IN THE MATTER OF

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

BETWEEN:

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

Claimants

- and -

THE REPUBLIC OF COSTA RICA

Respondent

COUNTER MEMORIAL

Submitted on behalf of the Respondent by:

MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA
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I. EXECUTIVE SUMMARY

1. Claimants have commenced their claim on the basis that the DR-CAFTA affords their investment protection from state interference. However, their claim is entirely unjustified. It is grounded on a profound misunderstanding of Costa Rican environmental law, a blatant misrepresentation of the facts and (consequently) a warped series of conclusions, all of which are premised on one fundamental mistake. That fundamental mistake is that Claimants chose to conclude there are no wetlands and forest on the Las Olas Project Site. This is simply wrong.

2. Based on the First KECE Report prepared for Respondent (and presented with this Counter Memorial), Mr Kevin Erwin, a world-leading authority with over 40 years of experience in the investigation and analysis of wetlands and ecosystems in many countries, has concluded that there are not one but *multiple* wetlands and forestry vegetation at the Project Site – and they are still there today – albeit altered. Furthermore, such wetlands and forest have not emerged in the last few months – they were always there, including at the time Claimants purchased the property. This underpins the fact that from the outset of their investment, Claimants should have taken tremendous care to work around the wetlands as well as the forests. However, they did not.

3. Claimants invested in a property in rural Costa Rica, thinking they would make a huge profit because of how low the purchase price was. It was located in an underdeveloped, rural town, with barely any basic services. However, the area was considered to be an environmental treasure, known for its wetlands and rich biodiversity.

4. The 2008 financial crisis changed the real estate market in Costa Rica, and by Claimants' own admission made it harder for them to market their project. Undoubtedly, this forced them to rethink their investment. In complete disregard of the area's ecosystem and of Costa Rica's environmental regulations, Claimants chose to begin construction in some of the most ecologically fragile areas of their property: areas that had a wetlands and forest. Claimants had over 37 hectares of land; however, they chose to begin work in the small fraction that contained wetlands. This is how little they cared for the country that welcomed them, its laws and the environment.

5. In a country that prides itself on its long tradition of spearheading movements to protect the environment, it should come as no surprise that once you commit a crime against the environment in Costa Rica, you will be tried for it.

6. Claimants wish to divert the tribunal's attention from the fact that all of their poorly executed decisions took them to the point where they are today. Claimants still own the property they originally purchased. That has not changed. In addition, Claimants can still develop it as long as they respect the wetlands and forests in it. However, they found it easier to file this claim against Costa Rica than to own up to their mistakes and accept that they made a series of poor decisions that ultimately led them to break the law and fabricate untenable stories.

7. Consequently, this case is not so much about investment protection, it is instead about the protection the State needs on issues affecting the environment, and the State's important prerogative to continue to enforce the public right to ensure a sustainable environment and to protect complex biodiversity and ecosystems. That protection is derived from DR-CAFTA.

8. By virtue of the Claims commenced by Claimants, the Tribunal presumptively draws its authority from Chapter 10 of the DR-CAFTA. However, as will be explained below, Chapter 10 expressly defers to the environmental protection measures afforded by States and the DR-CAFTA itself in Chapter 17. Chapter 17 (titled "Environment") represents a policy space that the Republic of Costa Rica, along with all other signatory states to the DR-CAFTA, identified as requiring special treatment. That special treatment can be summarized in two ways.

9. First, to ensure domestic environmental laws are respected, maintained and not impinged upon – even by the investment protection standards embodied in Chapter 10. Second, to the extent the signatory states aspire to improve environmental protection, the DR-CAFTA endorses such initiatives by the standards and procedures agreed therein. This case concerns the former.

10. Specifically, Chapter 10 must pay due regard to the environmental protection measures a State employs by virtue of Article 10.11 (titled "Investment and Environment") – notably, a provision from DR-CAFTA that is ***entirely omitted*** from Claimants' Memorial. Article 10.11 provides:

> "Nothing in this Chapter [10] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

11. If this case had to be summarized in two words it would be "Investment" and "Environment".

12. Article 10.2 also requires any Tribunal constituted under the auspices of Chapter 10, to pay due regard to other Chapters in the DR-CAFTA. Chapter 17 (considered below), articulates the standards expected to be observed from a procedural perspective, and the environmental measures adopted by Costa Rica, and their enforcement of them in this case, completely satisfy those standards.

13. Thus, while arbitral tribunals are frequently asked by States to consider the public interest when construing the investment protection contained in any relevant investment treaty, here the signatory States to DR-CAFTA very deliberately framed the presumption in different terms. Thus, this Tribunal should pay due regard first to the protections and measures the State has expressly reserved in all matters impacting the environment, as articulated in Chapter 17.

14. Notwithstanding, the Tribunal does not have to entertain the merits of this dispute, because it respectfully, does not have jurisdiction to resolve the Claims First, *vis-à-vis* Mr Aven, he does not satisfy the express criteria set out in Article 10.28 ("investor of a Party"). Mr Aven's effective nationality is Italian, as is evident from his business in both Costa Rica and other countries. Indeed, during his residency application made in Costa Rica and even in his subsequent engagement with Costa Rican authorities in relation to this matter, Mr Aven repeatedly held himself out as an Italian national. Consequently, in accordance with international law, Mr Aven does not qualify as a U.S. citizen and does not have standing to bring this Claim under DR-CAFTA.

15. Second, as well-established by international law, an illegal investment is not capable of attracting the protection afforded by Chapter 10 (to the extent such protection is applicable in light of Chapter 17, which is not admitted). Claimants' investment is illegal. As set out in part IV of this Counter Memorial, Claimants cannot avail themselves of the protection of DR-CAFTA due to a series of violations of Costa Rican law, which arose from the very beginning of the process they describe in their Memorial.

16. By way of example, Claimants have:

- Deliberately breached their obligation of good faith required to be discharged when certifying to the authorities that the Project would not illegally affect the Las Olas Ecosystem.

- deliberately misled Costa Rican authorities as to the likely negative impact of their development plan on the Las Olas Ecosystem;

- deliberately concealed critical technical assessments at the time they made initial submissions to the environmental agencies of Costa Rica, when such assessments identified evidence of wetlands. Such findings would have been highly influential in any assessment;

- The sum of such misrepresentations led to approvals being granted that would not otherwise have been granted.

17. Claimants also committed multiple breaches of Costa Rican law in the execution of the work on the Project Site. Specifically:

- Claimants undertook work without the necessary permits in place;
- Claimants overlooked the overriding imperative of the State to observe and uphold Claimants' and State's continuing legal obligation not to allow an adverse impact to the environment; and
- Claimants blatantly ignored the measures taken by the State to suspend the work that it was concerned was causing potentially irreparable harm to the environment.

18. In short, Claimants displayed a brazen disregard for Costa Rican law, environmental standards of protection, State control and procedures, and State police powers when it became apparent (due to third part complaints) that real harm to genuinely sensitive ecosystems was imminent due to impermissible Claimants' activities on Las Olas Project Site. These laws and regulations (as well as the institutions of relevance to this case) are described in great detail by Dr Julio Jurado (current Executive Director of the Sistema Nacional de Áreas de Conservación (SINAC)), in his witness statement (presented in support of this Counter Memorial).

19. In asserting their Claims, Claimants pretend that the relevant Costa Rican environmental authorities should have completely overlooked the complaints that were brought – notwithstanding the fact the complaints were premised on an accurate and justifiable belief that the Project Site comprised wetlands and forests. Moreover, the complaints were founded on the concern that Claimants were undertaking works that would cause harm to the wetlands and forests – which they indeed were.

20. However, in order to divert attention from this glaring and prevailing reality, Claimants' Memorial engages in an account of how agency reports purportedly provided the definitive basis for the authorization of Claimants' construction on the Project Site. This "account" is entirely misguided. First, the agency reports were premised on the information provided by Claimants – which we will show was partial (both in substance and qualitative objectivity). Consequently, the scrutiny employed by the agencies was influenced by the distorted representation of the facts, due exclusively to Claimants' lack of good faith.

21. Second, the agency reports were not indicative of final administrative acts, but instead they were mere stepping stones in a process that was always subject to revision in the circumstances that environmental protective steps were necessary. That revision became

highly relevant when the truth of the wetlands and forests began to emerge following increased public scrutiny by the local community.

22. Ultimately, that increased scrutiny brought to bear against Claimants by virtue of the engagement by the community and thereafter the relevant administrative and criminal authorities, has revealed comprehensively that the community concerns were very well-founded. On this basis an entirely lawful injunctive relief was granted, which was highly fortunate for the environment.

23. Had it not been for such intervention, Claimants would have permanently destroyed wetlands and forests that benefit from special protection under Costa Rican law and have done since before the time Claimants made their investment.

24. Claimants' account of its position in its Memorial is quite different. Claimants mount a sideshow of how they purport to have relied on certain agency assessments over the existence or not of wetlands and forests. Indeed, this sideshow occupies the vast majority of Claimants' Memorial, which is also peppered with hysterical levels of hyperbole.

25. In support of this sideshow, Claimants append a conspiracy theory that is built on defamatory allegations. The conspiracy theory is quite feeble and misplaced. However, so offensive and unfounded are the allegations that go into Claimants' conspiracy theory that the witness statement of Ms Hazel Diaz (presented with this Counter Memorial) puts Claimants on notice of potential legal action for defamation. Ms Hazel Diaz, a respected public servant who has had an unblemished record is unfairly criticized as part of Claimants' perverse conspiracy theory. As the Tribunal will note when reading Ms Diaz's witness statement, Claimants animosity toward her alleged conduct is in fact a product of their profound misunderstanding of how the *Defensoría de los Habitantes* (the "***Defensoría***") actually functions in practice.

26. Claimants also unfairly accuse Ms Mónica Vargas, the Environmental Manager of Parrita Municipality of egregious conduct, for conducting site visits in view of complaints from the communities and reporting such complaints to the competent authorities. Ms Mónica Vargas' witness statements (presented with this Counter Memorial) put things in place.

27. Claimants also take aim at Mr Luis Martínez, the public prosecutor who similarly, in his witness statement (presented with this Counter Memorial), provides an objective and coherent account of the due process employed when investigating the complaints raised in relation to Las Olas. Likewise, Mr Martínez expresses incredulity at Claimants' allegations, all of which are completely unfounded.

28. Even if the Tribunal found jurisdiction, this case fails on the merits for multiple reasons.

29. First, with respect to the allegation that Respondent violated Article 10.5, Claimants' legitimate expectations were, on their own admission, that Costa Rica's environmental regime is complex and involved. Costa Rican law and practice also told them precisely how the different institutions operate, which is set out in this Counter Memorial in part III and in Dr Jurado's statement. Costa Rican law and practice informed them that the developer assumes a large degree of responsibility in terms of the environmental investigations to be undertaken, which not least would have lent itself to Claimants disclosing (rather than concealing) the findings of wetlands that their own agents identified at the commencement of their construction approval process.

30. Second, Claimants' breach of FET allegation is a denial of justice claim disguised as a due process claim. Clearly, there has been no denial of justice, as the substantial evidence contained in (and exhibited in support of) this Counter Memorial, sets out. Claimants' have been given every opportunity to present their case, and it has been by virtue of Mr Aven's unilateral decision to abscond from an ongoing criminal trial, that has resulted in proceedings stalling.

31. With respect to the claim of a breach of Article 10.7, (indirect expropriation), Respondent identifies the multiple bases on which such allegation is capable of being rejected. Respondent's conduct was clearly adopted in the public interest, principally the protection of the environment. Costa Rican authorities considered carefully and invoked the precautionary principle that is internationally recognized to ensure that in the face of potential irreparable harm to the environment, interim and injunctive relief is entirely appropriate, pending a further investigation or prosecution.

32. Consequently, the suspension of works ordered by Costa Rican authorities on an injunctive basis (i) pursued the genuine public purpose of protecting the environment, (ii) was executed in accordance with due process, (iii) did not transfer benefit of the investment to the State or any private party, and (iv) there was no manifest disproportionality between the aims pursued and any harm purportedly inflicted on Claimants. Accordingly, Costa Rica's conduct was a bona fide exercise of police powers, thereby excluding the possibility of constituting an indirect expropriation.

33. Finally, based on the extensive technical and other evidence supporting the view that Claimants have violated Costa Rican environmental law, it is entirely appropriate and permissible for Costa Rica to raise a counterclaim. DR-CAFTA contemplates the Tribunal's authority to admit a Respondent state's counterclaim, and consequently, as set out in part VI of

this Counter Memorial, Respondent seeks relief for monetary damages in lieu of restitution of property under Article 10.26(b) of the DR-CAFTA.

34. Claimants have caused significant harm to the Las Olas Project. This is harm which could have been avoided but for the acts and omissions of Claimants. The relief sought by Costa Rica is predicated on the need for a proper investigation by relevant professionals based on a reparation plan to be submitted by Claimants. Pending such investigation, the KECE Report prepared by Mr Erwin, identifies his views on restoration at this stage.

35. Meanwhile, returning to Claimants' damages claim, it is utterly flawed. Claimants assert a claim based on a discounted cash flow in circumstances where there is no concluded business *in situ* at Las Olas, and therefore no basis to improve upon the total speculation Dr Abdala engages in. International law is not a friend of gross speculation and instead international law and applicable jurisprudence directs this Tribunal to consider the cost value of the Las Olas Project Site.

