.

17 As I mentioned, Costa Rican law also
18 recognizes the precautionary principle expressly in
19 Article 10 of the Biodiversity Law. Not only is this
20 a principle of substantive value; it must also be
21 considered as an interpretive tool for the Tribunal's
22 analysis.

1 In sum, if in doubt, defer to the
2 environmentally sustainable option, something that
3 Costa Rica is observing now and Claimants go to great
4 lengths to ignore. The formulation of the principle
5 relies on three key elements: first, a degree of
6 uncertainty of future harm where a threat remains
7 unaddressed; second, the lack of scientific evidence
8 at the time of the decision; and, third, making a
9 decision before having scientific certainty.

10 We've shown and we will show this week that
11 there was sufficient and reasonable doubt, even in the
12 absence of scientific certainty, to implement the
13 precautionary principle.

14 The threshold for harm has been expressed in
15 different ways, whether it is a threat of serious or
16 irreversible damage or threat of significant reduction
17 or loss of biological diversity or merely potentially
18 adverse effects.

19 We will show that the Claimants' actions
20 represented a real threat for the environment and that
21 were it not for Costa Rica acting under the
22 precautionary principle by suspending the Project,

1 irreparable damage would have been caused. As I said,
2 the effectiveness principle is the shift of the burden
3 of proof. The burden is on the Claimants carrying out
4 the operations, carrying out the development.

5 This is not just an argument in this
6 arbitration; it's expressly stated in Article 109 of
7 the Biodiversity Law, as it was when they invested.

8 It is also critical to note that this
9 principle applies to public agencies and naturally
10 impacts on their behavior since they must comply with
11 the precautionary principle. And that's something to
12 which we'll return in a moment.

13 Very briefly, with the preventive principle,
14 this also applies and it should inform your decision.
15 Claimants knew this before, during, and after the time
16 they invested in Costa Rica. They read or should have
17 read Article 11 of the Biodiversity Law.

18 And Article 11 expressly establishes the
19 preventive principle. This principle is not
20 restricted to State liability for transboundary
21 pollution, as the Claimants contend; but it derives
22 from the protection of the environment as an end in

1 itself.

2 I will skip the nonregression principle and
3 move, if I may, to the question of jurisdiction.

4 And this is where I will shortly be handing it
5 over to my colleague, Ms. Bouchenaki. I'd like--with
6 the greatest respect, we submit that you do not have
7 jurisdiction. First, Mr. Aven's effective nationality
8 is in question.

9 Second, claimants have not proven their
10 investment. They have not proven the necessary chain
11 of ownership in relation to certain elements of the
12 Las Olas Project; and, therefore, they do not qualify
13 under DR-CAFTA.

14 Let me deal with nationality, and
15 Ms. Bouchenaki will deal with the ownership issue. We
16 won't repeat the principles here. Mr. Aven accepts
17 he's a dual national. We would like to correct the
18 record. We misspoke when we suggested that Mr. Aven
19 was born in Italy. We will concede the point that he
20 was born in the United States. That was an error on
21 our part.

22 Article 10.28 of the CAFTA excludes claims by

1 dual nationals whose dominant and effective
2 nationality was of a noncontracting state. Its
3 purpose is to limit the treaty's protections to
4 nationals of states which are parties to DR-CAFTA.

5 The inquiry doesn't have to be contingent on
6 all of the potential Claimants being of those states.
7 Of course, a potential Claimant could come from beyond
8 those states. And we fundamentally disagree with
9 Mr. Weiler's characterization of 10.28.

10 In the context of this investment arbitration,
11 the nationality used to establish an investment must
12 be considered as a relevant factor to decide on cases
13 of dual nationality. That was found in *Champion*
14 *Trading v. Egypt*.

15 Mr. Aven has done the same as *Champion*
16 *Trading*. When doing business in Costa Rica, he held
17 himself out in official papers as Italian. Mr. Weiler
18 said he "uses American documents."

19 Incorrect. He has had the opportunity to use
20 his American nationality in Costa Rica, and he did
21 not. He was often using Italian nationality. He said
22 that this was to avoid persecution, but this is a

1 subjective basis. Even when subjected to criminal
2 proceedings, he identified himself as Italian. Now,
3 when he wishes to avail himself of all rights, he does
4 not have an Italian. He reverts to being an American.

5 Mr. Aven's dominant and effective nationality
6 is Italian, and this is how he, at his election, chose
7 to represent himself to the Costa Rican authorities.
8 And that is certainly the case vis-a-vis Costa Rica
9 from whom he is trying to now draw international
10 standards of protection. His claim should be barred.
11 To ignore this ignores the principle of good faith and
12 the protection against treaty shopping.

13 At this point, gentlemen, if I may pass it
14 over to Ms. Bouchenaki.

15 MS. BOUCHENAKI: Thank you. Members of the
16 Tribunal.

17 Under DR-CAFTA, Claimants have to prove their
18 standing. They have to prove their investment, and
19 they have to prove their qualification as protected
20 investor.

21 To prove that and to go to Dr. Weiler's take
22 on Claimants' alleged line of ownership to the land,

1 the parcels and the lots are relevant. And there is a
2 significant issue with the proof or the lack thereof
3 regarding the line of ownership between the Claimants
4 and the land on which they claim to have wanted to
5 develop their project.

6 So, this is for Claimants to prove. It is not
7 for Costa Rica to prove. Claimants have not provided
8 evidence of their ownership of the land such that, I
9 suggest, to discharge the standard of proof.

10 Specifically, I will walk you through the evidence on
11 this.

12 The evidence shows that Claimants do not own
13 78 of the properties making up the Project site.
14 Additionally, there is a significant level of opacity
15 as to the Claimants' commitment of either capital or
16 resources to this alleged investment.

17 Claimants have not discharged the strict
18 burden of proof. This failure, in our humble opinion,
19 does not present even a question of discretion for
20 this Tribunal, respectfully. This Tribunal must
21 refuse jurisdiction, vis-a-vis those lots and
22 vis-a-vis those Claimants. Without ownership of the

1 78 lots and without the commitment of capital or
2 resources from those Claimants, there is no investment
3 capable of attracting the protection of Article 10.28
4 of the treaty and, more pertinently, the Tribunal does
5 not have jurisdiction over--to hear such claims.

6 Regarding the Concession, we will explain.
7 There is an issue with the--the ownership of--of the
8 Concession, and the Claimants have failed to prove the
9 acquisition of the Concession. They--they have argued
10 estoppel in this case.

11 There should not be estoppel because Costa
12 Rica--the Costa Rican authorities were not made aware
13 of these illegal transactions; therefore, there can be
14 no basis for the principle of estoppel to take hold in
15 this particular instance.

16 In fact, the full nature of the acquisition
17 only became known following the disclosure stage in
18 this arbitration last summer. To demonstrate this, we
19 will briefly trace for the Tribunal Claimants' alleged
20 interest in the Las Olas Project chronologically
21 starting back in 2002.

22 And I would just like to say here that

1 Respondent has traced this to the best of its
2 abilities and has tried to overcome Claimants'
3 half-finished explanations of their acquisition of the
4 Las Olas properties.

5 It was not for Claimants--for Respondent to do
6 that. Claimants had the burden to--to prove their
7 line of ownership. They did not discharge that
8 burden, and Respondent reserves its right to raise
9 this at the submission on costs--at the stage of the
10 cost submission.

11 Now, the property called Las Olas that you are
12 starting to see here is composed of three parts which
13 you have already briefly heard about this morning.

14 So, the Concession here is on the left, which
15 is the--the left--the map which is on the left. The
16 Condominium Section is in the middle. And the
17 easement and the other lots are on the far--far right.

18 The land that forms part of the Concession
19 site is the land in the Maritime terrestrial zone of
20 Puntarenas. This is where the Claimants planned to
21 build their beach club. The main part of the site by
22 Claimant to be--was planned by Claimant to be the

1 Condominium Section. And Claimants planned to--that
2 it would comprise 288 individual lots on which
3 condominiums would be built. And then the
4 easement--the map on the right side of the screen and
5 the other lots have condominiums for residential use
6 on the western side of the property.

7 Now, on February 6th, 2002, Mr. David Aven
8 entered into an option agreement with the companies La
9 Canícula and Pacific Condo to acquire these properties
10 in Esterillos Oeste. Two of these properties were
11 recorded in the name of La Canícula, and the third
12 property was recorded in the name of Pacific Condo.

13 This option agreement was contingent upon two
14 things: the granting of the Concession for the
15 development of the beach in the Maritime Terrestrial
16 Zone of Puntarenas. Now, in March 2002, the Costa
17 Rican Institute of Tourism approved the granting of
18 the Concession to La Canícula, and also in March La
19 Canícula and the Municipality of Parrita did enter
20 into a Concession Agreement for the development of
21 land.

22 Now, the Concession Agreement is regulated by

1 Terrestrial Zone Law, the ZMT Law. And Clause 8 of
2 the Z--of the concession agreement provides that the
3 Claimants expressly assumed the obligation to abide by
4 all of the provisions of the ZMT Law and its
5 regulations.

6 Two provisions of the ZMT Laws are of
7 particular relevance in this case, Articles 47 and
8 Article 53. Under Article 47, a concession cannot be
9 awarded to a corporation unless at least half of the
10 shares in the corporation are owned by a Costa Rican
11 national.

12 Under Article 53--sorry--any transaction
13 entered in violation of Article 47 of the ZMT Law is
14 null and void. Now, on April 1st, 2002, Mr. David
15 Aven entered into an agreement with Mr. Carlos Alberto
16 Monge and Pacific Condo Park for the sale and purchase
17 of the totality of the shares in La Canícula and
18 16 percent of the interest that Pacific Condo held in
19 Inversiones Costco.

20 The agreement is submitted as Claimant--as
21 Exhibit C-8. But because the transaction made
22 Mr. Aven the owner of the totality of La Canícula's

1 share, which was the holder of the Concession, the
2 51 percent Costa Rican ownership pool was violated.

3 This, in turn, triggered the application of
4 Article 53 of the ZMT Law which, as mentioned earlier,
5 renders the concession null and void due to the
6 violation of the ownership law under Article 47. In
7 fact, Paragraph 341 of Claimants' Memorial admits that
8 the totality of the shares of La Canícula from its
9 sole shareholder--was acquired from its sole
10 shareholder, Mr. Monge.

11 On April 30th, 2002, Mr. Aven entered into a
12 trust agreement to transfer the totality of the shares
13 he owned in La Canícula to a trust to be administered
14 by Banco Cuscatlán de Costa Rica. This is
15 Exhibit C-237.

16 This assignment was made in violation of the
17 Concession Agreement. Indeed, the Concession could
18 not be assigned or transferred to a third party
19 without prior authorization by the Municipality or the
20 Costa Rican Institute of Tourism.

21 Now, one may imagine that Claimants who had
22 acquired 100 percent of the shares in La Canícula and

1 were in violation of the 40--Article 47 rule on the
2 51 percent ownership might want--might want to conceal
3 this assignment, which--which they did. And this
4 assignment was not notified to either the municipality
5 or the Institute de Turismo.

6 Now, the trust was terminated pursuant to its
7 term. It's a--on April 30th, 2003. Under Costa Rican
8 law, upon determination of an escrow, a property held
9 as the subject of the escrow, automatically relates
10 back to the trustor. Thus, on April 30th, upon the
11 expiry of the trust, the totality of the shares in La
12 Canícula reverted back to Mr. Aven, again in violation
13 of Article--of the 51 percent rule in Article 47.

14 Now, the other alleged investors in this case
15 appear on October 4th, 2004. That is when Mr. Aven
16 alleges that he sent a--the other Claimants a letter
17 in which he communicated the percentage of shares each
18 would hold in the properties. This is--this letter is
19 at Exhibit C-241.

20 Despite Respondent's requests in document
21 production, this is the only evidence that these
22 Claimants have submitted to establish that they made

1 an investment that has the characteristic of an
2 investment under Article 10.28 of CAFTA, which
3 includes the commitment of capital or other resources.

4 This letter from Mr. Aven to the Claimants--to
5 the other Claimants does not make any reference to the
6 actual date when the shares in La Canícula were
7 transferred from Mr. Aven to the other Claimants.

8 And Claimants have failed to submit any proof
9 of an actual transfer of shares. In fact, in
10 Credibility's second report, Paragraphs 86 and 87, at
11 least with regards to Mr. Shioleno and Mr. Raguso, no
12 evidence of payment of any form of capital was found.

13 Now, in reply to Respondent's memorial
14 pointing to the violation of Article 47, 51 percent
15 rule and the violation of that rule, Claimants have
16 found a letter dated March 8, 2005, which they had not
17 previously communicated. And in that letter, Mr. Aven
18 appears to have--to assign to Mrs. Paula Murillo, a
19 Costa Rican national, 51 percent of the shares in La
20 Canícula.

21 But this assignment, if it ever happened, is
22 as opaque as the Claimants' alleged interest in

1 Las Olas. Indeed, Claimants do not submit the
2 required evidence of this alleged transfer of shares.

3 Under Costa Rican law, the transfer of shares
4 in a Costa Rican corporation is evidenced by two
5 things: physical delivery of the share certificate to
6 the shareholder and registry in the books of the
7 company.

8 In the present case, there is no proof of an
9 actual assignment of shares. In addition, Claimants
10 only disclosed this letter allegedly executed in 2005
11 when prompted by the Tribunal during document
12 production.

13 In any event, the letter does not cure the two
14 sources of illegality previously mentioned. One,
15 between the extension of the trust agreement on
16 April 30th, 2003, and Mrs. Murillo's alleged
17 acquisition of her 51 percent share--stake in La
18 Canícula on March 8th, 2005, Mr. Aven and Claimants
19 owned the totality of the shares in La Canícula during
20 the period--during that period.

21 And, two, under Clause 10 of the Concession
22 agreement, the concession could not be assigned again

1 or transferred to a third party without prior
2 authorization. Just like it happened for the
3 assignment to the bank that held the shares in trust
4 back in 2002, no notification or authorization was
5 obtained for the assignment to Mrs. Murillo.

6 Now, going back to our tracing of Claimants'
7 interest in Las Olas, we see that throughout 2007 and
8 2009, Claimants acquired interest in a number of Costa
9 Rican corporations, including Trio International.

10 Claimants refer to these corporations as the
11 Enterprises.

12 On September 29th, 2009, Trio International
13 segregated that same property so that--the property on
14 which--that was the object of the acquisition to
15 create 288 lots.

16 Now, Claimants today have failed to indicate
17 that not all of these lots are the property of
18 Claimants. And they have wrongly included as part of
19 their alleged investment these properties. On
20 May 10th, 2010, Claimants allege that they sent a
21 letter assigning for a second time 51 percent of the
22 shares of La Canícula to the same Mrs. Paula Murillo.

1 As before, Claimants submit no document
2 proving when Mrs. Murillo allegedly purchased this
3 51 percent stake.

4 Now, if we look at--if we go to the map--so if
5 we look at this map, this is--this map is a map of Las
6 Olas properties where we have tried to identify the
7 areas that are not owned by Claimants. They are
8 colored in blue for the properties whose ownership
9 changed since Claimants' memorial, green for
10 properties that Claimants admitted to not owning, and
11 purple for the beach concession. These properties, we
12 allege, fall outside of the scope of your
13 jurisdiction.

14 And we take issue with the characterization
15 made this morning that the fact that these lots were
16 sold was an issue that only went to--that was only a
17 valuation issue. The absence of ownership on these
18 lots creates an issue for the Project itself if the
19 Project has to be taken into account as--as part of
20 the definition of the investment, which, again, we
21 contest.

22 If there are no plots--if there are no plots

1 of land, there is no project where this--that can be
2 developed and, therefore, no investment. Accordingly,
3 the Tribunal has no jurisdiction on the concession.
4 It has no jurisdiction on the lots of land that we
5 have identified, 78 of them. And we would like to
6 note that Claimants, again, have been less than
7 forthcoming in the information regarding this
8 investment.

9 It was Respondent that uncovered the
10 information regarding the sold lots, after much time
11 and effort, and one has to wonder what other elements
12 were concealed. This is fairly consistent with,
13 unfortunately, Claimants' conduct before the Costa
14 Rican authorities, which--to which you will be
15 speaking.

16 Thank you.

17 PRESIDENT SIQUEIROS: Mr. Leathley, would now
18 be a good moment to take a short break?

19 MR. LEATHLEY: Yes. Certainly.

20 PRESIDENT SIQUEIROS: Okay. Thank you. So,
21 let's--5-minute--10-minute break. 10-minute break.

22 Thank you.

1 (Brief recess.)

2 PRESIDENT SIQUEIROS: Thank you. If the
3 interpreters, court reporters, and counsel to
4 Respondent are ready, then we can proceed.

5 Thank you.

6 MR. LEATHLEY: Thank you very much, sir.

7 I'm going to--now moving to the merits, and if
8 you're like me, members of the Tribunal, and you read
9 a who-done-it novel, the temptation is often too great
10 to turn to the last few pages and see who actually did
11 commit the crime. And so, in a parallel sense, in
12 anticipation of Mr. Burn's presentation, there are a
13 few key questions that are probably floating around in
14 your mind that you want to know immediately how
15 Costa Rica responds.

16 I'll try to deal with some of these and see if
17 we can resolve some of the uncertainties. I would
18 call them red herrings. We're titling them here
19 distractions and irrelevancies. And I can identify
20 five immediate issues that are floating around this
21 case in general which form the mainstay of Claimants'
22 case, but which are nothing but pure distractions and

1 irrelevancies.

2 They are, first, the early decisions regarding
3 the wetlands; second, the allegations of bribery;
4 third, Mr. Bucelato; fourth, the forged document; and
5 fifth, this grand conspiracy of the State against
6 Mr. Aven.

7 First of all, the early decisions regarding
8 the wetlands. And I'll deal with these in more
9 substantive detail during my remarks, where we're
10 going to have an extended chronology in a moment. The
11 earlier statements from the public authorities
12 regarding the existence or not of the wetlands.

13 Claimants' case is--when there was an earlier
14 indication of no wetlands and Environmental
15 Viabilities or construction permits were granted, this
16 set in stone their progress to development. It did
17 not. Costa Rican law, as we have already shown in our
18 pleadings and evidence, permits at any time the
19 revision of an earlier decision based on the need to
20 protect the environment.

21 The Attorney General for Costa Rica endorses
22 this view in his testimony, international law also

1 permits regulatory action to be adopted to respond to
2 demands. And the legitimacy of this is compounded
3 when the response is contemplated by domestic law.

4 Therefore, while there are earlier statements
5 regarding the existence of wetlands, they're not
6 immovable obstacles to the protection of the
7 environment. They did not petrify any measures. They
8 did not stabilize the legal framework, and notably,
9 Claimants do not even plead this. This is wise, as
10 international law would reject such a proposition.

11 In addition, those earlier statements did not
12 create any contractually binding effect. Something,
13 again, Claimants do not plead.

14 In addition, as we've shown quite clearly,
15 those earlier findings were premised on a series of
16 flaws, most of which were created by the Claimants'
17 own wrongdoing. These flaws are the illegalities that
18 I consider a little later.

19 For example, the concealment of the Protti
20 report. I need to correct the record here, members of
21 the Tribunal. Mr. Burn said this morning that the
22 Protti report had been delivered to SETENA. We assume

1 the implication was that that was part of the D1
2 Application, the principle application for the
3 Environmental Viability. The Protti report did not
4 form part of the D1 Application. It is not in any of
5 the 120-odd pages which are before you on this record.
6 It was not presented at all as part of their
7 application.

8 This is a fundamental fact that was
9 misrepresented by Claimants' counsel. The forged
10 document, I will mention in a moment, and others. But
11 many of the steps that have been taken we say are
12 fruits of the poisoned tree. Bribery allegations.

13 This is the second distraction that is the
14 cornerstone of Claimants' case, which is utterly
15 unproven. And that is this allegation of bribery. No
16 credible evidence whatsoever exists to suggest any
17 bribery occurred. All we have is the testimony of
18 Mr. Damjanac, who says he was approached by
19 Mr. Cristian Bogantes. That's it. Nothing else. No
20 witness; no corroboration. Halfheartedly, they refer
21 to other alleged bribery attempts, but this would not
22 qualify as evidence in any country. It certainly does

1 not under Costa Rican law.

2 Claimants revel in a peculiar way that
3 Mr. Bogantes is not here this week or that we do not
4 submit a witness statement on his behalf. They should
5 not be so surprised. We reject the idea that this
6 should be the forum for the Republic of Costa Rica to
7 engage in a he-said/she-said battle with criminal
8 repercussions.

9 If there is an allegation that rises to a
10 level of a legitimate complaint of bribery, it can be
11 raised in Costa Rica, where any police power will
12 effectively ensure testimony is properly heard and
13 tested. The Costa Rican criminal courts can also
14 enforce perjury laws which are not in play in these
15 proceedings.

16 The Claimants had an opportunity to bring a
17 timely formal complaint against Mr. Bogantes, but
18 neither Mr. Damjanac nor Mr. Aven properly seized the
19 moment. The lack of timeliness was fatal to the
20 delayed complaint Mr. Aven ultimately commenced.

21 This is not an insignificant omission given
22 how much they now want to rely on the allegation in

1 these proceedings.

2 Above all, the allegation of bribery is not
3 relevant to the issues in dispute in this Arbitration.
4 The bribery complaint raised by Mr. Aven was rejected
5 in accordance with Costa Rican criminal law and
6 procedure. It is not central in any way to this
7 Tribunal's determination of the issues. It has no
8 bearing on expropriation or FET claims.

9 But let's go a level deeper and really analyze
10 what the Claimants are asking you to believe when they
11 raise this bribery allegation.

12 The allegation of a disgruntled official not
13 getting a purported bribe could be feasible if it were
14 the case that there were no wetlands. For example,
15 one could imagine, in theory at least, that an
16 official might originally write up a report saying
17 there was a wetland, even though there was not. At
18 that point, an official could ask for a bribe in order
19 to correct the record. And if he or she were
20 rejected, they might then refuse to correct the
21 record.

22 But here's the flaw. There are and always

1 have been wetlands on the property. This is
2 fundamentally important. Why? Because it means the
3 most natural motivation for bribery that I just
4 described does not function. What could Bogantes have
5 threatened when he supposedly was refused payment? To
6 reveal the truth, having previously fostered a lie?
7 That doesn't make sense. The evidence is clear, there
8 are wetlands in existence.

9 And this also means one of two things: First,
10 in this case, it might be that a genuine error was
11 committed in the earlier reviews of the land and the
12 wetlands that we know exist were somehow overlooked.
13 And just pausing here for a moment, even if that
14 happened, it does not--it does not prevent the State
15 or authorities from revisiting this finding if there
16 were later investigations into the wetlands, which is
17 exactly what happened in accordance with Costa Rican
18 law.

19 Or, the second alternative is there were known
20 to be wetlands from the start, and the blind eye was
21 turned when it should not have been.

22 If this had been the case, the Tribunal should

1 ask which party would have been behind such a campaign
2 of concealing wetlands? Which stakeholder would have
3 had a commercial interest to encourage officials to
4 ignore wetlands? The answer is quite obvious.

5 The third red herring, Mr. Bucelato. The
6 Claimants persevere [with the campaign] of pointing
7 fingers at Mr. Bucelato. Much like Mr. Bogantes, this
8 is an irrelevance. We have no need or desire to enter
9 into any appraisal of whether a neighbor with whom
10 Claimants have clearly fallen out, is of any
11 persuasion to the issues in dispute. Simply said, he
12 is not.

13 Whether he's complained about the existence of
14 wetlands is largely irrelevant. Public officials had
15 to listen to his complaint and process it accordingly,
16 in accordance with Costa Rican law. Whether he is a
17 thorn in the side of Claimants or even whether he's
18 defamed them in the past is all totaled irrelevant to
19 these proceedings.

20 If these proceedings degenerate into a
21 neighborly spat, then investment arbitration really is
22 in desperately bad shape. The fourth issue, the

1 forged document. The Claimants have made a big deal
2 of the annotation on the back of the forged document
3 purportedly deriving from Mr. Bucelato. Again, this
4 is a total distraction. There's no dispute that
5 the--that the document is forged, or at least we
6 thought there wasn't. The Costa Rican authority have
7 already ruled it is a forged--forged document,
8 although Claimants this morning now question perhaps
9 that it is forged.

10 And there is also, we thought, no dispute that
11 the forged document is cited in numerous official
12 determinations that earlier suggested that there were
13 no wetlands. Those early determinations, that there
14 were no wetlands, we say are fruit from the poisoned
15 tree to the extent they clearly relied on the forged
16 document; thereby setting in course a series of
17 events--series of events which should not have
18 occurred.

19 However, Claimants, reveling in identifying
20 Mr. Bucelato as the deliverer of this letter, is as
21 much bemusing as it is irrelevant. This--this
22 Tribunal can legitimately ask, why would the most

1 openly opposed man to the Las Olas Project prepare a
2 document that supported the project? The forged
3 document supported the project.

4 It's too twisted to take seriously and
5 ultimately doesn't change the fact that this is a
6 forged document that was relied upon to Foster the
7 wrong findings.

8 Members of the Tribunal, there is no need
9 whatsoever to get bogged down with these
10 irrelevancies. There's no sufficient proof to ground
11 them in any event; and as explained, even if you play
12 out the logical and objective context to what
13 Claimants are alleging, it doesn't reflect at all well
14 on them.

15 Finally, conspiracy theories. There's been a
16 colorful display, both in the witness testimony, we
17 say, and Claimants' pleadings, and this morning that
18 the Claimants and in particular, Mr. Aven, is an enemy
19 of the State. Total fantasy. Clearly led by
20 Mr. Aven. This is a clear example of someone who's
21 seeing shadows.

22 Moreover, it seems to have affected the

1 objectivity of Claimants' counsel. Obsessive
2 testimony illustrated well in Mr. Aven's second
3 Witness Statement has permeated their pleadings and,
4 we suspect, their ability to reason with Mr. Aven. Of
5 course, we sympathize with any predicament that would
6 compromise the safety of Mr. Aven. But the suggestion
7 that Costa Rica is in any way responsible for to his
8 well-being due to the Las Olas project and that he is
9 somehow the target of a statewide campaign is utter
10 nonsense. Of relevance to this Tribunal is the need
11 to view matters dispassionately. Demonizing the State
12 in the absence of evidence or in the absence of a
13 denial of justice is not an option.

14 An adverse decision of an agency or a court
15 against Claimants is not a breach of any law, let
16 alone customary international law. And to construe
17 incorrectly the procedures that criminal prosecutors
18 are entitled to pursue does not mean that there is a
19 personal vendetta held by that individual prosecutor
20 in some personal capacity. We urge the Tribunal not
21 to get sucked into the introspection that has been
22 displayed.

1 I'm going to touch briefly on the
2 inadmissibility of claims before we move to the
3 chronology.

4 The image I'm putting up on the screen is of
5 the representatives that signed the State--heads of
6 State that signed DR-CAFTA. Now, I want you to
7 imagine walking into that group of celebrating
8 officials and ask any one of them at the time whether
9 they thought they had signed up to protect foreign
10 investors from the other signatory States in
11 circumstances where those foreign investors were
12 consistently violating the applicable laws in their
13 territory.

14 Like me, you can probably imagine the look
15 that you'd have been given. No contracting party
16 would have contemplated the protection of unlawful
17 investments. And yet, this is precisely what the
18 Claimants pretend.

19 Claimants say illegality only arises in the
20 establishment phase. But as is clear from this case,
21 illegality can pervade many years of investment
22 activity. Under international law, Claimants cannot

1 avail themselves of CAFTA protections falling on--from
2 their own illegal conduct. And in your slide pack,
3 you have a summary chart of some of the illegalities
4 that we raise.

5 Claimants have operated their investment
6 illegally in breach of Costa Rican law. For your ease
7 of reference, we include in this slide pack, and
8 please read it later, these--and we'll touch on them
9 during the chronology--those examples demonstrate an
10 ongoing practice of misleading the Costa Rican
11 authorities. The result was damage to the environment
12 and a complete disregard for the environmental
13 protections and regulation of Costa Rica.

14 That misconduct precludes the availability of
15 international remedies to Claimants and the claim
16 should be dismissed on the base of inadmissibility.

17 Illegality is not being advanced as a ground
18 for lack of jurisdiction, as Claimants suggest in
19 their Reply Memorial. Instead, Costa Rica asked the
20 Tribunal to consider the claims inadmissible based on
21 the seriousness of Claimants' misconduct in the
22 operation of the investment.

1 In exercising jurisdiction, investment
2 tribunals have the power to dismiss claims as
3 inadmissible when there is serious misconduct in the
4 operation of the investment, and this is not new or
5 uncharted territory in international law. For
6 example, that approach is endorsed in Plama against
7 Bulgaria. Allowing Claimants the protections of CAFTA
8 would be to assist investors who come with unclean
9 hands.

10 In this case, this is a protracted pattern of
11 misconduct across the operation of the project. That
12 is not right. Customary international law does not
13 protect such illegal conduct, and the equities of the
14 situation certainly would not protect it.

15 Claimants claim comprises an alleged violation
16 of fair and equitable treatment, and an inherent
17 component of any FET claim must be that the equities
18 cannot be one-sided. The equitable treatment can only
19 be provided if the investment is equitably grounded.

20 Further, one of CAFTA's aims is to strengthen
21 the rule of law among the State parties. CAFTA must,
22 therefore, be interpreted in a manner that is in--that

1 is consistent with the role which, in turn, must mean
2 that the substantive protections under CAFTA cannot
3 apply to investments which are conducted contrary to
4 the law.

5 The absence of any express provision requiring
6 the investment to be in accordance with the host State
7 should not deter the Tribunal. The Tribunal in Plama
8 and Bulgaria was ready to prevent protection--I'm
9 sorry, was ready to prevent the same circumstances
10 under the Energy Charter Treaty.

11 Briefly, the wetlands. We would not be here
12 today if it weren't for the presence of the wetlands
13 and forests in Las Olas' ecosystem and the consequent
14 damage made by the Claimants to the project site.

15 Certainly, referring to Las Olas as an
16 ecosystem is not a random remark. An ecosystem
17 comprises of all living creatures of biotic organisms
18 interacting with each other. It's a community where
19 organisms each have their own role to play.

20 And we'll see how this exactly fits in.
21 Costa Rica has made the protection of the environment
22 a key priority. Its constitution in Article 50

1 provides the right for individuals to a healthy and
2 ecologically balanced environment. Costa Rica's
3 signature to the convention on wetlands, also known as
4 the Ramsar Convention, and the Convention on
5 Biological Diversity.