36. Characteristically, Claimants have entirely avoided addressing this reality, and do not provide the Tribunal with a reliable basis to assess the purported harm incurred. Dr Abdala's quantum report is riddled with flaws and frail assumptions, all of which are systematically dismantled by Dr Timothy Hart, author of the expert quantum report in support of Respondent's defense (presented with this Counter Memorial).

37. In conclusion, this Tribunal should reject all of the Claims, and find in favor of the Respondent. The measures adopted by Respondent were proportionate and entirely justified – because there exist wetlands and forests that are deserving of the environmental protection Costa Rican law has *always* envisaged. Moreover, this Tribunal should find in favor of Respondent in respect of its counterclaim, and award Respondent its costs on an indemnity basis.

38. Respondent reserves its right to supplement this Counter Memorial subject to the development of Claimants' Claims, and further to the disclosure to be ordered by the Tribunal in accordance with the Procedural Timetable.

II. INTRODUCTION

39. On September 17, 2013, Mr David Richard Aven, Mr Samuel Donald Aven, Ms Carolyn Jean Park, Mr Eric Allan Park, Mr Jeffrey Scott Shioleno, Mr David Alan Janney, and Mr Roger Raguso ("**Claimants**") initiated arbitral proceedings against the Republic of Costa Rica ("**Respondent**" or "**Costa Rica**") pursuant to Articles 10.16 and 10.28 of the Dominican Republic – Central America – United States Free Trade Agreement ("**DR-CAFTA**" or the "**Treaty**"). In Claimants' Memorial of November 17, 2015 (the "**Memorial**"), Claimants indicated that Mr Giacomo Anthony Buscemi sold his participation in the property in which Claimants allege to have an interest, and was no longer a Claimant in these proceedings. Claimants submitted a Notice of Arbitration on January 24, 2014, and a Memorial on November 27, 2015. Claimants allege violations by Costa Rica of its obligations under Chapter 10 of DR-CAFTA in relation to Claimants' alleged interests in Las Olas, a piece of land located in the Costa Rican town of Esterillos Oeste (the "**Claims**"). Pursuant to Procedural Orders 1 and 2, Respondent hereby submits its Counter-Memorial.

40. Claimants provided truncated facts to conceal their bad faith and illegal conduct in the development of a residential and commercial project (the "**Project**") on the Las Olas property (the "**Project Site**"). As Claimants were well-aware when they sought to develop land in Costa Rica, Costa Rica has had, for many decades, strict rules on the protection of the environment. Without regard for those rules and for the damage their Project was going to cause to the Las Olas property, Claimants have sought to circumvent and evade Costa Rican environmental laws and regulations. They cannot now seek redress for a situation that was caused by their own misconduct. Claimants' glaring shortcomings in this case cannot be cured by making up an unsubstantiated conspiracy by unrelated officials and employees scattered across the Costa Rican administration and judiciary. Ludicrous as Claimants' theory might be, Respondent has to contest it and clarify what this case is really about.

41. Accordingly, Costa Rica will first describe the facts of the case and the institutional, regulatory and judicial context in which they developed.

42. Second, Costa Rica will argue that Claimants' misconduct bars them from seeking the protections of the Treaty. To demonstrate the extent and gravity of Claimants' illegal conduct, Costa Rica will detail the facts of the case that most clearly support a finding of illegality of Claimants' conduct under Costa Rica's imperative norms of environmental protection.

43. Third, should the Tribunal decide to nonetheless entertain the Claims brought against Costa Rica in this arbitration, Costa Rica will demonstrate that Claimants failed to prove any violation by Costa Rica of its obligation to afford Claimants fair and equitable treatment. Costa Rica will

likewise establish that its actions complied fully with DR-CAFTA Article 10.7, and that Claimants' expropriation claim must fail.

44. Fourth, in fact, it is Claimants' illegal conduct that caused harm to Costa Rica in this case. The harm caused to the Costa Rican environment through Claimants' illegal development of the Project Site can be remedied through restoration work. Costa Rica therefore submits a counterclaim for monetary damages which should be quantified on the cost of the restoration of the land.

45. Fifth, and alternatively, in the event that the Tribunal were to find Costa Rica liable for any of the Treaty violations alleged by Claimants, Costa Rica will demonstrate that Claimants' valuation of their alleged losses is grossly inflated, and the interest rate they seek to apply entirely inappropriate.

III. STATEMENT OF FACTS

46. Located on a narrow strip of land between the Pacific and the Atlantic Oceans that occupies 0.03% of the planet's emerged lands,[1] Costa Rica hosts 6% of the world's biodiversity,[2] and 500,000 species of plants and animal life.[3] On a planet that continues to lose ecosystems and biodiversity by the day, the environmental strategies and policies Costa Rica has put in place and implemented for decades are facilitating the discovery of approximately 160 new species of fauna and flora each year.[4]

47. Costa Rica is recognized as a pioneer in the protection of nature,[5] allowing for what observers have described as an "[i]ncredible Noah's Ark".[6] Costa Rica achieved these results through an ongoing effort to implement international norms and guidelines on international protection. Indeed, Costa Rica's shift towards a sustainable economy did not happen without challenge. Costa Rica still needs to overcome significant economic and social difficulties for the desired outcomes to be reached.

48. Like anyone remotely interested in Costa Rica, Claimants could not possibly have ignored the environmental framework that applies to any investment in Costa Rica. Costa Rica's entire administrative and constitutional framework is designed to ensure that investments and developments in the country do not hamper the maintenance and revival of biodiversity. It was certainly known to Claimants, as they admit,[7] and it is in this context that Claimants acquired interests in a piece of property in Costa Rica.

49. However, Claimants undertook to develop that property in disregard of their duty to protect the area in which they anticipated to develop their Project. It fell to Costa Rica to uphold the environmental protection available to it, in order to sustain the biodiversity in situ, which forms a critically important part of Costa Rica's economy and financial, environmental and human sustainability.

1 **R-213,** Costa Rica: The Country where life is greener, GEO, December 2015, p. 85.
2 **R-213,** Costa Rica: The Country where life is greener, GEO, December 2015, p.81.
3 **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, p. 221.
4 **R-213**, Costa Rica: The Country where life is greener, GEO, December 2015, p.85.
5 **R-213**, Costa Rica: The Country where life is greener, GEO, December 2015, p.73.
6 **R-213**, Costa Rica: The Country where life is greener, GEO, December 2015, p.85.
7 C-63.

A. The environmental protection framework under which Claimants decided to develop their Project

50. The cornerstone of the protection of nature in Costa Rica is the preservation and fostering of biodiversity. Nature and environmental experts are unanimous as to the importance of fostering and maintaining biodiversity to diminish the impact of climate change.[8]

51. For many decades, Costa Rica has made the protection of the environment a key priority.[9] Article 50 of the 1949 Constitution of Costa Rica establishes the right of all citizens to a healthy and ecologically balanced environment.[10] The Constitutional Chamber has held:

> "Repeatedly, this Court has recognized the importance of the protection of the environment and its indisputable connection with the right to life and health. In this regard, it has been determined that the right to a healthy and ecologically balanced environment is an indispensable prerequisite for the existence and guarantee of the right to health and therefore, to the right to life."[11]

52. In 1994, the protection of nature was adopted as an express constitutional principle in Costa Rica.

> "The State shall procure the greatest welfare of all inhabitants of the country, organizing and promoting production and the most appropriate distribution of wealth.
>
> Every person has the right to a healthy and ecologically balanced environment, being therefore entitled to denounce any acts that may infringe said right and claim redress for the damage caused.
>
> The State shall guarantee, defend and preserve that right. The Law shall establish the appropriate responsibilities and penalties."[12]

53. An entire legal framework is in place to encompass the technical complexity of ensuring developments that sustain the protection of the environment. Indeed, to sustain Costa Rica's achievements in the field of the protection of a diverse fauna and flora, Costa Rica has had to put in place governmental agencies with competencies in the main areas of environmental protection: water, forest, ecosystems, wildlife. In addition, as early as the mid-1970's, Costa Rica has laid the foundations for a framework of interpretive principles so that its environmental agencies and its courts can help ensure economic growth that sustains biodiversity.

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8 First KECE Expert Report, ¶32.
9 **R-166**, Decision 3705-93, Constitutional Chamber, Supreme Court of Justice, July 30, 1993.
10 **R-214**, Article 50, Constitution of Costa Rica, 1949.
11 **R-185,** Decision 10791-2004, Constitutional Chamber, Supreme Court of Justice, September 29, 2004.
12 **R-214**, Article 50, Constitution of Costa Rica, 1949.

1. Key principles of environmental protection in Costs Rica

54. Even before international norms of environmental protection were adopted in the early 1990s, Costa Rica's Constitutional Chamber of the Supreme Court of Justice issued landmark decisions that strengthened the implementation of its environmental policies.[13] When the protection of nature became such a concern for the international community that international norms and conventions had to be codified, Costa Rica was immediately considered a key player in the field:

- Costa Rica was recognized as a leader in sustainable policy and practice by the United Nations Environment Program, which has called Costa Rica "a leader in sustainable policy and practice;"[14]

- At the United Nations Summit on Biological Diversity in 2010, Costa Rica was awarded the Future Policy Award for its Biodiversity Law "as a milestone of excellence in meeting the goals of the UN Convention on Biological Diversity;"[15]

- Costa Rica was ranked first in the Americas and fifth globally for the quality of its environmental performance by the Environmental Performance Index 2012;[16]

- Costa Rica became the first country to initiate a national program of payments for environmental services and to adopt the terminology of environmental services, which has been a key driver for Costa Rica's success in reforestation.[17]

55. Costa Rica is a member of more than 30 multilateral environmental agreements. Since 1992, Costa Rica is a signatory to the Convention on Wetlands (the **"Ramsar Convention"**)[18] and the Convention on Biological Diversity (the "**Biodiversity Convention**")[19] entered into at the Earth Summit held in Rio de Janeiro in 1992.

56. The Ramsar Convention establishes a framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. Costa Rica is the country with the highest number of "Ramsar wetlands" registered in the Convention's List of Wetlands of International Importance in Central America, with a total of 12 wetlands within its territory.

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13 First Witness Statement, Julio Jurado, ¶32.
14 **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, 2013, pp. 220, 227.
15 **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, 2013, p. 228.
16 **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, 2013, p. 228.
17 **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, 2013, p. 223.
18 **R-192**, RAMSAR Convention, Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1992.
19 **R-163**, Convention on Biological Diversity, 1992.

57. The 1992 Biodiversity Convention was adopted at a time when the international community began to realize the deleterious effects on humans of the manmade loss of biodiversity. The Preamble of the Convention thus notes "*the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.*"[20] Costa Rica was an early signatory of the Biodiversity Convention, which led to the enactment of the Biodiversity Law[21] in Costa Rica. The Biodiversity Law incorporates the Convention's core environmental principles into Costa Rican legal system.

58. Costa Rica has thus enacted a series of environmental rules including, among others, the Environmental Organic Act,[22] the Forestry Law,[23] the Wildlife Conservation Law,[24] and the Biodiversity Law.[25]

59. Likewise, Costa Rican case law has developed a series of principles and guidelines to implement its legislation and constitutional principles on the protection of nature:[26] The guiding logic behind these principles is that Costa Rica views it as its fundamental duty to protect the health and well-being of its population. [27] Thus, the priority given to environmental protection in Costa Rica stems from its underlying founding constitutional principle of protection of health and well-being.

60. On this basis, the protection of nature and the environment in Costa Rica is implemented in accordance with the following guiding principles:

- Equality of all citizens in their access to, and benefit from the protection of the environment;
- Sustainability in the use of natural resources;
- Precautionary principle;
- Preventative principle;
- Restorability principle;

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20 **RLA**-39.
21 C-207.
22 C-184.
23 C-170.
24 C-220.
25 C-207.
26 First Witness Statement, Julio Jurado, ¶39.
27 First Witness Statement, Julio Jurado, ¶32.

- Strict liability ("one who pollutes, pays");

- Citizen participation.

61. Regarding the principle of equality in the environmental protection field, the Contentious Administrative Tribunal has held:

> "[A]ll human beings have equal right to enjoy a suitable environment and access to justice, without discrimination, to enforce their rights where they have witnessed a violation of their right to a healthy environment."[28]

62. The principle of sustainability in the use of natural resources has been explained as being:

> "a universally accepted principle, including from a legal perspective. According to a report by the United Nations, sustainable development is development able to meet the needs of the present without compromising the ability of future generations to meet their own needs (Loperena Rota, Demetrio, the Principles of Environmental Law, 1998, p. 62). Article two a) and b) of the Environmental Organic Act established the obligation of the State and individuals to participate in the conservation and sustainable use of the environment; and the right of everyone to enjoy a healthy and ecologically sustainable environment."[29]

63. The precautionary principle in the field of environmental protection stems both from international law and Costa Rican law. Indeed, because of the specificity of environmental damage, and the irreversibility of such damage, under the precautionary principle, the mere risk of impact to the environment triggers an obligation for the competent authorities to act and protect the environment without a need to be supported by scientific evidence.