6 Costa Rica has balanced the aim of economic
7 development on the one hand with the protection of
8 biodiversity on the other.

9 Wetlands are areas that are inundated by water
10 cyclically, intermittently, or permanently. Water is
11 the primary factor, and plants and animal life have
12 adapted to live in the environment.

13 It is important to bear in mind that an area
14 does not need to be permanently wet to qualify as a
15 wetland. Wetlands among--are among the most
16 productive ecosystems in the world. They can be
17 thought of as biological supermarkets. They provide
18 great volumes of food, attract many species.

19 Legally speaking, I would like to turn to
20 Ramsar Convention, which is defined wetlands in
21 Article I.1 as, I quote, "Areas of marsh, fen,
22 peatland or water with a natural or artificial,

1 permanent or temporary; with water that is static or
2 flowing, fresh, brackish, or salt, including areas of
3 marine water, the depth of which at low tide does not
4 exceed 6 meters."

5 I emphasize marsh, natural and temporary
6 because these were--these characteristics were what
7 Mr. Aven and Mr. Janney had in front of them when they
8 decided to buy the property.

9 Costa Rican law also provides for definition
10 of a wetland. Article 40 of the environmental organic
11 law, together with the regulations to the law on
12 biodiversity, define wetlands as ecosystems depending
13 on water regimes, emphasizing that the water factor
14 can be permanent or temporary.

15 There are many types of wetlands. Let's look
16 at a few images.

17 Marine, estuarine, lacustrine, riverine, and
18 palustrine. It's not possible to provide a complete
19 set of characteristics that can be identically applied
20 to all existing wetlands, and the existence has to be
21 asserted case by case. Claimants' own experts
22 acknowledge this challenge.

1 Costa Rican Decree 35803, that's a number that
2 you will become familiar with this week. 35803. It's
3 a decree from MINAE. Sets forth a list of features
4 that may be present in a wetland ecosystem. They
5 serve as a basis for identification but must be
6 entirely analyzed in the particular case.

7 Since a wetland is composed of a number of
8 physical, chemical, or biological components giving
9 rise to different conditions that might appear. What
10 are the conditions?

11 The first is hydrophilic vegetation. This is
12 in the first few images that we've provided, meaning
13 species of plants that are known to grow and develop
14 in aquatic environments.

15 Second, hydric soils defined as those soils
16 which develop under conditions with a high degree of
17 humidity, up to reaching a degree of saturation.

18 This morning we heard from Mr. Burn, tried to
19 draw a distinction between hydric soils and
20 hydromorphic soils. And it may be that Mr. Baillie
21 draws that distinction; but, unfortunately, Article 5
22 of that MINAE decree, which is Costa Rican law, to

1 define wetlands does not. Article 5(b)--Article 5 is
2 titled "Definitions," and Article 5(b) has the title
3 "Hydric Soil," says, and I'm reading from it, "hydric
4 soil or hydromorphic soil."

5 Third, hydric conditions. Characterized by
6 climatic particular influence over determined
7 territory in which other variables, such as
8 geomorphic, topographic, soil makeup material and
9 occasionally other processes or extreme events are
10 involved. The frequency and duration of flooding and
11 soil saturation varies widely from being permanently
12 inundated or saturated to irregularly flooded.

13 Here, you have some images to give you some
14 examples. It's important to note that the existence
15 of a wetland per se does not preclude the possibility
16 to develop a real estate project. I really need to
17 repeat that.

18 It's important to note that the existence of a
19 wetland per se does not preclude the possibility to
20 develop a real estate project. And that's still the
21 position today.

22 The consequence for the developer is that it

1 would have to preserve these natural water features to
2 build its project and adapt accordingly. That's still
3 the decision today. This is imminently possible. And
4 it's something that SETENA, the institution that you
5 heard mentioned already, tries to accommodate through
6 harmonization. Dr. Jurado, Attorney General, will
7 testify to this fact.

8 Importantly, and this is central to
9 understanding how absurd this entire claim is, it's
10 something that the Claimants can still try to do today
11 with Las Olas. They can still try to realize an
12 environmentally friendly development. At the risk of
13 repetition, members of the Tribunal, why are we here?

14 So, why are the wetlands so important?
15 Wetlands store water and improve its quality. They
16 filter pollutants that would otherwise flow
17 downstream, such as soil sediment. Wetlands work like
18 sponges to avoid flooding. Wetlands are home to a
19 variety of species. And due to their importance,
20 their protection is a concern of the international
21 community as a whole.

22 Costa Rica has demonstrated that wetlands

1 exist in Las Olas' ecosystem; and, tellingly,
2 Claimants admit the same as of the status quo of the
3 land, today.

4 KECE, or the acronym is K-E-C-E, but I will
5 refer to it as "KECE," is Mr. Kevin Erwin, who you
6 will hear from either likely at the end of this week
7 or Monday. He identified not one but a total of eight
8 wetlands located in the east, northwest, and western
9 portions of Las Olas' ecosystem.

10 Please have a look at the pictures that were
11 taken by each of the wetlands by the Respondent's
12 experts--here's an example. And as it was stated a
13 couple of minutes ago, there are many types of
14 wetlands. KECE has confirmed the findings that the
15 Costa Rican authorities had already made. The
16 existence of wetlands which are palustrine.

17 "Palustrine" means inland; inland wetlands which lack
18 flowing water. These wetland areas are hydrated by
19 rainfall. They're seasonally inundated, which means
20 that depending on the time of the year, water can be
21 found.

22 The conditions provided in Decree 35803 to

1 determine the existence of a wetland in Costa Rica
2 were found in each of them by Costa Rican experts.

3 They concluded that the soils were hydric and
4 that there were hydrophilic plants; and, in addition,
5 that there were hydric conditions.

6 Because of Claimants' illegal works to wipe
7 out existing wetlands, the experts had to look for
8 evidence of preexisting conditions. It is for this
9 reason that the soil experts had to dig deep to find,
10 after the filling, decomposed organic matter in its
11 early stages, in, for example, Wetland 1.

12 Members of the Tribunal, Claimants' own
13 experts support the position of existing wetlands in
14 Las Olas's ecosystem. Dr. Calvo and Dr. Langstroth
15 expressly affirmed in their report that there are
16 three potential wetlands which corresponds to
17 Wetlands 2, 3, and 5 found by KECE. Because of the
18 limitations of their study Drs. Calvo and Langstroth
19 condition their findings on hydric soil conditions to
20 Dr. Baillie. Dr. Baillie endorsed KECE's findings,
21 identifying hydric soils in the three Calvo and
22 Longstroff's potential wetlands.

1 Because Dr. Baillie did not want to put in
2 evidence Claimants' illegal works on wetland Number 1,
3 he referred to the soils as marginally hydric, trying
4 to minimize the obvious. They're either hydric or
5 they're not.

6 In relation to the forests, not only do
7 wetlands exist on the property but also the Claimants'
8 property harvests a forest. Costa Rican environmental
9 policies comprise the protection of forests and
10 Costa Rican forestry law defines what is understood as
11 a forest.

12 Here is the full test. It's a doozy.

13 A native ecosystem intervened or not
14 regenerated by natural succession of the forestry
15 techniques occupies an area of two or more hectares
16 characterized by the presence of mature trees of
17 different ages, species and varied size with one or
18 more canopies covering more than 70 percent of the
19 surface where there are more than 60 trees per hectare
20 of 15 or more centimeters in diameter measured at the
21 height of an adult's breast.

22 As in the case of wetlands, Costa Rica courts

1 have understood a forest as an integral ecosystem.
2 Even if forests are located in a private property,
3 they enjoy the protection of Costa Rican law. And
4 that's why those who desire to use forestry resources
5 or to engage in tree-cutting must apply for a permit.

6 There are certain prohibitions in Costa Rica
7 regarding these activities. The prohibition in the
8 charge of the use of land on land covered by a
9 forest--sorry, in the change. The prohibition on the
10 cutting of trees can only be carried out on land for
11 agricultural use and without the forest with prior
12 permission from the regional environmental counsel.

13 The presence of forests in the ecosystem is so
14 crucial that Costa Rica raises infringements against
15 the forestry law to the category of criminal offenses.
16 That's what Costa Rican statute books say, and that's
17 what they said when investors invested in Costa Rica.

18 Despite this protection, the Claimants totally
19 ignored this framework and decided to cut down the
20 trees. This wasn't a simple management of vegetation.
21 Instead, the Claimants were again impacting a
22 protected ecosystem with the aim of developing the

1 project at any cost.

2 Costa Rica based its claim of forest impact on
3 tree-clearing as occurred in 2010 and 2011, and to
4 review the damage that was done to the environment,
5 it's necessary to go back to those critical dates. In
6 effect, the review of the forest conditions at
7 Las Olas' ecosystem during the period of the project
8 through the aerial photography.

9 The second KECE report shows a significant
10 increase in tree canopy cover within the Las Olas
11 ecosystem. There were multiple areas with tree canopy
12 greater than two hectares in size as required by the
13 forestry law. You can see that the areas with canopy
14 cover are typically concentrated around the wetlands.

15 The--yes, sir.

16 PRESIDENT SIQUEIROS: Mr. Leathley, what date
17 is this photograph? This photograph is of what date?
18 Do you have that date?

19 MR. LEATHLEY: 2010. I think in the very
20 small text on the corner, sir.

21 PRESIDENT SIQUEIROS: Okay.

22 MR. LEATHLEY: In the little black-and-white

1 text.

2 PRESIDENT SIQUEIROS: Is this June 5, 2010?

3 MR. LEATHLEY: Yes, sir.

4 PRESIDENT SIQUEIROS: Okay. Thank you.

5 MR. LEATHLEY: At the end of 2010, SINAC
6 estimated 400 trees having been felled within a
7 7.6-hectare area without any permits. It then
8 recommended cessation of site work until the site
9 could be properly evaluated.

10 However, the second KECE report shows that
11 instead of suspending the works, in 2011--again, the
12 little date in the bottom left, 2011--Claimants
13 developed interior roads reducing significantly the
14 tree canopy cover. SINAC conducted a quantitative
15 analysis confirming the existence of a forest.

16 Again, Claimants' own consultant considered
17 that there were--there were mature trees and that the
18 area had over 60 trees with a diameter of more than
19 15 centimeters, measured at the height of an adult's
20 breast.

21 So, the ecosystem has been altered by the
22 Claimants, first by filling and draining the wetlands

1 in the southwest portion of the property; and the
2 photos taken by KECE in the first report are telling.

3 The damage was made by the excavation of
4 drainage ditches and installing culvert pipes and
5 innate structures by terracing the hillsides to drain
6 the water and to flatten the land.

7 And I'd encourage you to look at the images
8 that we have on file here and in the record.

9 There's also construction of the house--just
10 go back one--the construction of the house there in
11 the bottom image, over a wetland.

12 Secondly, by cutting town the trees and
13 existing forest on-site have been significantly
14 reduced. You can see the clearing of the land here on
15 these images.

16 As you can see from these images taken by
17 SINAC in March 2011, significant filling and earth
18 movement was taking place. I think it was described
19 this morning as preparing for construction. But
20 whatever the description is, it was unlawful
21 construction work. The removal of the vegetation
22 considered as forest has dramatically decreased the

1 capacity of the forest to properly store and naturally
2 convey water, direct loss of animals and a substantial
3 knock-on effect.

4 Members of the Tribunal, this case must fail
5 because of the simple fact that wetlands exist. Both
6 the Claimants' and the Respondent's experts have
7 confirmed the evidence of at least three wetlands on
8 the project site. Mr. Burn refers to the status quo
9 today cannot condemn them for what happened in the
10 past. But it is our testimony, sir--it is our
11 evidence that there is ample evidence on the record to
12 show that there were in existence wetlands at the time
13 that the development started and that this is a mere
14 continuation of the natural ecosystems that are in
15 existence.

16 You can see here the seven wetlands identified
17 by Mr. Erwin on the project site. Claimants' expert
18 Dr. Baillie found hydric soils in KECE's Wetlands 2,
19 3, and 5. You see how we've interposed them on this
20 image.

21 And Drs. Calvo and Langstroth found hydric
22 vegetation and hydric condition on KECE's Wetlands 2,

1 3, and 5 as well.

2 These wetlands exist, and have always existed,
3 on the Las Olas Project.

4 And our final slide shows how that--Claimants
5 planned an aggressive and fully invasive development
6 that did not consider any of the wetlands on the
7 property or respect their protection under Costa Rican
8 law. And these last four images have been provided in
9 a small clip of documents in hard copy for you.

10 And if the Tribunal would like, I'll take you
11 through a chronology.

12 PRESIDENT SIQUEIROS: If you may,
13 Mr. Leathley--

14 MR. LEATHLEY: Yes, please, sir.

15 PRESIDENT SIQUEIROS: --perhaps I--this is an
16 issue for both Respondents and Claimants.

17 When we address with the experts this topic, I
18 think it would be interesting to make sure that when
19 photographs are being shown, we compare equivalents,
20 not only on years but also on the season in which
21 they're taken, because a photograph taken especially
22 from above--above, may be misleading if it's during a

1 wet season or if it's in a dry season. So, hopefully
2 we can address with the experts--and compare
3 photography on equal terms.

4 MR. LEATHLEY: We'll absolutely do our best,
5 sir, yeah.

6 PRESIDENT SIQUEIROS: Thank you.

7 MR. LEATHLEY: And so, we're going to go
8 through a chronology. And this is going to take me a
9 little while. So, I would beg your patience.

10 This is also going to be provided in a soft
11 copy. Obviously, we'll be providing it to the
12 Claimants' counsel. And you can manipulate this image
13 on the screen with just the drag of a mouse, so you
14 can see a lot of what is there in the chronology, and
15 we think it would be useful for you to see the whole
16 thing set out.

17 I will be referring to certain parts of the
18 chronology, not every single block that you'll see.
19 And so, if in doubt, gentlemen, I would ask that you
20 defer to listening to me instead of trying to getting
21 too lost in the actual document. I hope I don't
22 compromise my own objective.

1 And we believe that this chronology is the
2 complete chronology. It was notable that the parties
3 could not agree a chronology for your consideration,
4 and that is because we believe the devil is in the
5 detail. And to understand what happened and when and
6 by whom is critical to understanding really and truly
7 how Costa Rica has sought to enforce its laws in a
8 legitimate way at all times.

9 First, we'll revisit the Claimants' story as
10 explained today in very brief terms. The Claimants'
11 view of the world is, understandably, exclusively
12 focused on the Environmental Viabilities and the
13 construction permits that they obtained.

14 We'll take you to the EVs that they did not
15 obtain. We will dispute the legality, and even in
16 some instances, the existence of the construction
17 permits. We'll dispute the legality of both the EVs
18 and the construction permits which we will show were
19 premised on the withholding and perhaps even the
20 concealment of critical information.

21 After their remarks, we thought we would have
22 been given a very clear chronology during the

1 Claimants' opening, which we were not. So, you're
2 still, I suspect, a little confused as to what
3 happened and when. We'll try to assist you in this
4 regard.

5 Let's look at the basics, this table. The
6 site is divided into different portions. It's notable
7 this morning that the images that were put up on your
8 screen often had a red border. That red border was
9 seemingly represented as the Las Olas Project. It was
10 not. It was the Condominium Section.

11 And as you'll have seen from the presentation
12 by Ms. Bouchenaki, there is more to the Las Olas
13 Project than the Condominium Section. There is a
14 concession site, a little part down by the beach in
15 the south corner, a teardrop off the main piece; and
16 then the other easements that run up the
17 west-hand--west side.

18 This is what we believe is the position. For
19 the concession site, we have no complaint, although we
20 will raise this issue in relation to the ownership,
21 that we believe they do not have any standing. For
22 the Condominium Section, the EV was unlawfully

1 obtained and, therefore, the construction permits were
2 unlawfully obtained.

3 For the easements and the other lots, no EV
4 was obtained whatsoever. And only seven of nine
5 easements had construction permits but we say were
6 also unlawfully obtained.

7 In addition, we challenge the way that
8 Claimants approached the EV and construction
9 applications by fragmenting the Las Olas Project site
10 into different portions as part of a concerted effort
11 to avoid the proper processes.

12 The advantage of this was that Claimants
13 minimized their reporting and environmental
14 obligations. This effectively saw them circumvent
15 Costa Rican law and the highly sensitive awareness
16 that they had to show to the wetlands.

17 Why did they do this? We assume money. They
18 wanted their project to be as profitable as possible.
19 We do not begrudge pioneering entrepreneurship, but we
20 do when it damages the environment in ways to
21 contravene Costa Rican law.

22 What else will we show you today? We will

1 show you by reference to the documentary evidence what
2 Claimants knew regarding the existence of the
3 wetlands. We will also show that these are the very
4 same wetlands that our experts and theirs identifies
5 existing on the land today. They knew the wetlands
6 existed. At the very minimum, they should have known,
7 based on the series of red flags that were raised for
8 them by technical experts who were more than capable
9 than the Claimants to identify the wetlands.

10 The story gets bleaker. After having duped
11 the authorities by withholding or concealing critical
12 information that they then presented in an unlawful
13 way, they undertook works in order to conceal the
14 wetlands. This was done by filling them. This was
15 done by burning the vegetation. The expert reports of
16 Dr. Perret and Dr. Singh, who will be here this week,
17 clearly show man-made sways of earth that cover the
18 wetland soil. Literally, they were trying to bury the
19 evidence. And notably, they were undertaking this
20 work on the easements, remember that western strip,
21 where they had not properly obtained any Environmental
22 Viability permits or construction permits, EVs or

1 construction permits.

2 Having obtained some EVs and construction
3 permits on the unlawful basis, they were then
4 approached by certain authorities who began to
5 question the environmental integrity of the project.
6 If Claimants had genuinely overlooked the wetlands,
7 this was their moment to work with the authorities and
8 resolve how to integrate and accommodate the sensitive
9 ecosystems. They could have done that. They did not.
10 They doubled down.

11 Instead, Claimants ignored the authorities.
12 They ignored and rejected the complaints; and in doing
13 so, began their own campaign of demonizing the very
14 officials whose job it was to make these inquiries.

15 You have already heard the reputations of our
16 witnesses Mónica Vargas, Luis Martinez and Hazel Díaz
17 being slammed in this Arbitration. It's baseless.
18 They were doing their job.

19 They have absolutely no personal vendetta
20 against any of the Claimants. And you'll hear from
21 this--hear from them this week, and you can judge for
22 yourselves.

1 Injunctions were issued to protect the land.
2 Why? Precaution. If nothing else was done, the
3 eventual relief might have come too late. The
4 wetlands needed to be protected. The precautionary
5 principle not only permitted but obliged officials to
6 act reasonably--sorry, responsibly.

7 You have the testimony of Costa Rica's
8 Attorney General, Dr. Julio Jurado, who used to be the
9 SINAC director. He testifies as to what Costa Rican
10 law says in this regard. These injunctions were
11 entirely permissible. They were necessary to protect
12 the wetlands.

13 At around the same time, complaints were
14 raised by individuals and investigations began. Any
15 ordinary person would stop in their tracks, fearful of
16 having violated environmental laws and potentially
17 being guilty of crimes. But, no, Claimants doubled
18 down yet again and protested throughout the
19 proceedings exclaiming that there were wetlands.
20 Criminal investigations began against Mr. Aven and
21 Mr. Damjanac.

22 Now things were getting serious. And guess

1 what? Claimants doubled down again. Mr. Aven does
2 not stay in the country to defend himself and contest
3 any allegations; he absconds, violating Costa Rican
4 laws and triggering an automatic process that results
5 in Interpol notices being put in place.

6 I'll go into a little detail now about each of
7 these stages. But as you can see, the issues the
8 Claimants complain of are all of their own making.

9 The timeline begins in 2002. This is when the
10 first EV application was made in relation to what was
11 known as the first condominium site. We call it the
12 first because the site changed over time. It was
13 originally a development of 48 units. However, once
14 Mr. Mussio, the architect, became involved, that
15 mushroomed to 288.

16 Claimants filed for the EV on the 30th of
17 September 2002. Although even though it would have
18 been necessary in the circumstances, no biological
19 study addressing the presence of any wetlands or
20 forests was submitted.

21 Not only was this a violation of Costa Rican
22 law, it was the first known occasion of when the

1 Claimants failed to comply with the burden of proof on
2 them as developers.

3 Article 109--you would have heard me mention
4 it before in the earlier submissions. Article 109 of
5 the biodiversity law of 1998 says, the burden of
6 proving the absence of pollution, unauthorized
7 degradation or impact lies on the applicant for an
8 approval or permit, as well as on the party accused of
9 having caused environmental damage.

10 This, gentlemen, really is a provision we
11 would ask you to tab, to note, to have on your short
12 list of issues to consider.

13 On the 23rd of November 2004, SETENA granted
14 the first EV for the first condominium site.
15 Claimants used this and the other subsequent occasions
16 of an EV being granted as evidence of their right to
17 develop the property. They say it was for the State
18 to police their application. They say it was for the
19 State to visit the property and double-check what had
20 been disclosed in their application.

21 This is not what Costa Rican law provides for.
22 The burden was on them and them alone. They had to

1 disclose sensitivities, wetlands, forests; and if they
2 did not, then their applications would be granted on a
3 flawed basis.

4 Yes, they secured the EVs. But they were
5 unlawfully obtained. And as a result, Claimants
6 always ran the risk that their efforts to develop the
7 property would be unwound when the truth was outed.

8 This EV for the first condo site would lapse
9 on the 27th of February 2007, meaning a new
10 application had to be made.

11 The next key date is now the 26th of January
12 2005. On this day, La Canícula--that's the entity
13 that they--that you see in the corporate description.
14 La Canícula applied for an EV for the concession. The
15 concession is that little red part of the territory.

16 DEPPAT was hired as an environment regent.
17 That's Mr. Bermudez. You'll hear from him this week.
18 Now we move into to 2006. On the 20th of January
19 2006, SINAC issued confirmation--excuse me--that the
20 concession is not within a Wildlife-protected Area, or
21 WPA.

22 A Wildlife-protected Area is a national

1 categorization of land. However--and this is
2 important--because Claimants tried to confuse you a
3 little in this--in this regard, just because the
4 concession or indeed, any other part of Las Olas, was
5 not in a WPA does not mean that Claimants could ignore
6 the potential existence of wetlands. They were still
7 bound by Costa Rica's strict environmental protection
8 laws. If wetlands existed, as they did on Las Olas,
9 the same protection applied. The protection of
10 wetlands is completely independent of the
11 characterization that can be given by the State to a
12 certain area as a WPA.

13 More than a year after the application for the
14 EV, for the concession, the little piece of land at
15 the bottom by the coast, SETENA issued the EV on the
16 17th of March 2006. Like I said, we don't have any
17 complaint in relation to the information provided in
18 order to obtain the EV in relation to that concession.

19 2007. In April 2007, the architect firm of
20 Mussio Madrigal was hired and undertook surveys in
21 preparation of the EV application for the Condominium
22 Section. Now, this is where it starts getting

1 important.

2 Here it's worth noting that the Condominium
3 Section had evolved into larger, as I said, 288 units.
4 This is the red section now on the map.

5 Mauricio Mussio, the architect, prepared the
6 master site plan and devised the plan to fragment. It
7 is Costa Rica's position that fragmentation undertaken
8 in the way they did is unlawful. You'll hear from
9 Mr. Mussio tomorrow.

10 By this point in 2007, plans are moving to
11 develop the site in a major way. However, let's not
12 forget what the site comprises. As I mentioned,
13 there's a condo site and the concession. However,
14 there is a critical third portion of the land, which
15 is called "easements." I'll come to these in a--in a
16 moment. Let me just touch on the condo EV application
17 process, the main part of the land.

18 In June 2008, the EV was granted by SETENA for
19 the Condo Section. But let's return to the start of
20 that EV process since it was obtained unlawfully. And
21 this is a very important part of Costa Rica's case.

22 And you'll have heard and read about the D1

1 Application. This is a paper-intensive exercise, the
2 D1 Application, which requires the developers, that is
3 to say the Claimants, and them only, to disclose all
4 the necessary physical conditions of the site where
5 the activity is to be developed. As I said, the
6 burden was on them.

7 We set out in our counter Memorial in
8 Paragraph 158 onwards the requirements of the D1
9 Application process.

10 Claimants failed to properly complete this
11 application. They did not identify the wetlands and
12 forests on the property. They did not submit a
13 biological study that could identify the number of
14 species in those ecosystems. There were multiple
15 areas, all of which are identified in Priscilla
16 Vargas's report, which is appended to the KECE 2
17 study. Priscilla Vargas is from a consultancy called
18 Siel Siel. She's one of the experts appearing on
19 behalf of Costa Rica this week.

20 But here, it gets worse. Not only does the D1
21 Application fail on its face, during the course of
22 this arbitration, we have uncovered a document that

1 existed from June 2007. As I said before, to correct
2 the record, this--the Protti report was never included
3 as part of the D1 Application. And that omission was
4 not insignificant. You've heard Mr. Burn try to
5 downplay the significance of the Protti report, but
6 I'd like us to have a look at it.

7 Roberto Protti, a hydrogeologist--and that's,
8 again, not an insignificant qualification in these
9 circumstances--was hired by Techno Control. Techno
10 Control had been contracted by Mussio Madrigal, the
11 architect for the Claimants. Mussio Madrigal answers
12 to the Claimants.

13 Mr. Protti prepared and delivered a report to
14 Mussio Madrigal's contractor clearly stating that
15 possible evidence of wetlands existed on the site.
16 This is R-11.

17 We would invite you, please, to put a big red
18 tab or Post-It note in R-11. This is a document that
19 we will talk you through in numerous stages.

20 Expressly Protti identified wetlands using terminology
21 that Costa Rican law accepts as do Claimants' own
22 experts. Terminologies--terminology that would

1 identify a potential wetland.

2 He wrote there--and I think we have to zoom in
3 now--this is Protti's map. The (in Spanish ["áreas
4 anegadas de tipo pantanoso"]). This is--I'm sorry.
5 I'm quoting from the report, but if you see "Zona
6 anegada." This is specifically an area that had been
7 identified which notes in the report, as he says in
8 his report, and we'll find you the citations during
9 the course of this week, (in Spanish ["áreas anegadas
10 de tipo pantanoso"]). This means in English, a
11 swamp-type flooded area. Swamps are a type of
12 wetland, as are flooded areas, according to
13 Costa Rican law.

14 Areas of poor drainage were noted on more than
15 one occasion. And as you can see from the screen, the
16 broader areas approximately identified, and he says
17 approximately, is in precisely the areas where we have
18 found wetlands. Soil types indicated clayey, a red
19 flag for hydric soils, one of the possible indicators
20 of wetlands.

21 And Mr. Protti also found poor soil
22 permeability, having tested the soil to a significant

1 depth of 6 meters. This tells anyone with any degree
2 of environmental awareness that wetlands possibly
3 existed. Based on these findings, any developer
4 working in good faith would have not only disclosed it
5 but they would have investigated it further, precisely
6 dealing with the wetlands identified. They were also
7 under an obligation to disclose these findings, even
8 if they had preferred, as they did for the D1
9 Application, a report by a company called Geoambiente.

10 Instead, the Protti report was filed away.
11 The only way we got sight of this Protti document was
12 Mr. Aven, and we assume accidentally, disclosed it to
13 SINAC in February 2011, not November 2007 when it had
14 been produced and when the application was made to
15 SETENA.

16 Claimants, instead, filed the Geoambiente
17 report with that D1 Application. If the D1
18 Application had been properly completed, it would have
19 triggered a quite different process.

20 The entire process directs SETENA to assign
21 scores to the results. It's almost an empirical
22 exercise that SETENA undertakes. Based on that

1 scoring system, which is an exercise of assigning a
2 beta risk value, the level of environmental clearance
3 changes. Priscilla Vargas testifies in this respect.

4 Because Claimants fail to identify wetlands
5 and forests, they avoided the EIS, the Environmental
6 Impact Assessment process. They instead ended up
7 being processed through an easier environmental
8 management plan process. We set this out in our
9 counter Memorial.

10 This process becomes self-fulfilling. You
11 identify sensitive environmental areas; the bar is
12 raised. If you do not, it is lowered. And as I
13 mentioned before, it is not for SETENA to then get in
14 the car and visit the property and every other
15 property, presumably, in Costa Rica, and audit the
16 submissions made by the developers. Claimants say it
17 was SETENA's obligation. That is wrong as a matter of
18 Costa Rican law.

19 We do not rely only on the Protti report to
20 identify wetlands and to identify the failings of the
21 Claimants. In the course of this arbitration, the
22 Claimants disclosed notably during the document

1 disclosure phase, a Castro de la Torre report of 8th
2 of July 2002. The report shows extremely shallow
3 water tables according to Priscilla Vargas in the area
4 we know as Wetland Number 1.

5 The second report--or rather, the third if
6 you're counting Protti, is the Techno Control report
7 which is submitted by Claimants as part of their D1
8 submission in 2002, and R-13 would offer you a better
9 image than this; I apologize. That's the best we
10 could do for this presentation.

11 This is still in relation to the condo site,
12 the condo EV application. This report identified two
13 brooks, or "quebradas," which showed the tendency for
14 the existence of wetlands. That's page 14 of the
15 report that shows this graphic. And, again, I would
16 guide you gentlemen to the report by Priscilla Vargas.

17 So, as to orientate ourselves again, we're in
18 2007, and the Claimants submit their D1 Application
19 relying on the Geoambiente report which does not
20 identify potential wetlands, and that's submitted in
21 November 2007 to SETENA. This is unlawful. It cannot
22 be said any clearer. Claimants failed to disclose

1 what they knew. This is a breach of Costa Rican law.

2 Claimants EV application with SETENA omitted
3 crucial terms. It failed to identify the ecosystems
4 on the land--I'm reading from the screen here. It did
5 not propose measures to protect species from impacts
6 of the development, and no proper biological survey
7 was contained. And yet it was their legitimate
8 expectation that if wetlands were uncovered, they
9 would be held accountable for them. Knowing this,
10 they still continued with their preferred D1 form.

11 Now, we've been talking up until now about the
12 EV application by completing the D1 form for the condo
13 section. What about the easements? The third part of
14 the project? Well, we'll come to this in a moment,
15 but the D1 Application made in 2008 was only in
16 relation to the condo section. Mr. Aven describes the
17 easement section as--and I'm quoting from his first
18 statement--72 lots coming off the easements going into
19 Las Olas.

20 Mr. Aven testifies that Claimants established
21 nine easements along the main road going into Las Olas
22 project and carved out areas for a long--for others

1 along two roads.

2 This is the green section in the map on the
3 left. Their intention, Claimants' intention, was to
4 create lots for individual homes that fronted directly
5 onto the easements.