> "One of the essential principles of environmental law is the "precautionary principle" or the "principle of prudent avoidance," which is contained in the United Nations Conference on Environment and Development, the Rio Convention, which literally states: "Principle 15. In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of absolute scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." (See also Article 11 of the Biodiversity Law).The term derives from the Latin "praeventio" which refers to the act and the effect of preventing and to take action, with the intent of preventing a risk from materialising. Prevention aims to anticipate the negative effects and ensure the protection, conservation and proper management of the resources. The guiding principle of prevention is based on the need to take all precautionary measures to prevent or restrain possible damage to the environment or the health of the population. Thus, if there is a risk of serious or irreversible damage, or a concern to that effect, one should adopt a precautionary approach and even postpone the activity in question. This is because in relation to environmental

[28] **R-190**, Decision 0083-2013, Contentious Administrative Tribunal, Section IV, September 16, 2013.
[29] **R-190**, Decision 0083-2013, Contentious Administrative Tribunal, Section IV, September 16, 2013.

> matters, coercion a posteriori is ineffective given that if the biological and socially harmful consequences have already occurred, the sanction could have a moral effect but will hardly compensate the damage caused to the environment."[30]

64. Closely connected to the precautionary principle is the preventative principle, which, likewise, warrants action in the event that a project is assessed to cause damage to the environment:

> "The preventive principle refers to the assumptions which are made in relation to the damaging consequences of certain actions. Trying to avoid them in advance is the purpose of this principle; for example in the case of preventive policies reflected through Environmental Impact Assessments. In specific cases, this principle has resulted in the adoption of interim measures."[31]

65. The restoration principle addresses the consequences of acts that have already caused damage to the environment:

> "The principle of restoration is applicable in instances where civil liability arises as a result of inflicting damage, the sanction for the person responsible may be the obligation to compensate for damage caused (compensation) or returning the item to its original state before the situation was altered by the offense. The doctrine has held that, unlike other areas which generally provide the option of replacing (or not replacing) the damaged thing, in environmental law the effective restoration is essential and not optional for the user of the damaged property, particularly in the case of common ownership of environmental property because one cannot damage the environment and allocate the financial compensation for other uses."[32]

66. Consistent with the Biodiversity Convention, the Biodiversity Law incorporated the principle of strict liability. The Law further provides for an inversion of the burden of the proof both in advance of the initiation of a development, during the environmental clearance process, and during the works:

> "The burden of proving the absence of pollution, unauthorized degradation or impact, lies on the applicant for an approval or permit, as well as on the party accused of having caused environmental damage."[33]

67. Additionally, in the event of damage caused to the environment, Article 2(d) of the Environmental Organic Act has established a principle of strict liability for such damage:

> "Any person that pollutes the environment or causes any harm to it, will be held liable, as provided by the laws of the Republic and the international conventions that are in force."[34]

68. The principle of strict liability was further broadened by Costa Rican case law:

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30 **R-188**, Decision 9773-00, Constitutional Chamber, Supreme Court of Justice, November 3, 2000.
31 **R-190**, Decision 0083-2013, Contentious Administrative Tribunal, Section IV, September 16, 2013.
32 **R-190**, Decision 0083-2013, Contentious Administrative Tribunal, Section IV, September 16, 2013.
33 **R-207**, Article 109.
34 C-184, Article 2 (d).

> "According to the doctrine, environmental law has enshrined the principle of strict liability, with no requirement to prove any fault or negligence of the person causing the environmental damage (Loperena, 1998, p. 64), which might be thought to be included within the environmental responsibility of the Environmental Organic Act in Article 2… This application of principle would result in the polluter being liable for the payment and compliance with any interim measures ordered; the cessation or modification of the polluting activity; the payment of relevant fines; and the reparation and compensation for damage caused."[35]

69. Finally, because Costa Rican norms of environmental protection stem in large part from the State's obligation to ensure a healthy environment for its population, Costa Rican case law on environmental protection identifies an important role for citizen participation:

> "Citizen participation in matters of the environment is a consequence of the principle of democracy and includes the right to access information relating to environmental projects or projects which may cause harm to natural resources and the environment, as well as the opportunity to participate in the decision-making process. Article ten of the Rio Convention elevated the importance of citizen participation to the status of a principle in environmental matters, by stating that "the best way to address environmental issues is with the participation of all concerned citizens, at the relevant level. At the national level, each individual should have the appropriate training on the environment currently held by public authorities, including information on materials and activities that pose a danger in their communities, and the opportunity to participate in decision- making procedures."[36]

2. The implementation framework and key players identified in the context of the Claims

70. As it is explained in Dr Jurado's Statement, to account for the technical complexity of environment protection, Costa Rica allocated to the various fields involved in the protection of nature to several specialized agencies independent from, but under the supervision of, the Ministry of Environment and Energy (**"MINAE"**), a branch of the Central Administration. MINAE is the entity responsible for everything related to the environment, natural resources and energy, and relies on various specialized agencies, two of the most important for this case are:

- the National System of Conservation Areas (**"SINAC"**); and
- the National Technical Environmental Secretariat (**"SETENA"**).

71. Enforcement of the protection of the environment in Costa Rica takes place through a "robust judicial and administrative system"[37] comprised of a specialized Environmental Prosecutor's Office (the *Fiscalia Agrario Ambiental* or "**FAA**"), an Environmental Department within the

[35] **R-190**, Decision 0083-2013, Contentious Administrative Tribunal, Section IV, September 16, 2013.
[36] **R-190** Decision 0083-2013, Contentious Administrative Tribunal, Section IV, September 16, 2013.
[37] **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, 2013, p. 230.

General Attorney's Office and the Environmental Administrative Tribunal (**"TAA"**), one of the few of its kind in the world.[38]

72. Further, public officers of MINAE and SINAC have police power authority (*autoridad de policía)* which gives them the legitimate power to enter and inspect private properties to investigate irregular activities taking place at the sites.[39] MINAE officers, inspectors and technicians must cooperate with the Environmental Prosecutor's Office on the investigation of environmental crimes and can file criminal complaints before the competent authorities.[40]

a. *Framework of specialized agencies: SETENA and SINAC*

73. While (**i**) SINAC is responsible for the planning, development and control of wildlife in Costa Rica,[41] (**ii**) SETENA focuses on the impact on the environment of production processes.[42]

i. *SINAC*

74. Pursuant to the Wildlife Conservation Law, SINAC is in charge of, among other things:[43]

- Establishing the technical guidelines for the use, conservation and management of wildlife in Costa Rica;
- Extending, denying or cancelling hunting permits, permits for the control, extraction, research of wildlife, as well as any permits to import or export wildlife, its parts, its products or its by products;
- Protecting, supervising and managing, from an ecosystem related standpoint, wetlands and determining its qualification of national or international importance;
- Creating and managing the programs related to the use, control, surveillance and investigation of wildlife;
- Coordinating with other entities responsible for the prevention, mitigation, attention and monitoring of damage to wildlife;

38 **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, 2013, p. 230.
39 C-170, Article 54; C-220, Article 15.
40 **R-197**, Article 284, Criminal Procedure Code.
41 C-220, Article 6.
42 C-184, Article 83.
43 C-220, Article 7.

- Promoting the responsible participation of persons, individually or collectively, in the preservation and restoration of the ecological equilibrium and the protection of the environment;

- Promoting the conservation of natural ecosystems.

75. The Biodiversity Law also regulates the powers and the institutional organization of SINAC.[44] Under the Biodiversity Law, SINAC has jurisdiction in forestry matters, wildlife, protected areas and the protection and use of river basins and hydrological systems.[45] SINAC also has competences over the regulation and protection of (i) national parks and reserves; (ii) over a 100 protected areas; (iii) wildlife and biodiversity; (iv) wetlands and mangroves; (v) forest management and exploitation, including permits for cutting trees and the transportation of wood; (vi) public and private wildlife refuges; and (vii) natural monuments.[46]

76. To exercise these powers, SINAC has the authority to hear complaints relating to possible impacts to wetlands, forests, or wildlife and take the corresponding actions.

77. SINAC's jurisdiction is divided among territorial units known as Conservation Areas. Each Conservation Area is in charge of applying the environmental legislation within its territorial scope.[47] The Regulations to the Biodiversity Law provide for the existence of eleven Conservation Areas distributed throughout the Costa Rican territory.[48] Claimants' Project falls within the Pacífico Central Conservation Area ("**ACOPAC**").

ii. *SETENA*

78. SETENA was created in 1995. It evaluates applications by land developers as to the likely impact of their projects on the environment.

79. In that regard, the role of land developers, such as Claimants in this case, is crucial to the implementation of Costa Rica's framework of environmental protection. Indeed, as will be further explained below, the developers, along with their contractors and advisors, will advance a project from conception to planning and ultimately to execution. Their role is critical to the proper and lawful execution of any project. Notably, a developer's role, and their responsibilities, were overlooked by Claimants in both practice and (as a result) in their Memorial. The significance of this failure by Claimants is explained in detail below.

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44 C-207, Article 22.
45 C-207, Article 22.
46 C-220, Articles 6-7; C-170, Articles 5-6.
47 C-207, Article 28.
48 **R-15**, Article 21, Regulations to the Biodiversity Law, March 11, 2008.

80. Developers are required by Costa Rican law to engage directly with the relevant institutions. Based on a developer's submissions, SETENA directs the applicant to undertake actions SETENA considers necessary to minimize the impact of such projects on the environment. Specifically, SETENA:[49]

- Analyzes Environmental Impact Assessments;
- Evaluates the actions proposed to minimize the impact on the environment;
- Follows up and resolves claims on environmental damage;
- Establishes the amounts of environmental guarantees;
- Verifies compliance with the environmental commitments.

81. As will be further explained,[50] the developers' good faith submissions and analyses of their projects' likely impact on the environment is indispensable to SETENA's review process. Indeed, the entire viability of the system relies on developers making a good faith presentation to SETENA of what aspect of nature in a given project area would likely be impacted by the works that are contemplated.

82. Since the Environmental Organic Act was enacted in 1995,[51] environmental impact assessment has evolved in Costa Rica from being a generic obligation of the administration, stemming from Article 14 of the Biodiversity Convention, to an obligation weighing on developers to certify that their submission provides an exhaustive, good faith environment impact assessment of their project. SETENA was created in that context where the developer has an obligation to tell the truth.[52]

83. This is a critically important point in this case as Claimants violated the good faith obligation that they were under as developers of the Project Site. Developers are required to submit to SETENA a description of their proposed economic activity and an evaluation of its effects on the environment. The burden of this engagement with SETENA (and the responsibility to ensure its proper and lawful execution in accordance with Costa Rican environmental and other laws) rests with the developer. The information and analyses submitted by the developer to SETENA determines SETENA's and the other agencies' level of scrutiny over the impact the project could have, whether additional review should be required by a specialized agency such

[49] C-184, Article 84.
[50] Section IV.B.1.a.i.
[51] **RLA-39**, Convention on Biological Diversity, 1992; C-184, Environmental Organic Act.
[52] C-208, Section 81.

as SINAC, and if so, the scope of that review. Once the process is completed, SETENA delivers an Environmental Viability ("**EV**"), which the developers can then submit to municipalities in order to apply for the work permits.

84. The process leading to the EV, which takes place in several steps, will be reviewed in more detail when addressing Claimants' submission to SETENA.

85. With such responsibility on the part of the developers comes accountability, and like SINAC, SETENA can also hear complaints filed against developers for their activity, work or the development of their projects. SETENA can undertake site inspections as a result of such complaints and produce a report on the results of the inspection.[53]

b. *Costa Rica's robust judicial and administrative system*

86. To assist in the implementation of its norms on environmental protection, and to address both the local populations' and the developers' complaints or concerns, a number of judicial and administrative processes are available in Costa Rica. Of particular relevance to this case, these processes include specialized bodies tasked with reviewing environmental matters: (i) the TAA; and (ii) the FAA.

i. *The TAA*

87. The TAA was created by the Environmental Organic Act in 1995 as a quasi-judicial body competent to: [54]

- Hear and decide complaints against public or private entities for violations to environmental protection laws;
- Issue injunctions such as the enjoinment of works;
- Establish the corresponding compensation for damage against the environment;
- Set fees for infringements of environmental legislation.

88. In order to determine the veracity of the facts, the TAA is empowered to require from the various public administration bodies technical or administrative reports, which must be issued within 10 days of being requested.[55] If the TAA considers it appropriate, it can also order the

[53] **R-215**, Manual of Investigation of Environmental Crimes, United States Agency for International Development (USAID), 2010, p. 30.
[54] C-184, Article 111.
[55] **R-198**. Article 262, Public Administrative Law.

inspections that it deems necessary. The TAA has the power to decide whether or not to notify the parties of such inspections.[56]

89. Under Articles 99 of the Environmental Organic Act and Articles 11, 45 and 54 of the Biodiversity Law, the TAA holds the authority to issue precautionary measures *sua sponte* with the purpose of enjoining the violation of any legal provision or preventing the possible commission of damage or the continuation of harmful actions against the environment.[57]

90. Among the precautionary measures, the TAA may order:[58]

- Partial or total restrictions, or cessation of acts giving rise to the complaint;
- Suspension, in whole or in part, of the administrative acts causing the complaint;
- Temporarily closing, in whole or in part, the activities giving rise to the complaint;
- Any other action it deems appropriate in order to avoid damage which are difficult to repair.