6 But we repeat: No EV exists for these
7 easements. And these are important areas for the
8 Tribunal's consideration. Because Wetlands 1, 2, and
9 3 identified by KECE are all in the easements.

10 And so, let me describe what we know and what
11 the evidence tells us about the easements. First, as
12 stated by Mr. Aven, there are nine easements within
13 the section that we're referring to as the easement
14 section. So, I apologize there's a little ambiguity
15 in the large. We are saying easement section, but
16 divided into nine pieces.

17 Easements 8 and 9 are at the bottom southwest
18 corner of the Las Olas site, and the remaining
19 Easements 1 to 7 run up the west road as the map
20 indicates.

21 The second thing we know, Claimants say they
22 have construction permits for Easements 1 to 7.

1 That's the top sections. However, while they have
2 documentation showing construction permits were issued
3 by the Municipality, these were obtained without an
4 EV. This makes them unlawful. Articles 2 and 3 of
5 the general regulations on the procedures for
6 environmental impact assessment--that's 2004--and
7 Ms. Vargas sets this out in her report--the work that
8 is segregating urban projects must still seek EV
9 approval. Claimants say they did not need an EV.
10 This is simply wrong as a matter of Costa Rican law.

11 So, you'd be justified in asking, and why
12 would the Municipality issue construction permits in
13 the absence of an EV from SETENA if it was a necessary
14 requirement?

15 The answer is in the documents. Claimants
16 told the Municipality that the proposed works to be
17 undertaken on the easements could be considered as
18 work on the overall site. That was characterized as
19 the Condo Section. This is grossly misleading.

20 There are two separate sections. This appears
21 in DEPPAT's Document R-42. This is a document we
22 found at the Municipality, was not shared to us by the

1 Claimants, that Mr. Bermudez prepared, indicating, on
2 page 1, that he represented to the Municipality that
3 the whole Project benefits from the EV and that the
4 work to be carried out on the easements was covered by
5 the same EV.

6 This is a clear misrepresentation. On the
7 back of this, the construction permits were granted.
8 To this day, no evidence exists showing an EV for the
9 easements.

10 Now, that was Easements 1 to 7 that I've just
11 been describing. What about Easements 8 and 9? The
12 documentary evidence tells us that there is no
13 construction permit for Easements 8 and 9. None
14 exist. The Municipality's records tell us this for
15 2008 and 2009.

16 This is C-295. Now, you might be a little bit
17 amused this morning by a qualification as to what
18 C-295 comprises.

19 There's a very clear reason. C-295 is a
20 document that clarifies, and we would invite you to
21 look at it, that there are no construction permits at
22 all for Easements 8 and 9 in 2008 and 2009.

1 PRESIDENT SIQUEIROS: If I may, Mr. Leathley.

2 MR. LEATHLEY: Yes, sir.

3 PRESIDENT SIQUEIROS: I think it is clear that
4 Claimants were going to produce C-295. The one that
5 you have offered might not be the same one they have
6 stated they will submit to the Tribunal.

7 Am I correct on that, Mr. Burn?

8 MR. BURN: That's absolutely correct, sir.
9 And--and you will recall that I indicated at the
10 beginning of the proceedings today that if the
11 Respondent wishes to submit the document they
12 currently call C-295 as an R exhibit, they're
13 perfectly welcome to do that. We have no objection to
14 that. But we do object to this continued conflation
15 of one with another.

16 This is not C-295. They knew it, frankly.
17 We've held back from criticizing what they did a few
18 weeks ago, but they knew what they were doing at the
19 time. They were playing games. They should just file
20 it as an R exhibit and be done with it. We filed the
21 proper exhibit. We put it to them.

22 It will be before you by the end of today or

1 tomorrow morning once the Respondent's had a chance to
2 consider it. But really they're just playing games on
3 this point.

4 PRESIDENT SIQUEIROS: So--

5 MR. LEATHLEY: We will very kindly--thank you,
6 sir. And we're very happy to submit it as an R
7 document. The proprietorship of this document is
8 irrelevant.

9 PRESIDENT SIQUEIROS: Okay.

10 MR. LEATHLEY: But it is an important
11 document, sir.

12 PRESIDENT SIQUEIROS: Yes. Proceed.

13 MR. LEATHLEY: It shows that there were no
14 construction permits in 2008 and 2009. From the other
15 side of things--still, for example, Easements 8 and 9,
16 there is not a single document in the record that
17 shows any permit for any year regarding these two
18 easements. This is despite the fact that Mr. Aven
19 testifies that in the final quarter of 2007,
20 construction permits had, he says, been obtained to
21 build the first two easements.

22 What we also know is that the work on the

1 Easements 8 and 9 were undertaken and completed by
2 March 2009. Aerial photography shows us that by
3 March 2009, two roads in Easements 8 and 9 were built
4 and completed. A little hard to see. There are two
5 roads that come perpendicular to the main road. But
6 we would also invite you to look at the images from
7 the Claimants' submission this morning as they
8 indicate them even clearer.

9 Photographs from Mónica Vargas' report of
10 April 2009 also show the land at those points having
11 been substantially flattened. And SINAC also reported
12 in 2008 that they identified the two little easement
13 roads during their September 2008 visit. That's R-20.

14 Third, what do our recent studies tell us?
15 KECE and the report of Drs. Singh and Perret clearly
16 indicate that the wetlands we have found are located
17 right in the area of Easements 8 and 9.

18 Is this a coincidence? Is it a coincidence
19 that the very first work undertaken on the entire Las
20 Olas Project Site were undertaken in this corner of
21 Easements 8 and 9 where the wetlands are? Is it a
22 coincidence that the flattening and the major movement

1 of earth occurred where the wetlands are? Is it a
2 coincidence that the first lots sold by Claimants were
3 those in the easements on precisely the locations
4 where Wetlands 1, 2, and 3 have been found?

5 Finally, Claimants argue in their Reply
6 Memorial that they had construction permits for the
7 easements. They do not say which ones. Their
8 evidence for this is Exhibit C-40, which is a
9 construction permit for the Concession only. There is
10 no construction permit for the easements in this
11 exhibit.

12 In this case, we would have expected from
13 Claimants a forensic analysis of the EVs, the
14 construction permits, and taking each plot in turn,
15 setting out very clearly what they have. They don't.
16 They confuse, generalize, and try and hide the ball.

17 They do so because they've constructed roads
18 and undertaken work in contravention of Costa Rican
19 law, another evidence--further evidence of their
20 unlawful activity.

21 Let us return to the chronology. And we're
22 now in 2008. And there's the Claimants' note that

1 SETENA visited the property in January 2008 in the
2 midst of the dry season.

3 In February 2008, SETENA requested certain
4 additional information regarding the Condo Section EV.
5 One of the requests was a vegetation coverage map.
6 The verifications were framed by the information
7 provided by Claimants as Dr. Jurado confirms. And
8 when Claimants submitted their response in March 2008,
9 what was presented to SETENA was the forged document.

10 Now, Claimants have got excited about
11 Mr. Bucelato's apparent delivery and this being
12 recorded on the back. I've already commented on that.

13 In June 2008, the EV was issued for the Condo
14 Section. I mentioned that a moment before. And as
15 I've explained, this was off the back of this
16 misleading information. The EV was issued subject to
17 certain qualifications. If the cutting of any trees
18 was required, Claimants needed a permit, and they
19 would need to notify at least a month in advance the
20 commencement of any works.

21 As you will remember, by September 2008, the
22 global financial crisis hit. Claimants testified that

1 the Project was suspended weeks after construction had
2 started at the Concession Site in August 2008.

3 On the 30th of September, 2008, due to a
4 complaint that there were irregularities on the
5 property, SINAC inspected the property. Mr. Mussio
6 was present. Even though Claimants' submission in
7 this arbitration is that they knew nothing of the
8 visit, Claimants knew the complaints had been raised.
9 And on the 1st of October of this same year, 2008,
10 SINAC issued a report identifying two wetlands. SINAC
11 reported two possible wetlands. Although SINAC notes
12 that, Mr. Mussio preferred to describe them as
13 stagnant water due to drain blockage.

14 By 2009, the interest in the environmental
15 integrity of the Las Olas Site continues to grow. In
16 March of 2009, the neighbors filed a complaint against
17 the Las Olas Project with the Municipality. In
18 response, as was their obligation, Mónica Vargas
19 visited the property for her first time. This is
20 April 2009.

21 You will hear from Ms. Vargas this week. She
22 has testified that at the time she noted and recorded

1 in writing two paved roads, the same two and only two
2 roads in Easements 8 and 9, and she also noted cutting
3 and burning of trees.

4 The images on the screen show the photos that
5 were take--that were given to her, taken from 2007, as
6 contrasted with photos taken in March 2009. She
7 included these in her report.

8 They indicate some telling sites. For
9 example, Figure 3. This is R-26. It shows the road
10 built across the easement and the notable flattening
11 of the land by manmade measures. This is, what we
12 submit, the refilling of the wetlands. Claimants
13 understandably have and this week will be very nervous
14 about the content of this report.

15 We're now in 2010. Claimants allege that the
16 Project was reactivated. However, documentary
17 evidence shows that illegal works had already been
18 undertaken on the easements during '08 and '09.

19 Mónica Vargas returns to the Project twice, in
20 January and May of 2010. A summary of her reports is
21 summarized in the green boxes on the screen.

22 Ms. Vargas requested the Permits Department in the

1 Municipality for any permits for the works they were
2 undertaking. The Permits Department confirmed they
3 did not and notified Claimants on the 14th of
4 June 2010, as you can see in Exhibit R-35.

5 Now, we focused a lot in the last few minutes
6 on the Easements Section. But what about the Condo
7 Section? Let's go back to the main piece.

8 By June 2010, the EV was about to expire. Two
9 years was nearly up and no works had been undertaken.
10 Claimants say they notified SETENA at the start of
11 works on the Condo Section on the 1st of June, 2010.
12 The EV was to lapse the next day.

13 However, again, the documents tell another
14 story. SETENA is only officially informed when it
15 receives the--and stamps the relevant documentation.
16 The way one delivers any submission to SETENA is
17 through delivery to the office in order to obtain the
18 stamp, and mailing the document to SETENA is not an
19 option.

20 Exhibit R-31 shows the date stamp of 14th of
21 June. They were out of time. Now, is it a
22 coincidence that the same day Claimants' letter to

1 SETENA informing them that the works had been
2 undertaken was taken in on the same day the
3 Municipality informed them to stop their illegal
4 works?

5 On 8th of July, 2010, Mr. Bogantes and
6 Mr. Manfredi visited the site, informing Mr. Damjanac
7 of the reason; namely, the investigation of the
8 wetlands.

9 On the 16th of July, 2010, SINAC issued a
10 report mentioning that the area was not located on
11 wetlands and announcing the cutting and burning of
12 trees that had been observed.

13 You may react, why couldn't SINAC spot the
14 wetlands? Well, let's not forget, two years of moving
15 earth and filling wetlands has already passed as well
16 as the building of the road and the house that
17 Mr. Damjanac was now living in.

18 In addition, the conclusion that there were no
19 wetlands was founded in part on the findings contained
20 in the forged 2008 document.

21 Around this time--so this is around--also,
22 sorry, 16th of July, 2010, Claimants obtained seven

1 construction permits for Easements 1 to 7. To remind
2 the Tribunal, this was obtained without an EV,
3 rendering it unlawful.

4 On the 22nd of July, 2010, DEPPAT submitted a
5 Land Movement Contingency Plan to the Municipality.
6 And as I mentioned before, the plan showed the
7 intended works on the Easement Section, Easements 1 to
8 7.

9 This is the document I mentioned where
10 Mr. Bermudez indicated on page 1 that he represented
11 to the Municipality the whole Project benefits from an
12 EV and that the work was to be carried out on the
13 easements was covered by the same EV. That was wrong.

14 By August 2010, we come to the point that
15 Mr. Bogantes is accused of soliciting a bribe. No
16 credible evidence exists to support this. Certainly,
17 under Costa Rican law, no criminality could be
18 established.

19 Claimants allege that they had a tape
20 recording of the solicitation of this alleged bribe.
21 They make that in page 7 of their Notice of Intent to
22 Submit a Claim to Arbitration on the CAFTA back in

1 2013.

2 I'm sorry.

3 PRESIDENT SIQUEIROS: Please go ahead. When
4 we conclude this section and you go into--when we
5 conclude this section and go into, what, the
6 Defensoria, could we take a break--small break?

7 MR. LEATHLEY: Absolutely, sir.

8 PRESIDENT SIQUEIROS: Thank you.

9 MR. LEATHLEY: Let me just take one step back.

10 PRESIDENT SIQUEIROS: Sorry for my
11 interruption.

12 MR. LEATHLEY: No. Of course, sir.

13 Claimants say they had a tape recording of
14 this alleged bribery incident. They said this in 2013
15 at the time King & Spalding were representing them.
16 As of today there is no recording. Such a cornerstone
17 of their entire case is inexplicably missing.

18 Sir, if you wish to stop now for a short
19 break, I would be very happy to. I'm about to move
20 into the Defensoria part of these.

21 PRESIDENT SIQUEIROS: Thank you. So, let's
22 take a 10-minute break.

1 MR. LEATHLEY: Thank you.

2 PRESIDENT SIQUEIROS: Thank you.

3 (Brief recess.)

4 PRESIDENT SIQUEIROS: Are we able to proceed?

5 Interpreters, court reporters. If we may proceed.

6 MR. LEATHLEY: Thank you, sir.

7 PRESIDENT SIQUEIROS: Thank you, Mr. Leathley.

8 MR. LEATHLEY: No, thank you, sir.

9 And so, we're close to the end of the
10 chronology, and then I'll move into the applicable law
11 section. And I do hope to be on schedule to finish on
12 the three-hour mark.

13 PRESIDENT SIQUEIROS: We have, if you
14 wish--what is the--I think we have two hours and nine
15 minutes. So, it would be roughly 50 minutes left.

16 MR. LEATHLEY: Yes. Thank you, sir. I think
17 that's what we have as well.

18 So, let's reorientate ourselves. Where are we
19 in the timeline? Mid-2010. There's been a finding of
20 no wetlands by SINAC while simultaneously there are
21 complaints being raised about the existence of
22 wetlands.

1 And this is the moment when matters are
2 referred for the first time to the Defensoria de los
3 Habitantes. This is an Ombudsman office in Costa Rica
4 responsible for the enforcement of human rights.
5 You'll hear from Hazel Diaz this week, who will
6 explain how the investigations proceeded.

7 A complaint was filed on the 20th of
8 July, 2010, due to damages caused to a wetland. The
9 following month, on the 7th of August, 2010, the
10 Defensoria requested information from SETENA, SINAC,
11 the Environmental Administrative Tribunal, known as
12 the TAA, and the Municipality.

13 And these agencies responded during
14 August 2010. And I'll leave you to read the slides.
15 I was about to read them. I'm afraid my eyesight
16 doesn't permit me. But there you go, 18th of August
17 and the 27th of August are the responses.

18 In August 2010, SETENA visited the site and
19 found no wetlands. So, recently, after the refilling
20 of the wetland, it perhaps comes as no surprise that
21 they were not immediately observed. Only after a
22 prolonged period of abandonment has nature allowed the

1 natural restoration permitting our experts to
2 definitively identify and delimit the wetlands that
3 always existed on-site.

4 On the 1st of September, 2010, SETENA
5 dismissed the complaint regarding the existence of
6 wetlands on the Project Site. And it's worth pausing
7 here for a moment.