91. The precautionary measures will be in force until the proceedings are finally resolved. Therefore, it is not necessary for the TAA to stipulate the duration of the measure.[59]

92. The TAA has the authority to issue a number of sanctions, such as warnings, suspensions, cancellation of permits, enforcement of environmental guarantees, damages, modification, demolition of works or alternative forms of compensation.[60] Since 2008, the TAA has carried out investigations in coastal zones and detected serious infringements in tourism developments by domestic and foreign investors.[61]

ii. *The FAA*

93. The FAA was created in 1993 as a specialized body within the Attorney General's Office of Costa Rica.[62] The FAA focuses exclusively on the prosecution of criminal offences against the

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56 **R-215**, Manual of Investigation of Environmental Crimes, United States Agency for International Development (USAID), 2010, p. 27.
57 C-184, Article 99; C-207, Articles 11, 45, 54.
58 **R-215**, Manual of Investigation of Environmental Crimes, United States Agency for International Development (USAID), 2010, p. 25.
59 **R-215**, Manual of Investigation of Environmental Crimes, United States Agency for International Development (USAID), 2010, p. 25.
60 C-184, Article 99.
61 **R-195**, OECD Investment Policy Reviews: Costa Rica 2013, 2013, p. 231.
62 **R-216**, Environmental Criminal Prosecution Policy, General Attorney's Office of Costa Rica, 2005, Presentation section.

environment. Costa Rica has enacted eleven different laws that contain approximately sixty six environmental criminal offences.[63]

94. The prosecutors within the FAA have a duty to investigate every complaint filed with the institution. A complaint can be filed by any member of the community or even be anonymous.[64] After a complaint is filed, the prosecutor can request the issuance of precautionary measures to prevent any damage or further impact on the environment.[65]

95. During the investigation phase, a prosecutor has to collect all of the relevant evidence available by requesting information from public agencies, requesting the carrying out of inspections or technical surveys, personally conducting site visits and interviewing relevant witnesses.[66]

96. After the prosecutor has collected all the relevant evidence available, the prosecutor has to decide whether the evidence supports the filing of charges against the accused. If the prosecutor decides to file charges, then the parties have to participate in a preliminary hearing where a criminal court will decide whether the case should go to trial or not.[67]

c. *The Municipality and the Defensoría*

97. In addition to MINAE's specialized agencies, Costa Rica's local authorities, such as (i) the municipalities and (ii) the *Defensoría* (which is Costa Rican institution in charge of mediating relations between the population and the government) also play a role in the implementation of the environmental protection framework.

i. The Municipality

98. Costa Rican Municipalities are independent bodies from the Central Administration whose scope of action is limited to the territory of each canton. Municipalities are responsible for (i) the collection and management of local taxes, (ii) land use planning, (iii) the issuance of certificates of land use, (iv) the approval of permits for earth movement works, (v) the approval of construction permits, and (vi) the supervision of construction works to verify compliance of the developer with the approved permits.[68]

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63 **R-216**, Environmental Criminal Prosecution Policy, General Attorney's Office of Costa Rica, 2005, Introductory section.

64 First Witness Statement, Luis Martínez Zúñiga, ¶9.

65 First Witness Statement, Luis Martínez Zúñiga, ¶9.

66 **R-215**, Manual of Investigation of Environmental Crimes, United States Agency for International Development (USAID), 2010, p. 30-38.

67 First Witness Statement, Luis Martínez Zúñiga, ¶10.

68 C-219, Articles 28-29; C-205, Articles 2, 9, 11, 55, 74, 83, 87; **R-266**, Articles 1-5, 75-76, Municipal Code.

99. The role of the Department of Environmental Management ("**DeGA**") of the Municipality is to act *ex officio* or after the filling of complaints in cases where there is a suspicion that there is an impact on the environment. The DeGA shall inform other institutions that are competent to determine the existence of violations of environmental legislation such as SINAC, SETENA and the TAA. DeGA's officials have an obligation to report possible breaches of environmental regulations to the competent institutions and to monitor the cases until such decide on the issues.[69]

ii. *Defensoría*

100. The *Defensoría* (Ombudsman) is part of the Legislative branch of Costa Rica. It is in charge of overseeing that the conduct of the public agencies is in accordance with law, morality and justice.[70] The *Defensoría* is also the national institution for human rights protection in Costa Rica under the Paris Principles adopted by the United Nations.[71]

101. The *Defensoría* oversees the public agencies' acts as being in accordance with law. The *Defensoría* has the authority to initiate investigations *ex officio* or at the request of any party which has a complaint in relation to acts or omissions of such public agencies.[72] It has several specialized departments dealing with different types of investigations. The Department of Quality of Life takes care of investigations related to health and environmental issues, among others.

102. The *Defensoría* has broad jurisdiction over the public sector but with one limitation: the *Defensoría* cannot hear a complaint or continue its investigation if the case has been brought before a court or a judicial tribunal.[73]

103. As part of the procedures required for determining whether the public administration acted in accordance with the law, the *Defensoría* submits requests for information to the institutions involved in the complaint.[74] Each investigation concludes with a report signed by the *Defensora de los Habitantes* in which it decides whether a violation of rights has been proven or not, and in cases where the violation has been proven, the *Defensoría* recommends to the public administration the appropriate corrective action to be taken.[75]

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69 First Witness Statement, Mónica Vargas Quesada, ¶8.
70 First Witness Statement, Hazel Díaz Meléndez, ¶9.
71 Ibid.
72 First Witness Statement, Hazel Díaz Meléndez, ¶10.
73 First Witness Statement, Hazel Díaz Meléndez, ¶12.
74 First Witness Statement, Hazel Díaz Meléndez, ¶13.
75 First Witness Statement, Hazel Díaz Meléndez, ¶17.

B. Claimants' interests and project in Esterillos Oeste

104. It is within this framework that Claimants chose, in 2002, to seek to develop a "mixed residential and commercial project"[76] in Costa Rica. Claimants opted to develop a piece of land in Esterillos Oeste called Las Olas. Esterillos Oeste is a town located within the canton of Parrita in the Central Pacific area of Costa Rica. It is a beautiful area on the Pacific Coast that hosts some of Costa Rica's richest ecosystems Parrita is also consistently rated as one of the poorest cantons in the country.[77]

1. Esterillos Oeste and the Project Site

105. The town of Esterillos Oeste is located approximately 124 kilometers from the capital, San José. It is connected to the capital by a single highway that is often heavily congested, especially during the high tourist season, such that travel time between the nearest international airport of San José and Esterillos Oeste can take well over two and a half hours. In the town itself, the roads are unpaved and in poor condition. It has one public primary school, one football pitch and one recreation park for children:

Unpaved roads

[76] Claimants' Memorial, ¶49.

[77] **R-205**, Costa Rica: Social Development Index 2013, Ministry of National Planning and Economic Policy, 77-88, 101-106. The 2013 Social Development Index ranked Parrita in position 353 out of 477 cantons in Costa Rica and qualified it as of "low level of development" within the Central Pacific Region of the country.

Condition of the highway to Esterillos Oeste

Entrance to Esterillos Oeste

Football pitch

Public park

Public primary school

106. Due to the economic conditions, social inequality in Parrita is also a public concern,[78] and has been for some time, well before Claimants undertook to acquire land in the area. Consequently, the infrastructure and amenities in the area are also underdeveloped. While many efforts are made in order to improve the situation locally, poverty in the area has regularly resulted in some dangerous conditions.

107. The area is, however, known for its biodiversity and rich ecosystems[79] As the First KECE Report explains, "an ecosystem consists of the biological community that occurs in some locale, and the physical and chemical factors that make up its non-living or abiotic environment."[80]

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78 **R-196**, Atlas of Cantonal Human Development in Costa Rica, UNDP and University of Costa Rica, 2011, p. 84, 86, 92. In 2011, the United Nations Development Programme (UNDP) and the University of Costa Rica published an Atlas of Cantonal Human Development in Costa Rica, within its results, Parrita ranked in the lowest positions among 81 surveyed cantons in the country: within the Human Poverty Index, Parrita ranked 48th (2005) and 51st (2009), within the Human Development Index, Parrita ranked 67th (2005) and 44th (2009), within the Citizen Security Index, Parrita ranked 73th (2005) and 74th (2009).

79 First KECE Report, ¶23.

80 First KECE Report, ¶20.

108. Las Olas Project Site is an ecosystem.[81] It forms part of a biologic and hydrologic system that comprises the Aserradero River system, located a few meters away from the Project Site.[82] The Aserradero River system has been listed in Costa Rica's National Wetland Inventory since 1998, and identified by the International Union for the Conservation of Nature ("**IUCN**"),[83] a leading non-governmental organization in the field of nature, and a permanent advisory body of the United Nations.

109. These ecosystems obviously contribute to the beauty of the area, and its economic and social challenges make it more affordable than other better developed areas in Costa Rica. This explains Claimants' description of the property as a "jewel", the economic value of which was sufficiently low that simply "h[olding] onto it for a few years" while the Costa Rican authorities continue to attempt to improve living conditions in the area, could generate "a considerable return" for Claimants.[84]

2. Claimants' interests in the Las Olas Project

110. Claimants allege they have acquired interests in the following Costa Rican corporations (the **"Enterprises"**):

- Las Olas Lapas Uno, S.R.L.;
- Mis Mejores Años Vividos, S.A. (formerly Caminos de Esterillos, S.A., Amaneceres de Esterillos, S.A., Noches de Esterillos, S.A., Lomas de Esterillos, S.A., Atardeceres Cálidos de Esterillos Oeste, S.A., Jardines de Esterillos, S.A., Paisajes de Esterillos, S.A. and Altos de Esterillos, S.A.);
- La Estación de Esterillos, S.A. (formerly Iguanas de Esterillos, S.A.);
- Bosques Lindos de Esterillos Oeste, S.A.;
- Montes Development Group, S.A.;
- Cerros de Esterillos del Oeste, S.A.;
- Inversiones Cotsco C & T, S.A.; and
- Trio International Inc.

81 First KECE Report, ¶23.
82 First KECE Report, ¶24.
83 First KECE Report, ¶25.
84 Claimants' Memorial, ¶41.

111. Claimants allege they own several parcels of land acquired through the Enterprises and an interest in a concession held by La Canícula S.A. (**"La Canícula"**).

112. Respondent has, to the best of its abilities, attempted to retrace a clear trail of ownership and/or interest in the parcels of land, the Enterprises, and the property called "La Canícula." However, there appears to be some information missing from that which was provided by Claimants regarding their ownership structure. Respondent therefore reserves its rights to revise and modify the descriptions below, and any recognition of valid ownership or interest on the part of Claimants in the Enterprises, the parcels of land allegedly acquired, or the concession held by La Canícula. In this regard, Respondent reserves its right to request such missing information from Claimants at the appropriate stage in these proceedings.

113. On February 2, 2001, two existing Costa Rican entities, La Canícula and Pacific Condo Park incorporated Inversiones Cotsco C & T, S.A. (**"Inversiones Cotsco"**).[85] La Canícula held 84% of the shares and Pacific Condo Park owned the remaining 16%.

114. On February 6, 2002, Mr David Aven entered into an Option Agreement for the Sale and Purchase of Properties (the "**Option Agreement**") with the companies La Canícula and Pacific Condo Park S.A. ("**Pacific Condo Park**") for Inversiones Cotsco to acquire three properties in Esterillos Oeste:[86]

- A property recorded in the name of Pacific Condo Park in Puntarenas with Property No. 6-121678-000 and an area of 6 hectares and 1012.31 square meters;
- A property recorded in the name of La Canícula in Puntarenas with Property No. 6-91765-000 and an area of 29 hectares 0897 square meters; and
- A property recorded in the name of La Canícula located in the Maritime Terrestrial Zone of Puntarenas, Puntarenas with Property No. 6-001004-Z-000 and an area of 2 hectares 0782.45 square meters.[87]

115. Claimants allege they acquired five parcels of land, but Respondent was only able to identify the three parcels listed above. Again, Respondent reserves its rights in relation to Claimants' allegations regarding its ownership and interests in these parcels of land.

116. The Option Agreement was contingent, among other things, on the granting of a concession for the development of the beach in the Maritime Terrestrial Zone of Puntarenas over the parcel of

85 **R-13**, Complete D-1 form for Condominium site, November 8, 2007, p. 13.
86 Claimants' Memorial, ¶33.
87 C-27, Clause II.

land No. 6-001004-Z-000 owned by La Canícula (the **"Concession"**).[88] Once the conditions of the Option Agreement were met, La Canícula would transfer title of the three properties to a new Costa Rican corporation to be incorporated by Claimants.[89] The Option Agreement also provided that the parties would create a trust to be the guardian of 100% of the shares of the new Costa Rican corporation and to guarantee payment to the sellers.[90]

117. On March 5, 2002, the Costa Rican Institute of Tourism approved the granting of the Concession to La Canícula over property No. 6-001004-Z-000[91] for "Hotel-Cabins" use.[92] The next day, on March 6, 2002, La Canícula and the Municipality of Parrita (the **"Municipality"**) entered into a Concession Agreement for the development of land at the beach of Puntarenas (the **"Concession Agreement"**) under which:[93]

- The Concession's area was limited to 20.612,81 square meters. Claimants will, once again have to clarify their master plan's reference to the hotel having an area of construction of 22.781, 29,[94] which appears to exceed the Concession's area;

- The Concession had a renewable term of 20 years;

- La Canícula undertook the obligation to pay annual taxes for the Concession on the amount of 839.100 colones, a sum that, at the time, represented 4% of the appraisal of the property made by Costa Rica's General Management Direct Taxation;

- La Canícula had to initiate the development works within one year from the registration of the Concession Agreement with the National Registry of Concessions, otherwise, the Municipality could initiate actions to cancel the Concession;

- The Concession could not be assigned or transferred to a third party without prior authorization by the Municipality or the Costa Rican Institute of Tourism or the Institute of Agricultural Development.

118. Claimants allege that on April 1, 2002,[95] Mr David Aven entered into an Agreement for the Purchase-Sale, Endorsement and Transfer of Shares with Carlos Alberto Monge Rojas and Pacific Condo Park (the **"SPA"**) under which he purchased (i) the totality of shares of La

88 C-27, Clause II.
89 C-27, Clause VI.
90 C-27, Clause VII.
91 Now P-0757329-2001, C-223.
92 C-28.
93 **R-2**, Concession Agreement between La Canícula and the Municipality of Parrita, March 6, 2002.
94 C-54.
95 Respondent reserves all rights as to the validity of this information as the contract produced by Claimants does not appear have a specific date.

Canícula from its sole shareholder, Carlos Alberto Monge Rojas and (ii) 16% of the shares in Inversiones Cotsco from Pacific Condo Park (the other 84% being owned by La Canícula).[96]

119. According to the SPA, Claimants acquired control of the following parcels of land:

- Property No. 6-121678-000;
- Property No. 6-91765-000; and
- Property No. 6-001004-Z-000, property subject to the Concession.

120. Claimants alleged that currently Ms Paula Murillo (a Costa Rican national) owns a 51% majority interest in La Canícula and that on May 10, 2010, Claimants entered into an agreement with Ms Murillo, whereby she agreed to assign all the profits generated from Claimants' investment in the Concession to Claimants.[97] However, Claimants submit no document proving when Ms Murillo allegedly purchased the 51% of the interest in La Canícula. Accordingly, Respondent reserves its right to request such information at the appropriate stage in these proceedings.

121. To summarize, according to Claimants,[98] their alleged interest in La Canícula and the Concession is as follows:

Claimants	Ownership in La Canicula S.A
David Richard Aven	13.72%
Samuel Donald Aven	21.56%
Carolyn Jean Park	4.9%
Eric Allan Park	4.9%
Jeffrey Scott Shioleno	0.98%
David Alan Janney	0.49%
Roger Raguso	2.45%

122. According to Claimants, on May 22, 2002, Inversiones Cotsco acquired three parcels of land with Property Nos. 124625-000, 124626-000 and 124627-000 from Chicas Poderosas S.A.[99]

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96 C-8. Under the SPA the shares were to be transferred to a trust, to be administered by Banco Cuscatlán de Costa Rica S.A. as trustee.

97 C-65.

98 Claimants' Memorial, ¶15.

123. On September 16, 2005, Claimants applied to the National Registry of Costa Rica to consolidate and convert the five parcels of land allegedly acquired in April and May 2002 with Nos. 6-91765-000, 6-121678-000, 6-124625-000, 6-124626-000 and 6-124627-000[100] into one parcel. A new property was thus created and designated as Property No. P-142646, with Survey Map No. P-1021869-05.[101]

124. While Claimants did not produce all records in support of the segregations made to the consolidated Property No. P-142646, it appears that, starting in February 29, 2008, Claimants segregated Property No. P-142646, into at least nine properties with Nos. 156479-000 through 156487-000,[102] each of which was further segregated into sub lots.

125. On October 22, 2008, Claimants incorporated Trio International Inc. (**"Trio International"**),[103] a company that would act as trustee, holding title to property No. P-142646. On February 19, 2009, Claimants transferred title to property No. P-142646 to Trio International.

126. On September 29, 2009, Trio International segregated property No. P-142646 to create 288 lots: (i) Lot No. 2881-M-000, and (ii) Lots Nos. 79209-F to 79496-F.[104]

127. Again, Claimants did not provide all documents in support of the transaction described here. But it appears that, as a result of those segregations, Claimants, through the Enterprises, now own the following properties, collectively referred to as the **Project Site**:[105]

- Las Olas Lapas Uno S.A. owns property No. P-6-00156477;
- La Estación de Esterillos, S.A. owns property No. P-6-00156478;
- Montes Development Group S.A. owns property No. P-6-00115080;
- Cerros de Esterillos del Oeste S.A. owns property No. P-6-00156483 (which comprises 8 lots);
- Mis Mejores Años Vividos S.A. owns properties Nos. 156479-000 (which comprises 7 lots), 156480-000 (which comprises 8 lots), 156481-000 (which comprises 8 lots),[106]

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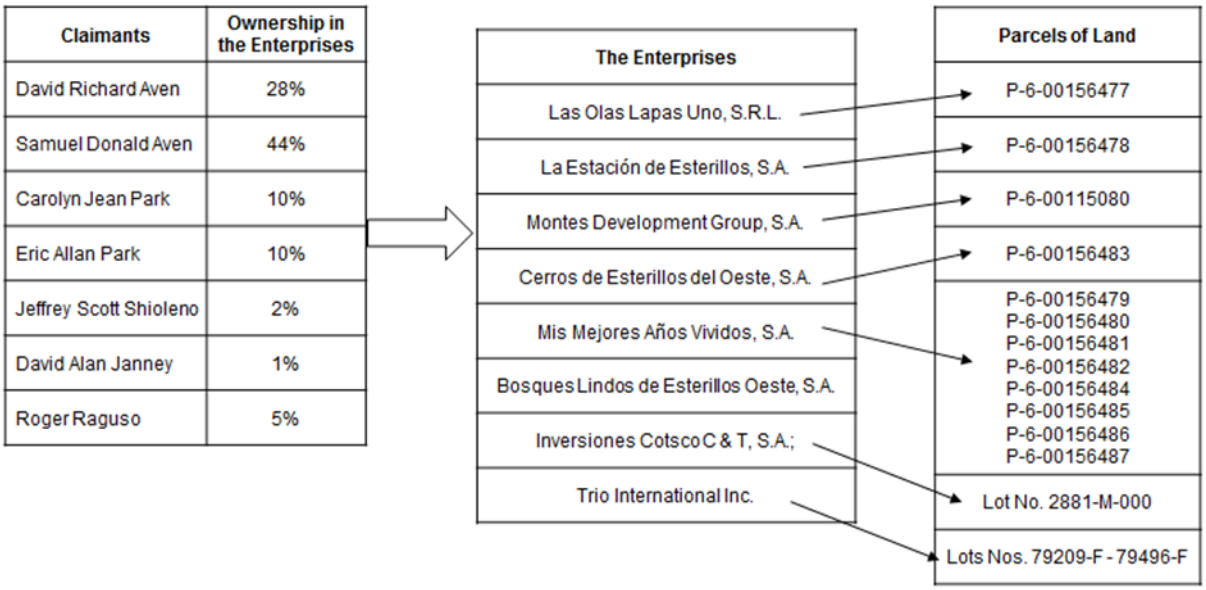
99 Claimants' Memorial, ¶36.
100 Claimants' Memorial, ¶37.
101 Claimants' Memorial, ¶37.
102 C-5.
103 C-4.
104 Claimants' Memorial, ¶40.
105 Claimants' Memorial, Annex A; C-11.
106 Claimants provide proof of only 2 of the lots.

156482-000 (which comprises 8 lots),[107] 156484-000 (which comprises 6 lots),[108] 156485-000 (which comprises 8 lots),[109] 156486-000 (which comprises 8 lots),[110] 156487-000 (which comprises 8 lots).[111]

128. To summarize again, Claimants' overall interest in the Enterprises and the land appears to be as follows:[112]



3. Claimants' fragmentation of the Las Olas Project

129. In addition to the complex structure of Claimants' interests in the Project Site, Claimants submitted their EV application in a fragmented way that made it more difficult to identify the ecosystems present on the Project Site. According to Claimants' master plan:

- The Concession would be used for the development of a hotel beach club at property No. 6-001004-Z-000;
- A condominium would be developed at Lot No. 2881-M and Lots. 79209-F to 79496-F (the **"Condominium"**);

107 None proved by Claimants.
108 None proved by Claimants.
109 Only 1 proved by Claimants
110 Only 2 proved by Claimants.
111 None proved by Claimants.
112 Claimants' Memorial, ¶¶9, 12, Annex 1, C-223.

- Another condominium and commercial areas were to be built at three larger parcels that were cut out of the Condominium site and Easements and other lots site;[113] and

- Easements and related lots were also considered as an independent part of the development.

[113] Witness Statement, David Aven, ¶58(c).

Las Olas Ecosystem

The Concession site

Easements and other lots site

Other Lots site

The Condominium site

4. Claimants' permit applications

130. In order to obtain work permits from the Municipality, and develop the Project Site, Claimants had first to obtain an EV from SETENA. Additionally, in the event that the project required Claimants to remove trees on the Project Site, Claimants had to apply to SINAC for a permit to do so.

131. In order to reduce the burden of administrative on the private sector, Costa Rica adopted a principle according to which it falls primarily on the private sector participants to notify the competent authorities of all possible impacts their projects might have on the environment. In this regard, private participants are held to an obligation of good faith in all submissions presented to the Costa Rican administration, and an obligation of prudence in all actions they undertake for the purposes of their projects.

132. The environmental impact assessment evolved in Costa Rica from being a generic obligation contained in Article 14 of the Biodiversity Convention (ratified by Costa Rica in 1994) to be a particular obligation for developers when the Environmental Organic Act was enacted in 1995.[114] The law provided for an institutional structure to regulate the environmental impact assessment thereby creating SETENA and the TAA.

133. To ensure that development projects comply with environmental regulations, developers are subject to a wide range of environmental evaluation and approval procedures. Developers are required to submit to SETENA a description of their proposed economic activity and the necessary information to evaluate its effects on the environment. Under the Environmental Impact Assessment Rules (Decree 31849) the developers have an obligation to tell the truth when submitting the information to SETENA:

> "Accuracy of environmental information. The person who has environmental responsibility for the activity, work or project will be administratively, civilly and criminally liable for the accuracy of the information in the documents they provide, as well as the appropriateness of the methods and procedures that are recommended, and will be jointly and severally liable with the project developer. This joint liability shall apply also when the responsibility for overseeing the environmental protection is exercised by an environmental consulting firm. In accordance with Article 20 of the Environmental Organic Act, the developer of any activity, work or project will be equally responsible, and the head or director of each of the steps or components thereof."[115]

[114] **RLA-39**, Convention on Biological Diversity, 1992; C-184.
[115] C-208, Section 81.

134. Based on the information proposed by the developer, including the estimated environmental impact levels of the project and the suggested mitigation measures, SETENA requires additional information and/or grants or deny the Environmental Viability ("**EV**").

135. The granting of the EV involves a twofold process of submissions by the developer. Depending on the type of project and its impact on the environment, a developer may be required to submit an Environmental Assessment Document D1 (**"D1 Form"**), for high potential environmental impact or a D2 for low potential environmental impact.[116] In cases where a D1 Form must be submitted, the developer is required to engage an Environmental Consultant.[117]

136. The D1 Form is a pre-established Excel matrix where the developer fills out the characteristics of the development and the matrix automatically calculates the points of environmental relevance. The more points the project has, the higher the impact the project will have on the environment. Also, if the area where the project is located contains an Environmental Fragile Area, such as forests or wetlands,[118] the score can increase significantly.[119]

137. Once the D1 Form is filed, SETENA verifies the environmental impact of the project based on the information submitted by the developer, assigns the classification, and determines the type of instrument of Environmental Impact Assessment that is required:

- If the score is less than 300, the developer has to submit a Sworn Statement or Affidavit on Environmental Commitments, which is a statement made under oath, granted in public deed executed before a Public Notary, in which the developer of the activity, work or project, undertakes to wholly and entirely comply with the terms and conditions stipulated in the guidelines derived from the Environmental Impact Assessment process;[120]

- If the score is between 300 and 1,000, the developer has to submit an Environmental Management Plan, which is a technical instrument in a pre-established format to execute the Environmental Impact Assessment. This document provides for a general forecast of the more relevant environmental aspects and impacts that the activity, work or project to be developed will generate, and includes the environmental measurements, the potential costs, timeframes, names of the responsible

116 C-208, Article 8.
117 C-208, Article 9.
118 C-208, Annex 3, List of Environmental Fragile Areas.
119 C-215, Annex 3, Section III.2.4.; Section VI.
120 C-208, Article 3(29).

representatives for the application who are responsible for preventing, mitigating, correcting, compensating or restoring environmental impacts that may occur;[121] or

- If the score is more than 1,000, the developer has to submit an Environmental Impact Study (**"EIS"**) which constitutes the most complex environmental evaluation instrument, which the developer must submit in relation to an activity, work or project, prior to its execution. Its objective is to predict, identify, evaluate and correct the environmental impact which certain action could cause the environment and define the environmental feasibility (permit) of the project, work or activity the object of the study.[122] For developments with scores which are relatively high (600 to 1,000), or in the presence of fragile ecosystems such as forest and wetlands, SETENA might require that an EIS is undertaken even if the project does not meet the 1,000 threshold.