8 First, this finding was founded on the
9 March 2008 forged document. Second, we've heard a lot
10 from the Claimants about the broad campaign against
11 them, starting with the supposed animosity shown by
12 the entire apparatus of the State instigated by
13 Mr. Bogantes whose bribe was refused. But yet here in
14 September, the first official act after the moment
15 Mr. Bogantes' bribe was apparently rejected, we find a
16 decision favorable to the Claimants.

17 If Claimants' theory held water, this would
18 have been the perfect opportunity for Mr. Bogantes to
19 have his revenge.

20 In addition, a week later, on the 7th of
21 September, 2010, a construction permit is issued by
22 the Municipality for the Condo Section. On the 13th

1 of September, 2010, the Municipality noted there were
2 missing documents in the Claimants' file that were
3 required to obtain the Condo Section construction
4 permit.

5 Now, what knowledge do Claimants have of this
6 Defensoria investigation? Well, the Claimants have
7 gone to great lengths to show as part of their
8 international law claim that they were never informed
9 of these "secret investigations" conducted by the
10 Defensoria, SINAC, and the Municipality. However, the
11 record shows that Claimants knew, since
12 January--sorry--the 29th of September, 2010, so very
13 contemporaneous--they knew of the investigations
14 conducted by those Costa Rican agencies.

15 In the defamation suit against Mr. Bucelato,
16 information was requested by the Claimants of the
17 investigations initiated by various institutions;
18 namely SINAC, TAA, the Environmental Department of the
19 Municipality, which is known as DeGA, and the
20 Defensoria.

21 So, still in the context of the Defensoria
22 proceedings, in November 2010 the neighbors filed a

1 copy of the complaint requesting SINAC to confirm if
2 the forged document was an official and valid
3 document. On the 25th of November, SINAC confirmed
4 that the forged document was indeed forged.

5 For now, we leave the Defensoria proceedings
6 as events took precedence elsewhere.

7 On the 25th of November, 2010, the director of
8 SINAC requested Mr. Luis Picado to undertake an
9 inspection of the Project Site. This letter
10 represents the culmination of the various inquiries
11 and inconsistencies that have been observed by the
12 various institutions.

13 Please recall that SINAC is the only
14 institution that can determine the existence of
15 wetlands or not. If you think wetlands, you think
16 SINAC.

17 And please also remember that notwithstanding
18 the previous findings of no wetlands by SINAC, it had
19 absolutely--absolute authority to find contrary to
20 that in order to protect the environment were it found
21 to be necessary.

22 Now, this letter--this is the 25th of

1 November, 2010, letter--says, "In this respect, I
2 should highlight the Municipality of Parrita as well
3 as the Defensoria are monitoring the alleged
4 illegalities."

5 This is the conclusion at this point. And
6 here SINAC is advancing the investigation, bearing in
7 mind that the forged document and other illegalities
8 were being investigated by others.

9 On the 30th of November, SINAC requested
10 SETENA to suspend the EV for the Condo Section because
11 of a complaint relating to the existence of the forged
12 document.

13 Here is that hair trigger. Here is the
14 precautionary principle in action, the practical
15 effect. Here you begin to see the institutions noting
16 how their previous findings will have been partly
17 tainted by the forged document. On December 2010,
18 SINAC officers carried out several Project Site
19 visits.

20 We're now moving into 2011. And on the 3rd of
21 January, 2011, SINAC issued a report with the results
22 of their site visits, observing and recommending

1 various things.

2 They recommended issuance of an injunction,
3 precautionary principle in real life, the INTA soil
4 Study, the Study of Wetlands by the National Wetlands
5 Authority, a SINAC wetlands study, a criminal
6 complaint.

7 As you can see, by now things are getting
8 really serious for the claimants. Specifically, in
9 making those recommendations on the 3rd of January,
10 2011, a number of important points are mentioned by
11 SINAC in their conclusions. These include reporting
12 the illegal felling of approximately 400 trees,
13 describing conversations with neighbors who had lived
14 in Esterillos Oeste for over 30 years who told
15 Mr. Cubillo that a wetland was refilled over time and
16 the vegetation was removed and burned.

17 Neighbors also reported animals, amphibians,
18 reptiles. The letter also described the construction
19 of a drainage channel within the property that would
20 connect with the public sewer system constructed by a
21 municipality apparently dividing a wetland. It
22 reported the existence of forged documents, and it

1 also included a video where you could easily see a
2 drainage of the wetland and damage made by the
3 Claimants.

4 Now, the conclusions of the letter speak for
5 themselves that are contained in your file, which I
6 would really encourage you to read in your spare time.
7 We summarize, I think, the conclusions in the next
8 image.

9 The body of evidence was growing and the
10 legitimacy behind the complaints that there
11 potentially existed wetlands becomes clearer, so much
12 so that by the end of January, beginning of February,
13 a multiple stream of activity was occurring among the
14 respected institutions, each with their own
15 jurisdictional right to pursue the relief that the law
16 permitted.

17 Namely, A criminal complaint was launched by
18 SINAC on the 28th of January, 2011, having visited the
19 site and undertaken their reviews. This focused on
20 the refill of the wetland, the illegal felling of
21 trees, and the forgery of a public document. Also,
22 there was an injunction that was issued by SINAC in

1 February 2011 suspending all works at the Las Olas
2 Project Site.

3 Information was requested by the National
4 Wetlands authorities by SINAC and a soil study from
5 INTA was requested by SINAC on the 4th of February.
6 SINAC noted that it would be convenient rather than
7 necessary.

8 At the same time, other steps were also being
9 taken. A criminal complaint was commenced by
10 Mr. Bucelato on the 2nd of February 2011. The
11 prosecutor, Mr. Martínez, who you will hear from this
12 week, requested a study of the wetlands from the
13 National Wetlands organization. Mr. Martínez also
14 requested a soil study from INTA. And Mr. Bucelato
15 filed a complaint for the refilling of the wetland
16 with the TAA. Mr. Burgos also filed a complaint in
17 relation to the illegal cutting of trees in the same
18 month.

19 Not feeling threatened by the evidence growing
20 against them, the Claimants challenged the SINAC
21 injunction, something that was dismissed because
22 Mr. Aven never responded to requests from the Court.

1 In any event, Claimants ignored the
2 injunction, stating clearly on the record, even in
3 this arbitration, that they were advised that they did
4 not have to adhere to it. What is more, they
5 continued working on Las Olas, irrespective of that
6 injunction.

7 This is despite the clear concerns expressed
8 regarding the health and integrity of the environment.
9 Claimants were notified of the SINAC injunction the
10 same day, which stated in relevant part, "In order to
11 prevent any greater assault to the ecosystem affected
12 by the property, this precautionary measure has been
13 issued for the immediate cessation of the land
14 clearings, tree cutting, and constructions, as well as
15 any other actions which may be harmful against the
16 environment until it is duly determined that the
17 appropriate legal permits have been appropriately
18 granted and whether there is a wetland area at the
19 site, in addition to the legitimacy of the
20 signatures."

21 In March 2011, Mr. Gamboa, of the National
22 Wetlands Program, along with Mr. Cubero, of INTA,

1 visited the site to inspect conditions, the result of
2 which was a report from Mr. Gamboa on the 18th of
3 March 2011. This concluded that there were wetlands.

4 He identified that the wetland had been filled
5 and was being impacted by the Project works. This
6 report included findings of INTA on hydric soils. And
7 here it's worth looking at the photographs taken from
8 that visit where INTA found hydric soils. In this
9 photo--this is the grey soil known as "gleying."

10 Mr. Gamboa notes this in his report. Remember these
11 are INTA's field study findings. That's hydric soil.

12 Claimants put a lot of emphasis on the fact
13 that in May of 2011--so this is a couple of months
14 later after that visit with SINAC and with INTA--in
15 May INTA writes up its report. And Mr. Cubero
16 concluded, notwithstanding those hydric soils you
17 literally saw in that photo, that, in his view, there
18 were no wetlands. Claimants rely on this. How should
19 you reconcile this contradiction?

20 It's simple. SINAC, not INTA, determines the
21 existence or not of a wetland. SINAC concluded that
22 there were wetlands based on Mr. Gamboa's visit and

1 based on the hydric soil findings contemporaneously by
2 Mr. Cubero at the time. This is to say SINAC
3 incorporated INTA's expertise from the field reports.

4 Now, I cannot begin to answer how INTA's final
5 May 2010 report would pretend that there were no
6 wetlands when they found hydric soil and photographed
7 it.

8 Mr. Cubero said in his May 2011 report that
9 there were soils there are "not typical of wetland
10 systems." But he also says there were "gleyed soils"
11 and "anaerobic conditions," both red flag indicators
12 of hydric soils; i.e., wetlands.

13 The samples taken by Mr. Cubero which form the
14 only basis of his scientific analysis in his May 2011
15 report are dated and came from the only two bore holes
16 dug in March 2011 with Mr. Gamboa.

17 And we can see the results in the photo that
18 we had up a moment ago. Mr. Cubero's conclusion,
19 referring to the agricultural classification--this
20 might be a term you've been seeing in the papers on
21 the soils--we know this is a guide and not a
22 definitive basis on which to conclude that there are

1 wetlands.

2 Drs. Perret and Singh visited the site, dug
3 holes deeper than the 120 centimeters that Mr. Cubero
4 dug, thereby allowing them to inquire below the
5 manmade strata of soil that Claimants had shifted and
6 moved over the wetlands. You will hear from
7 Drs. Perret and Singh this week. In April of
8 2011--this is a slight step back from that May 2011
9 INTA report--further injunctions were issued.

10 First, SETENA issues an injunction on the 13th
11 of April based on the forged document. Second, the
12 administrative tribunal issues an injunction the same
13 day on the basis of the wetlands being discovered.

14 Now, Claimants kept performing illegal works
15 on the project in spite of the SINAC injunction, which
16 was followed by an injunction from SETENA issued on
17 that 13th of April 2011, which is on your screen,
18 which incidentally Mr. Damjanac refused to receive.
19 And an injunction from the TAA also was issued on that
20 same day, 13th of April.

21 Now, how do we know that the Claimants kept
22 performing works? From agency reports. For example,

1 on the 12th of May, 2011, one day after the
2 notification of the SETENA injunction, the
3 municipality reported works being conducted on the
4 project site. Claimants have contested the
5 authenticity of these reports. This is Exhibit R-270.

6 But their own construction logs show Claimants
7 engaged in substantial construction in May, 2011.

8 These photos you're looking at now indicate
9 the works that were being undertaken at the time.

10 They come from the 2nd of May, 2011, which is the
11 Claimants' construction log, R-512.

12 Other dates when work was being undertaken
13 were the 9th of June, 22nd, 23rd of June, and 27th of
14 June. By mid May, inspections are ongoing. And on
15 the 18th of May, 2011, SINAC issued a report
16 delimiting the wetlands and remarking on the forests
17 being cut. This is R-265.

18 It appears it was a failure on the GPS
19 settings since the plotting is outside the boundary of
20 the site which clearly would not have been there
21 where--clearly would not have been where they were
22 undertaking the survey. A GPS glitch.

1 Any ordinary law-abiding investor would have
2 been frozen in their tracks literally by the
3 injunction but also by the specter of criminal
4 proceedings. But not the Claimants. They pushed on,
5 conducting ongoing illegal works on the site, as I
6 mentioned, in June 2011. And on the 7th of July,
7 2011, SINAC submitted another report to Mr. Martínez,
8 the prosecutor, confirming the existence of a forest
9 and damage being caused.

10 And here it's worth us mentioning the forests
11 since so much of our time is dedicated to the
12 wetlands. In exactly the same way the Claimants were
13 under the burden to disclose the wetlands, they were
14 under the obligation to disclose forests and determine
15 whether they existed on the site. They failed. Let's
16 remember that the EV for the Condo Section was
17 expressly conditioned on the terms that if the
18 claimants were to cut any trees, they required a
19 permit from SINAC.

20 And in September of 2010, Minor Arce, who is a
21 witness here this week for the Claimants, on the
22 advice of Mr. Bermúdez, was commissioned to prepare a

1 study regarding whether permits were required to cut
2 trees on the land.

3 Arce advised seeking a permit if more than 10
4 trees per year were to be cut. Claimants never
5 applied for or obtained any such permits, despite
6 reports of tree cutting from third parties.

7 For example, the report issued by Mr. Cubillo
8 on the 11th of January, 2011--sorry. That's Mr.--yes,
9 Mr.--yeah, Mr. Cubillo from SINAC noted the cutting of
10 trees, as I mentioned a moment ago, of close to 400
11 trees. Now, this prompted the prosecutor,
12 Mr. Martínez, to request SINAC to undertake a
13 technical study.

14 SINAC's response was given in July 2011,
15 determining that there were forests and damage had
16 been caused to the ecosystem.

17 This is a major environmental violation by the
18 Claimants. In actual fact, probably frowned upon more
19 than wetland violations. Contrition and concern from
20 the Claimants, mitigation and sensitivity towards the
21 environment? No way. Claimants hire INGEOFOR in
22 December 2011 to analyze the findings of SINAC's

1 July 2011 report.

2 INGEOFOR concludes there are no forests on the
3 site. You'll hear this week from KECE, or Mr. Kevin
4 Erwin, in this regard which he confirms the SINAC
5 findings of a forest.

6 This is a point not rebutted by Claimants'
7 witnesses or experts. In October 2011, Claimants
8 continue to ignore the injunctions, the criminal
9 proceedings, and push ahead with tree cutting on the
10 site. SINAC visited the site and reported on the
11 3rd of October there had been men cutting the trees.

12 Let's not forget, SINAC had already determined
13 within its legal competence that the site contained a
14 forest. Criminal investigations were ongoing. Any
15 cutting of any kind required permits. But with the
16 injunctions in place, no thought should have been
17 given to cutting and burning trees.

18 On the 21st of October, 2011, based on the
19 SINAC findings, Mr. Martínez, the prosecutor, takes
20 the next step and criminally charges Mr. Aven and
21 Mr. Damjanac.

22 He charges them for illegal tree cutting and

1 for the refilling of the wetlands. The Claimants
2 allege he's on a personal vendetta and had no evidence
3 to bring charges.

4 And I would simply refer you to Paragraph 247
5 of our Counter-Memorial to see the long list of
6 reports, studies, and evidence that justified
7 Mr. Martínez' processing of this file.

8 On the 30th of November, 2011, the Criminal
9 Court of Quepos issued a judicial injunction against
10 the continuance of the works at the project site. And
11 you heard me mention a number of injunctions up to
12 this point. SINAC, TAA both had issued injunctions.

13 But this is one that should really resonate.
14 The judicial injunction has the effect up to and
15 including today of suspending the Project in its
16 entirety.

17 Members of the Tribunal, with the judicial
18 injunction in place and a number of institutions
19 clearly concerned about harm being caused to the
20 environment, Claimants resist. We're meant to believe
21 from Mr. Burn's comments this morning that his
22 colleagues--sorry, that Mr. Aven and his colleagues

1 are victims subject to the State's intent on
2 persecuting unsuspecting foreign investors.

3 Our evidence and the testimony you will hear
4 this week, we believe, will debunk that myth.
5 Claimants have made much of the criminal proceedings,
6 treating them as an example of this victimization. We
7 believe this is nonsense.