138. After SETENA's preliminary determination on the type of instrument assigned to the project, the developer is responsible for the second submission which in the three scenarios requires the developer to submit:[123]

- A certified copy of the cadastral plan (or a copy and the original to compare against);
- A notarial certification or registrar's certification of the property or building where the activity, work or project will be developed (or a copy and the original to compare against). If the developer of the project is not the owner of the property, an authorization to use the property issued by the owner and his/her signature certified by an attorney must be provided;
- An original and one copy of the D1 submitted in original form, completely filled out and signed both by the developer and by the environmental consultant;
- Original and one copy of the Affidavit on Environmental Commitments and the specific requirements that may have been requested in the administrative resolution concerning the D1;
- Deposit slip covering the payment of the technical analysis;
- Cartographic sheet showing the location of the project;
- Geo-referencing in accordance with the SETENA guidelines;

[121] C-208, Article 3(59).
[122] C-208, Article 3(35).
[123] C-208, Article 9.

- Basic identification matrix of the environmental impacts;
- Environmental measures;
- Matrix of the cumulative and synergistic effects;
- Weighing parameters;
- Detailed description of the project;
- Design of the site of the activity, work or project (these are not the construction plans), including the preliminary location of the waste water treatment plant in the design of the site, should it be necessary;
- Basic engineering study of the land, according to the protocol (geotechnical, hydrological, anthropic risks);
- Study of the basic geology of the land, in accordance with the protocol (geology of the area, hydrogeology and natural hazards). If a waste water treatment system through absorption systems is used or when it relates to storage or commercialization of hydrocarbon substances, this study must include an analysis of transit time of contaminants;
- Brief archaeological report of the land;
- Brief biological study;
- Certification issued by a Certified Public Accountant or Appraisal by the CFIA on the amount of the total investment of the activity, work or project;
- Correct Land Use certification issued by the applicable municipality;
- Notes on the availability of public services: drinking water (potable), collection of solid waste, electric energy, municipal approval for the storm water vent.

139. Should it be deemed necessary, a field inspection can be carried out and additional information may be requested and must be submitted by the developer within a definite time-frame. SETENA's Environmental Assessment Department will analyze the information presented; will issue its technical recommendation and will send the technical report to the Plenary Commission of SETENA. The Plenary Commission receives the technical recommendation

and evaluates the technical recommendation; should it accept the recommendation, it will issue the resolution on the Environmental Viability.

140. The process for the granting of the EV is more complex where SETENA requires that the developer presents an EIS because:

- It requires the notification of the EIS to SINAC and the corresponding municipality to receive their comments on the proposed project or development;[124]
- The developer is required to publish in a newspaper of national circulation its intention to undertake the proposed project, in order to give notice to any interested third parties;[125]
- It requires a process of communication and interaction with the community and the relevant local authorities, where the developer has to hold a public hearing to receive comments from the community.[126]

141. Throughout the years, Claimants made four separate EV applications to SETENA in relation to the Project Site:

- In 2002, Claimants applied for an EV for Hotel La Canícula (File No. 552-2002-SETENA) (the **"First Concession site"**);
- In 2002, Claimants applied for an EV for Villas La Canícula (File No. 551-2002-SETENA) (the **"First Condominium site"**);
- In 2005, Claimants applied for a new EV for the Concession (File No. 110-2005-SETENA) (the **"Concession site"**);
- In 2008, Claimants applied for a new EV for the Condominium (File No. 1362-2007-SETENA (the **"Condominium site"**);

142. Claimants left out of their EV applications the following areas of the Project Site:

- Easement and other lots;
- Other lots site (commercial lots).

[124] C-208, Article 35.
[125] C-208, Article 41.
[126] C-208, Article 33, 41, 42.

a. *EV Application for the First Concession site*

143. On September 23, 2002, Claimants submitted to SETENA their Preliminary Environmental Assessment Form for project "Hotel La Canícula".[127]

144. On October 11, 2002, SETENA conducted an inspection of the site and concluded that "[g]iven that the project is located in the maritime terrestrial zone, the increase in the capacity of load of the services, an [Environmental Impact Study] is required."[128] SETENA required from Claimants the submission of an Environmental Impact Study ("**EIS**")[129] on November 22, 2002. As will be explained in more detail, an EIS is required when SETENA considers that the project's likely impact on the environment warrants a more complex and thorough environmental impact assessment study from the developer, and the appointment of a team of licensed professionals to assist in that assessment.

145. On December 2, 2002, Claimants appointed Mr Carlos Dengo Garron as the consultant in charge of the submissions to SETENA to obtain the EV. However, Claimants never filed any application to develop Hotel La Canícula to SETENA.

b. *SETENA's EV for the First Condominium site*

146. Dealing specifically and exclusively with the EV for the First Condominium site, on September 30, 2002, Claimants filed an application to obtain SETENA's EV for the development of 48 units of a condominium within an area of 29 hectares and an area of construction of 7.5 hectares at property No. 6091765 (and sub lots 0733357, 0741687, 0741685, 0741688) and No. 1219039 owned by Inversiones Cotsco.[130]

147. While Claimants retained the services of a forestry engineer, they submitted their file to SETENA without a biological study addressing the presence of wetlands or forest in the areas for which this EV was sought. As will become apparent upon reading the First KECE Report, this oversight was an undeniable failure on the part of Claimants – on whom the responsibility rested, in accordance with Costa Rican law.

148. Based on Claimants' application, SETENA granted the EV to Claimants to develop "Villas La Canícula" on November 23, 2004.

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127 **R-3**, Preliminary Environmental Assessment Form Hotel La Canícula, September 23, 2002.
128 **R-4**, SETENA Technical Report - Hotel La Canícula, October 11, 2002.
129 **R-5**, SETENA requests EIS for Hotel La Canícula, November 22, 2002.
130 **R-9**, SETENA's EV for Villas La Canícula, November 23, 2004; **R-7**, Lots for Villas La Canícula, June 2, 2003.

149. On March 6, 2006, Claimants appointed DEPPAT as the Environmental Regent.[131] The Environmental Regent is the professional tasked with ensuring that the works undertaken by a developer do not impact the environment. On April 3, 2009, DEPPAT notified SETENA of its withdrawal as Environmental Regent due to Claimants' failure to indicate a start date for the development.[132]

150. On February 27, 2007, SETENA granted a one year extension to the Villas La Canícula EV given that Claimants "were still in the process of obtaining the construction permits."[133] The EV for Villas La Canícula lapsed on February 27, 2008.

151. Over three years later, on March 23, 2011, Mr Pacheco Polanco inspected the site and reported that the works had not started and that the project will not be executed due to the existence of a new project "Hotel Colinas del Mar" to be undertaken in the same area of the project.

152. The project was never developed. Therefore, the same year, on September 13, 2011 SETENA closed the file on the project and returned the environmental guarantee that had been deposited by Claimants when they applied for that EV.[134]

c. *SETENA's EV for the Concession*

153. With regard to the EV for the Concession, on January 26, 2005, La Canícula, represented by Mr Aven, made its first submission to SETENA for the "Hotel Colinas del Mar" on Property No. 6-001004-Z-000.[135] The SETENA file for the Concession was No. 110-2005-SETENA. For the preparation of this application, Claimants hired the environmental consultancy firm DEPPAT as the Environmental Regent for the site.

154. On March 17, 2006, SETENA granted the "EV" for the Concession for a period of two years ending on March 17, 2008.[136]

155. On March 24, 2008, Claimants requested from SETENA the extension of the EV for Hotel Colinas del Mar which was granted for the term of one additional year.[137]

131 **R-10**, Appointment of DEPPAT to Villas La Canícula, March 1, 2006.
132 **R-24**, DEPPAT withdrawal from Villas La Canícula, April 2, 2009.
133 **R-12**, SETENA extends EV for Villas La Canícula, February 27, 2007.
134 **R-112**, SETENA closes files to Villas La Canícula, September 13, 2011.
135 C-223.
136 C-36.
137 **R-17**, SETENA grants extension of the EV for Hotel Colinas del Mar (Resolución No. 884-2008-SETENA), March 24, 2008.

156. On June 1, 2010, by which time the EV had lapsed, Claimants requested from SETENA authorization to replace the Environmental Regent DEPPAT S.A. for an alleged breach of environmental laws.[138] Yet, the next day, the same DEPPAT was hired by Claimants' Inversiones Cotsco to be the Environmental Regent for the Condominium site discussed below.

157. Claimants changed the design of the hotel to be developed in the Concession and on August 23, 2011, SETENA granted the EV for the Concession that reflected a change in units: the eighty original units had been reduced to sixty five.[139]

d. *SETENA's EV for the Condominium*

158. The Condominium site (as shown in the above plans) was the largest part of the Project Site. In 2007, after five years of having acquired the lands for the Condominium, Claimants started the environmental administrative clearance process for the development of the Condominium.

159. On November 8, 2007, Claimants submitted a D-1 Form[140] with SETENA in order to obtain the EV for the Condominium to be developed at property No. P-142646. The SETENA file for the Condominium was No. D1-1362-2007-SETENA. For this process, Claimants hired Mr Edgardo Madrigal Mora, architect of the firm Mussio Madrigal, as the professional assisting Claimants in the preparation of their EV application.[141] The D-1 Form submitted by Claimants to SETENA for the Condominium included:[142]

- Form D-1;
- An Environmental Management Plan prepared by Empresa Geoambiente S.A. dated 2007; [143]
- A Geotechnical Survey performed by Mr Roger Esquivel on behalf of TecnoControl S.A. dated June 18, 2007;
- A Physical Environmental Protocol prepared by Mr Eduardo Hernandez Garcia;
- An Archeological Survey conducted by a consultant Ms Tatiana Hidalgo that concluded there was no archeological evidence on the Project Site; and

138 **R-36**, Request to replace DEPPAT as Environmental Responsible, June 1, 2010.
139 C-138.
140 **R-13**, Complete D-1 form for Condominium site, November 8, 2007.
141 Claimants' Memorial, ¶88.
142 **R-13**, Complete D-1 form for Condominium site, November 8, 2007.
143 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007.

- An Anthropic Risk Certification from Edgardo Madrigal Mora that certified that there were no sources of anthropic risk within the site.

160. In their application, Claimants (either in their own capacity or through the necessary involvement of their technical advisers identified above) failed to: (i) identify the ecosystems the land held (*i.e*. the presence of wetlands and forests); (ii) conduct a biological survey to identify the great number of species that lived in those ecosystems; and (iii) propose measures to protect those species from the impacts of the development. This omission was an undeniable failure on the part of Claimants – on whom the responsibility rested, in accordance with Costa Rican law.

161. Claimants also appear to have engaged a well-known hydrogeologist, Roberto Protti, for the performance of a Geological Hydrogeological survey in 2007 (the "**Protti Report**").[144] But Claimants failed to include his survey within their initial submission to SETENA of November 8, 2007. The Protti Report was only filed with SINAC in 2011,[145] after Claimants obtained SETENA's Condominium EV in [June] 2008. Unlike Claimants' application to SETENA, the Protti Report noted the existence of a central zone that presented swamp-type flooded areas (*areas anegadas de tipo pantanoso*) with poor draining, which the Protti Report mapped. This was a material omission by Claimants. **It shows that since 2007 Claimants were aware of the existence of wetlands in the Project Site and the intentionally decided to keep this information from SETENA**. Probably because they knew that if SETENA were to have been informed of it, Claimants would have had to go through a much more demanding process for obtaining the necessary permits for the development and make arrangements to protect the ecosystems in the Project Site. We develop this below.[146]

162. On February 13, 2008, SETENA requested Claimants to present within 30 days: (i) a vegetation coverage map, (ii) the property's registration certificate, (iii) a statement by ACOPAC-MINAE whereby it indicates the main use of the soil, (iv) the presence of forest areas, (v) three georeferenced points of the property, (vi) a photographic record of the project area and (vii) a sworn statement by the developer not to commence works without the EV. [147]

163. On March 14, 2008, Claimants' representative, the architect Edgardo Madrigal Mora, communicated to SETENA that there was no forest at the Project Site, only pastures[148] and

144 **R-11**, Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007.

145 **R-11**, Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007. The survey rests in the files of SINAC for Las Olas Project.

146 See section IV.B.1.a.

147 C222, p. 56 (SGP-DGI 098-2008).

148 **R-16**, Letter by Edgardo Madrigal Mora to SETENA, March 14, 2008.

requested before SINAC a confirmation that the Project Site was not located within a Wildlife Protected Area (**"WPA"**).[149] This communication from Mr Madrigal Mora (an architect) was a one page letter summarizing his views regarding environmental issues, with no attachments or annexes. On April 2, 2008, SINAC responded to Claimants' request and issued a confirmation that the Project Site was not within a WPA.[150]

164. Critically, before SINAC's confirmation, on March 27, 2008, a document purportedly signed by Gabriel Quesada Avendaño, [a biologist from SINAC] and Ronald Vargas (*Director of SINAC*) was filed with SETENA (SINAC 67389RNVS-2008).[151] Such document stated that the criteria followed by the Las Olas Project for environmental protection met SINAC's requirements and concluded that the project was not a threat to the biodiversity in the area. This document was later on proved to be a forgery (the "**Forged Document**"). Claimants understandably go to great lengths to distance themselves from this document, which was forged and presented in support of Claimants' applications at a critical time in the timeline.

165. On April 3, 2008, Claimants made a second submission to SETENA with the information and documentation requested on February 13, 2008.[152]

166. On June 2, 2008, SETENA granted the EV for the Condominium for a period of two years.[153] The EV provided that (among other things):

- In the event that the cutting of any tree was required, a permit ought to be requested from the MINAE;
- Claimants had to submit one month prior to the initiation of works: (i) a deposit of the environmental guarantee, (ii) the appointment of an Environmental Regent for the Project (which had still not been appointed at this stage), (iii) an Environmental log for the development; and
- Claimants had to notify with one month in advance from the start of works, the beginning of construction at the property.

149 C-45.
150 C-48.
151 C-47.
152 **R-18**, Claimants' submission of pending documentation to SETENA, April 3, 2008.
153 C-52.

e. *Municipality permits for the initiation of works*

167. After the granting of the EV, Claimants had to apply in order to obtain construction permits for the Las Olas Project from the Municipality. For the granting of construction permits, the Municipality requires that the developer submits:[154]

- A certification of the Land Use for the construction site;[155]
- 3 copies of the maps of the construction site certified and signed by a responsible engineer or architect or member of the Federate College of Engineers and Architects of Costa Rica;[156]
- Alignment certificates, if necessary;[157]
- Letter of availability of rainwater drainage;
- Letter of electricity availability;
- An insurance policy for the works to be performed;[158] and
- The payment of a fee.[159]

168. For the Concession, Claimants obtained two construction permits. One in 2007 for the construction of "Cabins" and another one on August 29, 2008, for the construction of "Hotel, cabins and pool." Both permits related to the construction of infrastructure for property No. 6-001004-Z-000, now P-0757329-2001.[160]

169. Regarding the easements of the Las Olas Project, on July 16, 2010, the Municipality issued seven permits for the construction of easements for the following properties:[161]

- No. 15684 owned by Atardeceres Calidos de Esterillos Oeste S.A., now Mis Mejores Años Vividos, S.A.

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154 **R-199**, Munipality of Parrita Construction Permits requirements.
155 C-219, Article 28, Urban Planning Act.
156 **R-192**, Article 54, Organic Federate College of Engineers and Architects Law, January 10, 1966; C-205, Article 18.
157 C-205, Article 18.
158 **R-191**, Insurance Policy provisions, Labor Code.
159 C-205, Article 79.
160 C-14; **R-98**, Municipality's certification of construction permits granted to Claimants to TAA, May 19, 2011.
161 C-71.

- No. 15685 owned by Atardeceres Calidos de Esterillos Oeste S.A., now Mis Mejores Años Vividos, S.A.
- No. 15683 owned by Cerros de Esterillos Oeste S.A.
- No. 166479 owned by Amaneceres de Esterillos Oeste S.A., now Mis Mejores Años Vividos, S.A.
- No. 156481 owned by Caminos de Esterillos Oeste S.A., now Mis Mejores Años Vividos, S.A.
- No. 156480 owned by Altos de Esterillos S.A., now Mis Mejores Años Vividos, S.A.
- No. 156482 owned by Noches de Esterillos S.A., now Mis Mejores Años Vividos, S.A.

170. According to Claimants they started the application for the construction permit for property No 2881-M-000, part of the Condominium site.[162]

171. On July 19, 2010, the Municipality denied the permit for construction for the Condominium for property No. 2881-M-000 for several reasons:[163]

- The term of the EV had lapsed (it now being 2010, while the EV had been granted in 2008);
- Claimants failed to submit a copy of the hydrological study;
- Claimants failed to submit drawings for the rainwater drainage within the Project Site;
- Claimants failed to submit a copy of the cadastral map.

172. On July 22, 2010, DEPPAT submitted to the Municipality an Environmental Contingencies Plan for Land Movements for the "Villas La Canícula" project (*Plan de Mitigación Ambiental para Movimientos de Tierra*).[164] However, when it details the project, it refers to the construction of a condominium of 300 units and 72 additional lots in front of the public road.

173. This document could not have referred to Villas La Canícula because (i) the EV for that project lapsed on February 27, 2008 and (ii) works were never started at that site.

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162 Claimants' Memorial, ¶102.
163 **R-39**, Denial of construction permit (OIM 133-2010), July 19, 2010.
164 **R-42**, Environmental Contingencies Plan for Land Movements, July 22, 2010.

174. The document erroneously refers to Expediente SETENA No. is 484-2002, which was neither the record for the Condominium (No. 1362-2007) nor the Villas La Canícula (No. 551-2002).

175. On September 7, 2010, the Municipality issued a certification of the Land Use for the Project's specific lot.[165] On the same day, the Municipality granted a construction permit to Claimants to start works in the Condominium for property No. 2881-M-000.[166] However, this was not lawfully obtained, as the following developments immediately thereafter illustrate.

176. On September 9, 2010, the Department of Municipal Engineering of the Municipality informed the Mayor of Parrita, that Mr Sebastián Vargas Roldan, Claimants' counsel, had presented the documents that were pending but given the hour, the officers were unable to review the use of land and the cadastral maps of the property.[167] After a review of the drawings of the property, Claimants' application was still missing:[168]

- Alignment Certificate from the National Institute of Housing and Urban Development;
- Alignment Certificate from the Ministry of Public Works and Transportation;
- The appointment of a responsible professional from the Federate College of Engineers and Architects of Costa Rica for the construction.

177. The Department of Municipal Engineering further recommended that a study had to be conducted with regard to the impact on the Project to the Regulator Plan, according to which the area of construction was affected by four zones: high plains, hills, a beach zone and mangrove zone.[169]

178. On September 13, 2010, the Department of Municipal Engineering of the Municipality noted that:[170]

- The Condominium lacked two Alignment Certificates from the National Institute of Housing and Urban Development, and from the Ministry of Public Works and Transportation;

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165 **R-53**, Certification of Land Use for the Condominium (US No. 182-10), September 7, 2010.

166 C-85.

167 **R-56**, Letter from the Department of Municipal Engineering to the Mayor of Parrita (ADU No. 012-10), September 9, 2010; **R-55**, Certification that the Project does not have a professional in charge, September 9, 2010.

168 **R-56**, Letter from the Department of Municipal Engineering to the Mayor of Parrita (ADU No. 012-10), September 9, 2010; **R-55**, Certification that the Project does not have a professional in charge, September 9, 2010.

169 **R-56**, Letter from the Department of Municipal Engineering to the Mayor of Parrita (ADU No. 012-10), September 9, 2010; **R-55**, Certification that the Project does not have a professional in charge, September 9, 2010.

170 **R-57**, Municipality report on outstanding documents (ADU No. 013-10), September 13, 2010.

- The Federate College of Engineers and Architects of Costa Rica had notified the Municipality that the Project did not have a professional in charge as required by the law.

179. Thus, Claimants obtained the construction permit for the Condominium unlawfully.

5. Claimants' misconduct and complaints and concerns of the neighbors

180. The neighbors of Esterillos Oeste were well aware of the ecosystem that Claimants' land possessed. The land had always been known for its wetlands and diversity of species. Therefore, as soon as the neighbors realized that Claimants were affecting the ecosystem, wetlands, forests and consequently the species that lived in the land, they alerted the relevant authorities.[171]

181. In 2009 and early 2010, the neighbors of Esterillos Oeste issued numerous complaints with the Municipality claiming that Claimants had started works at the Project Site that were resulting in negative effects to the wetlands located within the property. This would have put Claimants on immediate notice of the real risk that they were seeking to develop land that contained wetlands and forests, even if it had not been apparent to them (or capable of being discovered with reasonable and prudent input from suitably qualified individuals at the appropriate time), particularly in light of the First KECE Report's conclusions.

182. Neighbors were also concerned about the damage Claimants were causing to the forest on the land. Claimants' felling trees not only affected the vegetation but also the fauna living in that ecosystem and the ecosystem itself, given the alteration that action causes on the hydrologic conditions of the property, and therefore, on the wetlands.

183. Because of the multiple complaints filed against Claimants, several institutions in charge of the protection of the environment became involved in the investigations regarding the environmental damage caused by Claimants:

- The Municipality conducted several inspections and requested MINAE to investigate the complaints;

- The *Defensoría* contacted four institutions (the TAA, SINAC, SETENA and the Municipality) to enquire about the impacts of Claimants' actions on the ecosystems;

[171] First Witness Statement, Mónica Vargas Quesada, ¶10.

- SINAC, as the institution in charge of determining and delineating wetlands in Costa Rica and overseeing the protection of forestry resources, engaged in an exhaustive process of investigation that led to the filing of a criminal complaint against Mr David Aven and Mr Damjanac for the damage caused to the ecosystems in the Project Site;

- The TAA, upon the submission of three complaints against the Las Olas Project, also initiated an administrative proceeding against Claimants;

- The environmental prosecutor investigated the complaints from SINAC and the neighbors.

184. The evidence obtained during such investigations confirmed that Claimants had drained and refilled wetlands and illegally cleared a forest causing serious environmental damage to Esterillos Oeste.

a. *Investigation proceedings conducted by the Municipality*

185. The construction permits for the easements were granted on July 16, 2010 and the permit for the construction of infrastructure on September 7, 2010. Nonetheless, Claimants had started work at the Project Site in 2009, before being granted any permit.

186. In 2009 residents in the vicinity of Esterillos Oeste filed a complaint with the Environmental Management Department of the Municipality, alleging that wetlands had been refilled and, as a result, streets, houses and the local football pitch were flooded.[172]

187. On April 26, 2009, the Environmental Manager (*Gestora Ambiental*) from the Municipality (Ms Vargas) inspected the Project Site. Ms Vargas' report determined that: [173]

- Residents in the vicinity of the Project Site had attested that during the rainy season, the lot was comparable to a lagoon, holding fauna typical of a wetland;

- Erosion of the lagoon;

- Trees had been cut down and burnt to the ground – to an extent which made it impossible to determine their species;

- Two paved roads had been built.

[172] **R-23**, Complaints by neighbors of Parrita with the Municipality, 2009.
[173] C-55.

188. On January 20, 2010 and May 21, 2010, Ms Vargas visited the Project Site again and as she explains in her Witness Statement, she saw:

> "Subsequently, on 20 January 2010 and 21 May 2010 I revisited the site, following new claims that there were works being carried out on the site. During those visits, I observed that the cutting and burning of trees had continued. According to what the neighbors told me, this practice took place during the weekends, given that public officials do not work during those days; we cannot state exactly when the practice was occurring. During those visits, as well as the two paved roads, I observed that two poles had been put up."[174]

189. As a result of those visits, on May 31, 2010, Ms Vargas prepared three reports:

- Report DeGA 091-2009, detailing the visits conducted and requesting that the relevant authorities undertake an official categorization of the area;[175]

- Report DeGA 090-2010, informing the Construction Department of the Municipality of a complaint regarding the existence of a wetland in the Las Olas Project Site and requesting information from the file for the Project;[176]

- Report DeGA 092-2010, addressed to the Department of Permits of the Municipality requesting information on the existence of permits for the development of the Las Olas Project.[177]

190. On June 14, 2010, the Urban and Social Development Department of the Municipality sent Note 113-2010 to Ms Vargas reporting that the Las Olas Project did not hold any construction permits to undertake earth movements or built private roads with electrification.[178]

191. On the same day (*i.e.* June 14, 2010), the Municipality notified Claimants of the complaints that works were being performed without having obtained any construction permits.[179] The Municipality demanded that Claimants obtain the required permits to start works and warned Claimants that further legal action to be taken by the Municipality against the Project, such as the closure of roads and commencement of a legal action.[180] On the same day as this warning, Claimants notified SETENA of the start of works.[181]

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174 First Witness Statement, Mónica Vargas Quesada, ¶14.
175 C-67.
176 **R-29**, Report from Mónica Vargas to the Construction Department (DeGA-090-2010), May 31, 2010.
177 **R-30**, Report from Mónica Vargas to the Department of Permits (DeGA-092-2010), May 31, 2010.
178 **R-34**, Letter from the Urban and Social Department Department to Mónica Vargas (OIM 113-2010), June, 14, 2010.
179 **R-35**, Letter from the Department of Urban Development to David Aven (OIM No. 114-2010), June 14, 2010.
180 **R-35**, Letter from the Department of Urban Development to David Aven (OIM No. 114-2010), June 14, 2010.
181 **R-31**, Delayed notice of the start of Works to SETENA, June 14, 2010.

192. On June 15, 2010, in full compliance with her professional responsibilities, Ms Vargas filed a complaint with the TAA requesting that it conduct an investigation of the Project given that (i) there were concerns as to whether wetlands were being refilled causing serious damage to the land; (ii) two roads had been constructed without permits; and (iii) vegetation had been cut down and burnt.[182]

193. On June 16, 2010, Ms Vargas, sent a note to SINAC informing it of the findings of her prior reports and requesting a formal categorization of the Project Site. [183]

194. On July 5, 2010, several neighbors of Esterillos Oeste filed a second complaint against the Project with the Municipality claiming several hazards, refilling of wetlands, floods, chopping down of trees and destruction of fauna.[184]

195. On July 8, 2010, Ms Vargas replied to a request for information made by SINAC regarding the data of the properties involved in the Las Olas Project and whether Claimants had been granted any permits. Ms Vargas attached to this report, the Note 113-2010, where the Urban and Social Development Department had informed that Claimants did not have any permits to engage in construction works or earth movement works.[185]

196. On August 29, 2010, Ms Vargas informed the Mayor[186] and the TAA[187] of the July 2010 SINAC Report. Relying on that report, Ms Vargas recommended that Claimants request an EV from SETENA because the current EV they held had already lapsed.