8 Mr. Martínez took steps that were lawful and
9 permissible for any prosecutor to adopt. No arbitrary
10 steps were taken. You'll hear this week from Judge
11 Chinchilla, an experienced and decorated judge from
12 Costa Rica, who confirms that Mr. Martínez acted
13 properly.

14 In relation to the criminal proceedings, also
15 we have a separate line--we've branched it off for the
16 Defensoria and the TAA in the criminal
17 proceedings--and, again, you can manipulate this in
18 your free time. On the 6th of May, Mr. Aven
19 voluntarily testified in the criminal investigation.
20 He makes a big deal of this day because he says he
21 informed Mr. Martínez of the alleged bribe from
22 Mr. Bogantes. The fact Mr. Martínez did not commence

1 an investigation into Mr. Bogantes is, according to
2 Mr. Aven, evidence of arbitrariness.

3 Mr. Martínez and Judge Chinchilla roundly
4 reject this. A prosecutor would, of course, be
5 greeted by counter-accusations when a subject of
6 investigation is being questioned. Mr. Martínez has
7 the right but not the obligation to follow up on any
8 counter-accusation.

9 He also has the right to ignore such evidence
10 if his belief is this is nothing more than an attempt
11 to avert criminal proceedings.

12 In fact, on the 16th of September, 2011,
13 Mr. Aven filed the criminal complaint against
14 Mr. Bogantes. The record shows Mr. Aven was contacted
15 on multiple occasions by the ethics prosecutor--this
16 is someone else, not Mr. Martínez--to investigate this
17 complaint. And our submissions rely on the
18 documentary record of that prosecutor's approaches.

19 Mr. Aven says he never received such
20 approaches. No credible evidence has been offered by
21 Mr. Aven in this regard. The fact that Mr. Martínez'
22 conduct as a prosecutor in this setting becomes the

1 subject of criticism when it is Mr. Aven that is the
2 subject of the criminal investigation beggars belief.

3 The criminal proceedings show balance and
4 objectivity. For example, on the 21st of
5 October 2011, the same Mr. Martínez dismissed further
6 investigation for forgery and disobedience to
7 authority. Notably, Judge Chinchilla actually thinks
8 that Mr. Martínez erred on this occasion and would
9 have had a basis to pursue the investigation. In
10 June 2011, a preliminary hearing is--against Mr. Aven
11 and Mr. Damjanac was held. The judge, not
12 Mr. Martínez, ordered the case to go to trial.

13 At this preliminary hearing, Mr. Aven
14 testified voluntarily. On the 5th of December, 2012,
15 the criminal trial commenced. Due process up to this
16 point has been observed. No arbitrary conduct has
17 occurred. Costa Rican criminal law and procedure has
18 been complied with. It is not now available to
19 Mr. Aven to criticize the decision of the judge simply
20 because he disagrees with the outcome.

21 And as I'll explain later, the role of
22 international law is not to second-guess questions of

1 criminal culpability. Claimants complain about the
2 application of Costa Rican criminal procedural law.
3 But I won't entertain it further here for the interest
4 of time. But there is plenty on the record of this.
5 And you will have an opportunity to hear from Judge
6 Chinchilla, who is more than capable of answering any
7 questions you have in this regard.

8 In May 2013--we're now in 2013--the ethics
9 prosecutor is trying to reach Mr. Aven to inquire into
10 his complaint about Mr. Bogantes. We're trying to
11 respond to his complaint about this bribery.

12 But by May 2013, Mr. Aven has fled from Costa
13 Rica. Again, throughout 2013 and 2014, as the
14 illustration on the screen shows, we see a number of
15 developments in the criminal proceedings. And
16 finally, I'd like to mention INTERPOL. Again, the
17 idea of the state conspiracy is a fantasy. Mr. Aven's
18 inclusion in the INTERPOL notice was appropriate.
19 You'll hear from Judge Chinchilla that this was a
20 natural consequence and is a legal consequence of the
21 issuance of an international arrest warrant.

22 I'd now like to move to the law, gentlemen,

1 and I apologize. I went a little longer than I
2 anticipated, so I'll try to be brief on our legal
3 submissions.

4 First of all, you'll see in our pleadings the
5 issue of state responsibility and whether it should be
6 triggered in these circumstances. I'll be very brief.
7 We think our pleadings set this out quite clearly.

8 It is not the role of an International
9 Tribunal to sit on appeal against the correctness of
10 individual administrative acts. The Tribunal is not a
11 super-national appellate body to review local
12 administrative decisions.

13 The State is judged not on every step in its
14 administrative process; rather, it is judged on its
15 final product. And its liability is engaged only if
16 the overall process of its decision-making is flawed.
17 When the process of decision-making is still ongoing,
18 as in this case, the State's liability is not engaged.

19 This is for good reason. International law
20 developed principles to regulate international state
21 liability for multi-level decision-making in
22 administrative affairs. It's a fundamental principle

1 of international law that are not, in and of
2 themselves, internationally wrongful acts. These
3 shouldn't be brought before an International Tribunal.

4 A low-level administrative or judicial
5 decision can constitute an international delict only
6 if one of two things is true. Either, number one,
7 there is no effective remedy available, meaning
8 appeals process is such that it does not afford the
9 investor a meaningful prospect of correcting the
10 deficiencies it challenges; or, number two, the
11 applications for remedy the investor made do not lead
12 to redress.

13 This necessarily means that the investor
14 sought to challenge the decision locally, but after it
15 was allowed to go to the length, the system of appeals
16 did not correct the deficiencies of the lower
17 official's decision.

18 Members of the Tribunal, we are not in either
19 of those circumstances. Claimants must therefore show
20 much more than an individual erroneous decision. In
21 fact, Mr. Burn's words were, I think, a couple of
22 agencies bringing the State into disrepute. That is

1 not a test under international law, and it is
2 certainly not a basis to find Costa Rica liable under
3 the DR-CAFTA. They must demonstrate that Costa Rica's
4 administrative and legal system is fundamentally
5 flawed. They have not.

6 Claimants' case on the alleged breach of FET
7 also lacks any basis in international law. We submit
8 that in order to find a breach--I'm sorry, sir.

9 PRESIDENT SIQUEIROS: Could we take a 5-minute
10 break?

11 MR. LEATHLEY: Absolutely. Absolutely.

12 (Brief recess.)

13 MR. LEATHLEY: I'd just like to move briefly
14 on to FET. I feel like the sand is slipping through
15 my fingers and have many points I wish to make. But
16 let me deal with FET. I'd like to deal with due
17 process. We may have to truncate our remarks on
18 arbitrariness and abuse of rights. I would like to
19 touch on expropriation and then briefly conclude.

20 Notably, very few pages was dedicated to the
21 legal analysis of what appears in their pleadings in
22 what we would actually described as law-light

1 regarding FET. It's not enough to repeat general
2 principles of good faith or the rules of law without
3 really looking at what they mean and how they sit
4 within what the Claimants argue is the legitimate
5 expectations test. The sprinkling of some sort of
6 international law spirituality that are called with
7 the subjective views of the Claimants is not enough.

8 Claimants' case is that there was a violation
9 of the legitimate expectations. Costa Rica, much like
10 the position that it's consistently adopted in many of
11 the cases, such as Spence, a case where Mr. Weiler
12 remarked he had been working a late night, although he
13 was counsel to Claimants in that case, does not--Costa
14 Rica does not accept that the legitimate expectations
15 test can be derived from customary international law.
16 The intervention from the United States makes this
17 point in its submission from Spence. Therefore, the
18 starting point for this Tribunal is to determine
19 whether legitimate expectations is an applicable test
20 in the first place. If it finds that customary
21 international law does not ground such a standard,
22 then the entire claim for breach of legitimate

1 expectations must be disregarded.

2 However, we don't wish to shadow-box in this
3 regard, so let's assume the legitimate expectations
4 test applies. It's an objective test, not a
5 subjective test; and let us break that down for one
6 moment. We've raised the question of who the
7 investors are because of their lack of ownership. But
8 notwithstanding that, let's assume, for the ease of
9 reference, that Mr. Aven and the other Claimants are
10 all to be treated as having invested roughly around
11 the same time.

12 By the time they invested, was the date they
13 first made their investment in Costa Rica. For Mr.
14 Aven, this was 2002, when he made his first investment
15 into Pacific Condo Park and La Canicula. For the
16 other Claimants, this was around 2004. Again, this is
17 only an assumption that some of our submissions on
18 jurisdiction are disregarded.

19 They all invested with the sole objective of
20 developing the property at Las Olas, and those initial
21 investments with a starting point in that development.

22 The time when you make your investment is not

1 an iterative process. Claimants have once--have one
2 investment, and there is one moment when it was made.
3 It's not something that repeats itself, whether you
4 get to reset the clock on, when you go back through
5 different phases of a project. International law is
6 very clear on this. Therefore, we look at the
7 objective expectations an investor could have at 2002
8 and 2004.

9 The law in place at the time remains the law
10 in place throughout all relevant phases in this
11 Arbitration. It's been clear, it's been stable, it's
12 been predictable.

13 Excuse me, sir. One minute may save ten.

14 So, we would remark, in brevity, that the
15 submissions from the Claimants have been confused
16 regarding the objective test. It appears from their
17 submissions there have been a number of references to
18 the conversion of a subjective analysis into an
19 objective test.

20 We believe, sir, that that is the incorrect
21 approach to determining what the objective--the
22 legitimate expectation of the investors would be at

1 the time. It is not to start with their subjective
2 analysis and then see if there was a reasonable and
3 legitimate expectation that could be construed. That
4 is to take things the wrong way around.

5 The objective expectation was the existence
6 and the clear language of Costa Rican environmental
7 law. This is what they were on notice of, and we've
8 heard on numerous occasions that they apparently
9 received advice on this issue. That would have put
10 them on constructive notice of all of the enforcement
11 mechanisms that were available to the--to Costa Rican
12 authorities.

13 There is no attempt to credibly argue
14 inducements or incentives occurred here in order to
15 build their case of legitimate expectations and that,
16 gentlemen, we would say is wise.

17 No acquired rights are alleged to have formed.
18 No guarantee that deviated from the enforcement rights
19 of the State is pleaded. Every investor that invests
20 in Costa Rica is aware of their laws. Ignorance of
21 the law is not a defense, and international law
22 upholds that principle.

1 The Claimants' due process claim, we believe,
2 is confused and misplaced. In Paragraph 317 of their
3 Memorial, Claimants profile a shopping list of what
4 due process purportedly comprises. They cite an array
5 of investment arbitration cases in support of what
6 they notably overlook that is the actual text of
7 CAFTA. This is contained in Article 10.5.

8 In addition to concocting a standalone
9 standard by reference to international jurisprudence,
10 none of which is DR-CAFTA authority, they also try
11 desperately to isolate a standard of due process by
12 sourcing it from Chapter 17 of the CAFTA.

13 While we would embrace Claimants' late
14 conversion to the fact that Chapter 17 is capable of
15 offering more than mere hortatory statements, even the
16 recourse to Chapter 17 is flawed, specifically
17 Claimants rely on Article 17.3. What Claimants forget
18 is that their claim is brought under Article 10.5, not
19 17.3.

20 As the U.S. intervention notes, in effect as
21 well, this Tribunal does not have jurisdiction to
22 decide violations of standards essentially imported

1 from Chapter 17.

2 The only reference in Chapter 10 to due
3 process is quite clearly linked to the denial of
4 justice, and this is the core of the Parties'
5 disagreement. We want to break down Claimants' case
6 on due process and reveal precisely how it is either
7 misstated or flawed by its own measure.

8 First, while the Claimants in their Reply
9 Memorial avoid the precise text of Article 10.5, 10.5
10 is both the starting and finishing point for this
11 question. It's on your screen.

12 10.5, the minimum standard of treatment,
13 customary international law standard. We would urge
14 the Tribunal never loses site of this restrictive
15 standard, which is expressly linked to the standard of
16 customary international law.

17 In pertinent part, Article 10.5(2)(a) provides
18 fair and equitable treatment, includes the obligation
19 not to deny justice in criminal, civil, or
20 administrative adjudicatory proceedings in accordance
21 with the principle of due process embodied in the
22 principle legal systems of the world.

1 As an aside, we find it very telling that
2 neither in Claimants' Memorial nor in their Reply
3 Memorial do they ever quote Article 10.5(2)(b) of the
4 CAFTA.

5 This is the provision that is meant to be the
6 backbone of their case. While the Claimants can hope
7 the Tribunal may or may not apply the cases they cite,
8 what the Claimants unquestionably cannot ask of you is
9 to ignore the clear and unambiguous wording of
10 10.5(2)(b). The obligation not to deny justice in
11 criminal, civil, or administrative adjudicatory
12 proceedings in accordance with the principle of due
13 process. It should not trouble any members of the
14 Tribunal for too long to immediately discern that the
15 drafters of DR-CAFTA had a very specific objective
16 when considering the scope and application of FET.
17 Consistent with the restrictive interpretation of FET
18 is the minimum standard of treatment, FET is focused
19 on the denial the justice.

20 But more than this, the denial of justice and
21 the principle of due process are explicitly and
22 inextricably connected. Therefore, the standard of

1 due process is a reference point when determining a
2 denial of justice. It is not an independent standard.

3 Put in other terms, it is the lens through
4 which you should scrutinize whether there has been a
5 denial of justice.

6 As the U.S. submitted, denial of justice
7 arises, for example, when a State's judiciary
8 administers justice to aliens in a notoriously unjust
9 or egregious manner which offends a sense of judicial
10 propriety. The CAFTA drafters clearly went to
11 specific lengths to connect due process only to denial
12 of justice.

13 Claimants protest that their claim is not a
14 denial of justice claim. In Paragraph 316 of their
15 Memorial, they state that claims which pertain to the
16 conduct of host state officials rather than court
17 judgments are to be considered under a different
18 application of the due process principle than the
19 doctrine on denial of justice.

20 Well, their subsequent pleadings belie that
21 desire. Claimants summarize their due process claim
22 in Paragraph 367 of their Memorial by stating in this

1 penultimate paragraph to an extended review of the
2 alleged due process violations that in this case,
3 there is, and I quote, "systemic miscarriage of
4 administrative justice which involved multiple
5 agencies whilst apparently excluding others over a
6 span of two years has few analogues in modern arbitral
7 practice."

8 This is still an adjudicatory process. What
9 could better encapsulate a denial of justice claim
10 than the Claimants' own summary characterization?

11 The acts the Claimants criticize as part of
12 their claim are adjudicatory acts, and they are
13 subject to the denial of justice regime. In their
14 Reply Memorial, Claimants make numerous assertions
15 regarding the history of this matter, talking in
16 generalities and opining that steps were taken lacking
17 in due process. However, what is quite remarkable is
18 that there is no evidence cited or legal basis
19 established under Costa Rican law for these apparent
20 due process violations. Instead, it is a long rant of
21 what they characterize as objectionable events but,
22 when scrutinized are, instead, adverse decisions.

1 Claimants' invention of a self-standing due
2 process claim is flawed even by its own measure. For
3 example, Claimants dedicate time and attention in
4 their Memorial to the import of human rights law by
5 virtue of Article 10.22, reference to applicable rules
6 of international law. This is a flawed approach to
7 constructing a standard under DR-CAFTA.

8 As this Tribunal is well aware, and in
9 particular, Professor Nikken, the import of human
10 rights is not only a substantive consideration but a
11 procedural one. The infrastructure of human rights
12 institutions is as much a part of human rights law.
13 For example--and knowing this myself as having
14 previously worked at the Inter-American Commission on
15 Human Rights, the first assessment in determining
16 whether there has been a violation of any human right
17 is the assessment of the exhaustion of domestic
18 remedies. Petitions can and will be summarily
19 dismissed where domestic recourse has not been
20 exhausted.

21 Consequently, if Claimants wish to benefit
22 from the fruits of human rights law, they cannot do so

1 without also bearing the burden of the procedural
2 requirements and constraints that come with it.

3 And that is entirely appropriate here, where
4 Article 10.5 2(b) expressly links due process with the
5 denial of justice. And in this regard, a claim for
6 denial of justice cannot be made while proceedings are
7 ongoing.

8 Therefore, Members of the Tribunal, this is
9 where I would like to conclude my remarks on due
10 process, and--but for the avoidance of doubt, Costa
11 Rica does not pretend that domestic remedies must be
12 exhausted before this Arbitration can be commenced.
13 To suggest this is to conflate two quite different
14 concepts. But what do we maintain--sorry, what we do
15 maintain is that as our--as set out in our pleadings,
16 no denial of justice claim can survive while the
17 processes in question are still in process. For what
18 other reason does the term "due process" exist but to
19 emphasize the need for a process?

20 Mr. Burn described "This is a permit
21 cancellation case." Well, let it conclude. And if
22 Costa Rican law upholds precisely that, a process,

1 then importantly, that process must be permitted to
2 proceed.

3 Claimants have prevented that. Mr. Aven
4 absconded, violating Costa Rica's criminal laws; and
5 meanwhile, the very processes of appeals or challenges
6 and checks and balances that Costa Rican law readily
7 embrace have been denied application because of the
8 Claimants' own abandonment. As part of the Claimants'
9 due process claim, they refer to two other elements:
10 The failure to notify and the lack of transparency.
11 I'd refer you to our pleadings in regard of both of
12 those.

13 Finally, we come to the Claimants' argument on
14 expropriation. And I've left this to last for a
15 specific reason. This claim does not warrant any
16 serious consideration by this Tribunal. We suppose,
17 as is the way with inflated damages claims, that a
18 baseless argument might be thrown in as the pawn in
19 order to allow some ground to be given on the others.
20 We're confident this Tribunal won't be so easily
21 misled. This claim has absolutely no legitimacy.

22 The starting point is agreed to be

1 Article 10.7. We refer the Tribunal to the language
2 in your slide packs, which recites that Article; and
3 regard must also be paid to Annex 10-C. But also,
4 please refer to Article 10.28, which is the definition
5 of "investment."

6 As appears on your screen, Footnote 10 to
7 Article 10.28 is very important to qualification.
8 It's part of the definition of investment, which has a
9 direct bearing on their claim. We've heard
10 already--I'll come to that Footnote 10 in a moment.

11 We've heard already from the Claimants, and
12 even today, the nature of their investment is very
13 confusingly described. Is it the land? Is it the
14 construction permits? Now we're told today that
15 it's--the investment is, quote, in a project or, as
16 was concluded, the maintenance of the Las Olas
17 project? Is this an amalgamation? Are we meant to
18 consider them all?

19 There is no juridical precision whatsoever.
20 And, frankly, gentlemen, we are none the wiser today
21 as to what their investment is. But what we are sure
22 is they have not properly made out their claim under

1 international law. Claimants in their Memorial
2 describe the investments as "a combination of property
3 rights in land and licenses, authorizations, and
4 permits." That's Paragraph 409.

5 Perhaps in their own realization that this
6 peculiar amalgamation has no real clarity, they attack
7 things from the other side. In the same paragraph,
8 they say, and I quote, "The Tribunal simply needs to
9 decide whether the conduct outlined above prevented
10 the Claimants from realizing their plans for
11 developing Las Olas."

12 Gentlemen, this is perverse. It bears no
13 relation to the test of expropriation whatsoever. In
14 a last-ditch attempt to plead their case, they
15 continue in the next paragraph, "Either the
16 Respondent's unlawful conduct prevented the Claimants
17 from utilizing the construction permits granted to
18 them or it did not." Paragraph 410.

19 What was the Claimants' investment? It was
20 the acquisition of the land, plain and simple. In
21 their Reply Memorial, Claimants provide an ambiguous
22 response: "Obviously, it is not the Claimants'

1 position that their investment constituted solely of
2 construction permits. Rather, they possessed property
3 rights in land, the use of which was enhanced by the
4 grant of various certifications and permissions."

5 This does not advance things. And the
6 amalgamation of rights seems to be Claimants'
7 preferred characterization. Unfortunately, this is
8 not satisfactory. It is Costa Rica's position that
9 Claimants can only cite their acquisition of the land
10 as their investment. And that, quite clearly, remains
11 in their possession, or whoever's possession it is in.

12 If the Claimants insist on looking to the
13 construction permits as their investment--and I'm not
14 clear today if that is their case--then they're in
15 serious trouble as a matter of international law.

16 First within the context of their FET claim,
17 if the date of their investment is now meant to be the
18 date when they obtained any construction permits, this
19 changes the landscape significantly and puts them in
20 an even more precarious position, because by 2010, for
21 example, they would have already known about the
22 various reports such as SINAC and the Protti report

1 such that these red flags on wetlands were well and
2 truly raised. Their legitimate expectation would have
3 been framed even more on the enforcement rights of the
4 State.

5 Second, the definition of "investment"
6 contained in Article 10.28 becomes critically
7 important if their claim is that their investment is
8 the construction permit.

9 And let's look at Footnote 10. This provides,
10 quote, whether a particular type of license,
11 authorization, permit, or similar instrument,
12 including a concession, to the extent it has the
13 nature of such an instrument, has the characteristics
14 of an investment depends on such factors as the nature
15 and extent of the rights that the holder has under the
16 law of the party. That's Costa Rica.

17 Among the licenses, authorizations, permits,
18 and similar instruments that do not have the
19 characteristics of an investment are those that do not
20 create any rights protected under domestic law.

21 That footnote critically embodies the
22 international law principle that the existence of

1 property and vested rights is a matter to be
2 determined by the host state, Costa Rica.

3 Put simply, international law, the test under
4 international law, to determine if there exists an
5 acquired or a vested right looks to how domestic law
6 treats that. This principle is well established and
7 endorsed by numerous tribunals, such as Nations Energy
8 against Panama and the recent Charanne against the
9 Kingdom of Spain.

10 Claimants flirted with the idea of pleading
11 the construction permits as vested rights; but in
12 their Memorial, very notably in Paragraph 396, they
13 called back before making this an explicit claim,
14 knowing it was going to lose.

15 Costa Rican law would have confirmed this for
16 them. As we argue in our submission, Costa Rican law
17 does not treat the construction permits as a vested or
18 acquired right. In order to be considered as an
19 investment, the permit must create rights under Costa
20 Rican law. No construction permits waive the
21 continuing obligation not to impact the environment
22 under Costa Rican law.

1 As a result, the construction permits simply
2 do not give the Claimants the right to breach Costa
3 Rica's environmental laws. In addition, if they are
4 breached, the permits must be stopped immediately in
5 accordance with the precautionary principle, and this
6 was always known to the Claimants.

7 Claimants' permits do not grant them a right
8 to be immune from the application of environmental
9 law.

10 PRESIDENT SIQUEIROS: Perhaps, Mr. Leathley,
11 you might--I see that you're very close to
12 conclusions, and you might want to proceed with that,
13 because just as we were a few--tolerant a few minutes
14 with Claimants' statement--opening statement, we will
15 with Respondent. But that means only a few minutes--

16 MR. LEATHLEY: Thank you. I can--if it's
17 amenable to Mr. Burn, I can promise four minutes, and
18 I'm sitting down again.

19 PRESIDENT SIQUEIROS: Thank you.

20 MR. LEATHLEY: Let me conclude, sir.

21 Why are we here? This is a tremendously
22 misplaced claim. Were it not for the complex

1 chronology, this would have been a prime example of a
2 case that could and should have been dismissed
3 summarily under the CAFTA rules for a frivolous and
4 vexatious claim.

5 There are ten points I would like to conclude
6 as to how Costa Rica can summarize its position.

7 First, Claimants do not own all the plots. They have
8 not proven their investment and cannot bring a claim
9 in the absence of definitive proof. It is their claim
10 to bring, and they have failed since 2013.

11 Accordingly, this Tribunal does not have jurisdiction
12 over large sways of the property investment alleged to
13 exist.

14 Second, Chapter 17 does apply to uphold Costa
15 Rican environmental laws that permit the
16 marginalization of Chapter 10 protection, or at least
17 that this Tribunal should show deference to the
18 enforcement rights of Costa Rica in the context of an
19 investment.

20 This seismically changes the prism through
21 which you should view the claims, and the entitlements
22 Claimants pretend to have. Irrespective of

1 Chapter 10--sorry, Chapter 17's application, Costa
2 Rican and international law maintain the precautionary
3 and other established principles entitled the State to
4 regulate its environment even where a permit may have
5 been granted. That right of the State exists at all
6 times, and Claimants knew this the day they set foot
7 in Costa Rica.

8 Third, customary international law truly
9 limits the standards of protection to the absolute
10 minimum standards of protection. This means in the
11 absence of egregious and shocking conduct, the ELSI
12 test, with which we would ask the Tribunal to adhere,
13 without that egregious and shocking conduct, the
14 Claimants' case must fail.

15 Fourth, State responsibility is not triggered
16 by any of the alleged conduct of Costa Rica. It is
17 not the role of an international tribunal to sit on
18 appeal against the correctness of individual
19 administrative acts. The Tribunal is not a super
20 national appellate body to review local administrative
21 decisions; and we believe, sir, that a finding in
22 favor of Claimants would be the opening of a

1 horrendous set of flood gates.

2 Fifth, Claimants' claims are inadmissible
3 under international law because CAFTA never
4 contemplated protecting illegal conduct. Claimants'
5 conduct is a litany of failures, many of which are
6 committed in highly suspicious circumstances. It
7 increasingly appears as if Claimants set out to bury
8 the wetlands as soon as possible in order to leapfrog
9 what they thought were burdensome and costly
10 environmental considerations.

11 Whether this is by virtue of the Claimants'
12 advisors or Mr. Aven himself is not the issue. The
13 issue is Claimants' clear and repeated violation of
14 Costa Rican environmental, administrative, and
15 criminal laws.

16 Sixth, no violation of FET exists. FET, in
17 the context of DR-CAFTA, requires a finding of a
18 denial of justice, and no justice has been denied. We
19 are still administering justice in accordance with
20 Costa Rican law; and for Claimants to pull the
21 ripcord, ignore those proceedings, and yet, launch a
22 gargantuan claim at great expense to Costa Rica is an

1 abuse of process. The processes are still ongoing in
2 Costa Rica, and this claim, even if it had a
3 legitimate basis, is far from ripe.

4 Seventh, no arbitrary conduct has arisen. All
5 public officials have acted within the constraints of
6 local law and in no way exceeded their mandates. The
7 personalization of Claimants' case against public
8 officials is premised upon a complete misunderstanding
9 of how Costa Rican law operates. The same can be said
10 of their allegations of abuse of rights.

11 Eighth, no expropriation has occurred. Their
12 investment is in the land, and they still own that
13 land, to the extent that they ever did. No other
14 investment exists based on any alleged permits, as
15 I've explained, at least not to the extent that they
16 accrue to become an acquired or vested right under
17 international law.

18 Ninth, there is nothing stopping the Claimants
19 from trying to develop the land. Being sympathetic to
20 the wetlands and the forests that exist, Costa Rican
21 law to this day still embraces development, provided
22 it is harmonious with the ecosystems that exist.

1 Careful planning could deal with this. Therefore, it
2 beggars belief why Claimants have so belligerently
3 ignored the pleas of the State to recognize the
4 existence of wetlands and forests on the site.

5 Claimants have caused the delays, and Claimants have
6 caused the problems.

7 Tenth, finally, and most importantly, there
8 are, and always have been, wetlands and forests on the
9 site. Both sides' experts agree on the findings of
10 wetlands. This is utterly fatal to the claims,
11 because it means one simple thing: No matter how
12 elegant or inelegant the process was in establishing
13 the necessary protection over the ecosystems, the
14 Tribunal can conclude that Costa Rica reached the
15 right result. In reaching that result, the Tribunal
16 can also conclude that, for many years, Claimants
17 inadvertently, or perhaps intentionally, ignored the
18 wetlands and the forests that always attracted the
19 utmost protection from domestic laws.

20 Gentlemen, we respectfully request that all
21 the claims be dismissed with the full costs to be
22 awarded to Costa Rica. Thank you.

1 PRESIDENT SIQUEIROS: Mr. Nikken, any
2 questions? Mr. Baker, any questions?

3 Any comment from Claimant at this point?

4 MR. BURN: No, sir. I mean obviously, in
5 terms of time allocation, you will already have in
6 mind that Mr. Leathley ran significantly longer than
7 we did, and that will come out of the arithmetic.

8 But no, no other comments at this stage.

9 PRESIDENT SIQUEIROS: Before we conclude, we
10 will ask Mr. Grob to make an update on the time which
11 each Party has taken.

12 There is a question, and taking advantage that
13 our guests from the United States of America are here,
14 we would ask--and given the significance of the
15 submission that has been made, the Tribunal would like
16 to ask the representatives from the United States of
17 America to identify what other submissions they have
18 made with respect to the two provisions on 10.5 and
19 10.7 of CAFTA in other--in other proceedings that have
20 been initiated under Chapter 10 of CAFTA.

21 Because we would like to know the consistency
22 of those statements; and although the Tribunal could

1 naturally investigate those and identify them, it
2 would probably take more time than if we ask you, if
3 you have those readily available, if you could share
4 those with the Tribunal, and the Parties, of course.

5 MR. PEARSALL: Thank you, Mr. President, and
6 Members of the Tribunal, for the question.

7 We'd be happy to do so. With the Tribunal's
8 indulgence, if we could ask for a day or two to get
9 that together so that we can take a sounding within
10 government and make sure that we have all the
11 appropriate sources for you.

12 PRESIDENT SIQUEIROS: Absolutely. Thank you.

13 And also remind the Parties that the
14 representatives from the United States of America have
15 reserved the right to make oral argument during this
16 Hearing. But at this time, they have not identified
17 whether they will. But they will retain that right to
18 intervene during the Hearing, if they wish to do so.

19 Okay? Well, if there is no further comment
20 from any of the Parties, I would ask Claimants whether
21 Claimants has any further issue for the rest of the
22 day?

1 MR. BURN: Well, just to say that we will
2 complete our discussions with respect to the few
3 additional documents. So, we will report back to you
4 at the beginning of proceedings tomorrow.

5 PRESIDENT SIQUEIROS: Okay. Thank you very
6 much.

7 Francisco, would you mind sharing what the
8 time of which each Party has spent from their--

9 SECRETARY GROB: Yeah. The Claimants, three
10 hours and four minutes; and the Respondent, three
11 hours and eight minutes.

12 PRESIDENT SIQUEIROS: Thank you very much.
13 And see you tomorrow at 9 o'clock in the morning.

14 Thank you. And naturally, appreciate the
15 court reporters and the interpreters for their hard
16 work today.

17 (Whereupon, at 5:53 p.m., the Hearing was
18 adjourned until 9:00 a.m., the following day.)

1

CERTIFICATE OF REPORTER

I, Michelle Kirkpatrick, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



Michelle Kirkpatrick

CERTIFICATE OF REPORTER

I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARGIE R. DAUSTER