197. On September 7, 2010, Ms Vargas informed Sebastián Vargas, counsel for Claimants, of the complaints she had received against the Las Olas Project for the refilling of a wetland and illegal cutting of trees.[188] Ms Vargas recommended to Mr Sebastián Vargas that it was very important that the Environmental Regent take charge of the environmental matters relating to the Project and asked him to tell the Environmental Regent for the Project to communicate with her. At this point it was clear that Claimants' complete disregard for the applicable environmental rules was a significant part of the problem.

182 C-69.
183 C-70.
184 **R-37**, Complaints by members of Esterillos Oeste, July 5, 2010.
185 **R-38**, Municipality report to SINAC (DeGA-0117-2010), July 8, 2010.
186 **R-52**, Letter from Mónica Vargas to the Mayor of Parrita (DeGA-0122-2010), August 29, 2010.
187 C-158.
188 First Witness Statement Mónica Vargas Quesada, ¶25.

b. *Investigation proceedings conducted by SINAC*

198. On September 30, 2008, two inspectors of SINAC and MINAE inspected the Project Site and concluded that two separate areas of the Project Site could be categorized as wetlands**.**[189]

199. During this inspection, Mauricio Mussio, another architect of Mussio Madrigal's firm that worked for Claimants at the time, joined the inspectors on their visit.[190] Mr Mussio (Claimants' agent) must have informed Claimants of the inspection and the investigations relating to the wetland – and even if he did not, his knowledge can be imputed to them. Therefore, by 2008, Claimants were on notice that the authorities were conducting inspections regarding the existence of impacts on wetlands at the Project Site.

200. On July 8, 2010, after several complaints of refilling wetlands and felling of trees, Mr Manfredi and Mr Bogantes from SINAC visited the Project Site. Mr Manfredi's report (the "**2010 SINAC Report**"):[191]

- mentioned that the site was not located in an area of wetlands;
- concluded that vegetation had been burnt and that the burning was occurring at the time of the inspection; and
- recommended that SINAC demand that Claimants stop destroying the vegetation and obtain the necessary permits to cut down trees.

201. On November 25, 2010, SINAC's Director requested Mr Picado Cubillo to undertake an inspection of the Project Site and to prepare a report to determine whether Claimants had engaged in any impact on the environment.[192]

202. Mr Picado Cubillo performed four visits to the Project Site on December 6th, 10th, 17th and 21st. The results of his visits were addressed in his report of January 3, 2011 which (the "**January 2011 SINAC Report**"):[193]

- Reported the illegal felling of approximately 400 trees;
- Described conversations with neighbors, who had lived in Esterillos Oeste for over 30 years, who told Mr Cubillo that a wetland was refilled over time and the vegetation was

189 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008.
190 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008.
191 C-72.
192 **R-60**, Request of inspection to Luis Picado Cubillo (ACOPAC-D-1519-10), November 25, 2011.
193 **R-262**, January 2011 SINAC Report (ACOPAC-CP-003-11), January 3, 2011.

removed and burnt. Neighbors also reported animals, such as amphiboles and reptiles, could easily be spotted prior to the draining of the wetland;

- Described the construction of a drainage channel within the property that would connect with the public sewage system constructed by the Municipality;

- Reported the existence of a forged document containing forged signatures of Mr Ronald Vargas and Mr Gabriel Quesada;

- Included as an annex a video of the visits where one can easily determine the drainage of the wetland and the damage made by Claimants to the ecosystems[194]

203. Given the seriousness of the findings of the December 2010 inspections, on January 28, 2011, Mr Picado Cubillo filed a criminal complaint with the Environmental Prosecutor (*Fiscalía Auxiliar Ambiental*) against Claimants for (i) forgery of a public document, (ii) deforestation and (iii) a potential refilling of a wetland.[195] Mr Picado appended to the complaint a statement of Mr Ronald Vargas Brenes whereby Mr Vargas Brenes confirmed that the signature imputed to him in the Forged Document was not his.[196]

204. On February 4, 2011, Mr Picado also issued an injunction against Claimants enjoining any works on the site (the "**SINAC Injunction**").[197] Claimants had notice of the injunction on February 14, 2011,[198] however, refused to comply with it and continued performing works.

205. On March 2, 2011, Mr Dionel Burgos, on behalf of SINAC, filed a claim against Claimants with the TAA for damage to wetlands and illegal tree cutting.[199]

206. On October 1, 2011, a neighbor of Esterillos Oeste called the SINAC offices in Parrita to report the cutting of trees at the Project Site. Mr Picado Cubillo and Dionel Burgos from SINAC went to the Project Site and found four Nicaraguan men cutting trees. Upon inspecting the area, the inspectors prepared a report (the "**October 2011 SINAC Report**") that:[200]

- Described that the trees had been cut down to the ground, burnt and its residues were being covered with soil;

194 **R-62**, SINAC Inspection Video, December 21, 2010.
195 **R-66**, Criminal Complaint filed by SINAC (ACOPAC-CP-015-11-DEN), January 28, 2011.
196 **R-63**, Letter by Ronald Vargas to ACOPAC confirming it is not his signature in the Forged Document, January 4, 2011.
197 C-112.
198 Claimants' Memorial, ¶133.
199 **R-73**, Police Report (ACOPAC-CP-052-11-DEN), March 1, 2011.
200 **R-264**, October 2011 SINAC Report (ACOPAC-CP-129-2011-DEN), October 3, 2011.

- Reported that an higuerón tree located at the boundaries of the property had also been chopped down;

- Concluded that the area of forest affected was of 2.06 hectares.

207. On October 25, 2011, Mr Manfredi conducted another visit to the Project Site where he observed once again Claimants' workers cutting vegetation. In his report, Mr Manfredi reported the chopping down of trees, erosion of the soil and impact on the natural draining of pluvial water.[201] It further recommended constant monitoring of the site.

c. *Complaints regarding Claimants' use of a Forged Document to obtain the environmental permits and illegal impact on the Las Olas Ecosystem*

208. On November 23, 2010, members of the Parrita community filed a complaint with SINAC, challenging SETENA's reliance on a forged document that was found within the SETENA record for the Condominium EV.[202] The document "SINAC 67389RNVS-2008" (the Forged Document) dated March 27, 2008 certified that the Las Olas Project was "not a threat to biodiversity in the area".[203] The Forged Document included the forged signatures of Gabriel Quesada Avendaño, a biologist from SINAC and Ronald Vargas, the Director of SINAC at the time. The Forged Document was relied upon by several authorities in studies and reports that either examined the site's conditions or attested to the inexistence of environmental risks.

209. Prior to the complaint of neighbors of November 23, 2010, a report of SINAC dated October 7, 2008 had already identified potential irregularities in relation to the use of the Forged Document by Claimants to obtain permits, in the following terms:

> "I consider important to inform you that as part of the investigation undertaken by the responsible officer, a series of documents were obtained, among which is oficio "INFORME SINAC 67389RNVS-2008 REFUGIO NACIONAL DE VIDA SILVESTRE AREA DE CONSERVACION ESTERILLOS OESTE." This technical report is not an official document issued by this conservation area within any of its offices and further, [the document] points out in a categorically erroneous manner the name of the office Refugio de Vida Silvestre Playa Hermosa Punta Mala."[204]

210. Furthermore, due to the complaints from the neighbors lodged with the Municipality in relation to the drainage of wetlands and cutting of trees at the Las Olas Project, on or around August

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201 C-143.
202 **R-59**, Complaint of neighbors re Forged Document, November 18, 2010.
203 C-47.
204 **R-21**, Letter to Ronald Vargas from Mr Quiros Rodriguez, Director of ACOPAC (ACOPAC-D-1063-08), October 7, 2008.

2010 Mr Aven submitted the Forged Document to the Municipality in support of the legality of the works being carried out at the Project Site.[205]

211. The Forged Document had raised concerns in the vicinity of Esterillos Oeste and therefore, the neighbors requested SINAC to confirm whether the Forged Document was official and valid.[206] A copy of the complaint was also filed with the *Defensoría* requesting its participation in the investigations against Claimants.[207] Therefore, on November 23, 2010, the *Defensoría de los Habitantes* also requested information from SINAC on whether the Forged Document was valid or not.[208]

212. On November 25, 2010, SINAC reported back to the *Defensoría de los Habitantes* confirming that the Forged Document was not signed by any employee of SINAC and that it was not an official document.[209]

213. On December 3, 2010, SINAC also informed SETENA[210] of the forgery of Mr Roland Vargas's signature. Upon learning of that information, on January 17, 2011, SETENA requested Claimants present the original of the Forged Document or a certified copy authenticated by public notary.[211]

214. On February 9, 2011, Claimants replied to SETENA's request of January 17, 2011 denying any connection to the Forged Document as well as denying having submitted it to SETENA despite the fact this is what had occurred.[212] Furthermore, Claimants contended that internal investigations within their company have led them to be convinced that Steve Bucelato, a neighbor of Esterillos Oeste, as part of an "evil plan" fabricated the Forged Document.[213] For the purposes of this arbitration against Costa Rica, Claimants have changed their "conspiracy theory." Instead of their neighbor, a retired musician from the U.S., Claimants now accuse Mr Bogantes, an officer of SINAC, of the fabrication of the Forged Document.[214]

215. On March 30, 2011, given the serious irregularities involved in the Project, SETENA's Department of Audit and Environmental Monitoring recommended to SETENA's board the issue of a provisional measure to stop any works at the site, and that the Municipality refrains

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205 **R-49**, Municipality Report to the *Defensoría* (200-2010) p, 2, August 18, 2010; see C-47.
206 **R-59**, Complaint of neighbors re Forged Document, November 18, 2010.
207 First Witness Statement Hazel Díaz Meléndez, ¶40.
208 C-91.
209 C-92.
210 C-93.
211 **R-65**, SETENA's request to produce Forged Document (SG-ASA-041-2011), January 17, 2011.
212 C-111.
213 C-111.
214 Claimants' Memorial, ¶¶351, 413.

from granting any construction permit for the project.[215] The Department of Audit and Environmental Monitoring also indicated that the Forged Document was used as grounds for the granting of the permits and that Edgardo Madrigal Mora, Claimants' architect of record, submitted the Forged Document to SETENA on April 23, 2008.[216]

216. On April 13, 2011, SETENA issued an injunction ordering that any works at the site be stopped and that the Municipality refrain from granting any construction permit to the project.[217]

217. However, and notwithstanding the recommendation of the Department of Audit and Environmental Monitoring, on November 15, 2011, SETENA reconfirmed the validity of the EV because it could not find enough evidence to prove that Claimants were the ones who falsified the Forged Document.[218]

218. A criminal investigation was also initiated concerning the Forged Document. As Prosecutor Martínez explains, he personally interviewed the two officers whose signatures were forged so there was no doubt as to the lack of authenticity of the Forged Document.[219] Notwithstanding, during the prosecution and trial against Mr Aven, he continuously relied on the assertions in the Forged Document to prove his innocence:

- First, on May 6, 2011 during Mr Aven's voluntary testimony with the Prosecutor, he insisted on the validity of the document – a curious way to testify under oath in light of the subsequently shifting position taken by Mr Aven both in Costa Rican proceedings and now this international arbitration;[220]

- Second, when Mr Aven filed his Statement of Defense in the criminal proceedings, Mr Aven submitted as part of his exculpatory evidence the Forged Document;[221]

- Third, on January 16, 2013, during Mr Aven's testimony at trial, Mr Aven claimed that the Forged Document was valid and it had confirmed that there were no problems with the Project.

219. Prosecutor Martínez explains that all of the evidence he gathered pointed to Mr Edgardo Madrigal Mora (Claimants' architect and agent) as the person who submitted the Forged

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215 **R-77**, Report from SETENA on Forged Document (ASA-590-2011-SETENA), March 30, 2011.
216 **R-77**, Report from SETENA on Forged Document (ASA-590-2011-SETENA), March 30, 2011.
217 C-122.
218 C-144.
219 First Witness Statement, Luis Martínez Zuniga, ¶32.
220 **R-90**; Sworn Declaration by David Aven, May 6, 2011.
221 **R-154**, Statement of Defense of David Aven.

Document with SETENA because of his interest in benefiting Claimants' project, as well as the dates of his submissions to SETENA.

220. However, the Prosecutor had to dismiss the charge of forgery against Mr Aven because he was not able to gather sufficient evidence to accuse him of Mr Edgardo Madrigal's wrongdoing.[222]

d. *Investigation proceedings conducted by the Defensoría*

221. On July 20, 2010, neighbors also filed a complaint against Claimants with the Ombudsman (*Defensoría*) due to the damage to a wetland.[223] The complaint explained that since the beginning of the rainy season the refilling of the wetland had led to flooding; a situation that had not occurred in the past.[224]

222. On August 7, 2010, the *Defensoría* gave notice of the complaint and requested information from all of the bodies involved with the protection of the environment in Parrita, namely: (i) the TAA;[225] (ii) the Municipality;[226] (iii) SETENA;[227] and (iv) SINAC.[228]

223. First, on August 18, 2010, the Municipality responded to the *Defensoría* informing them of the situation of the Project: [229]

- The Municipality had requested from MINAE a determination of the existence of a wetland in the site;
- The Municipality had received complaints of works being performed at the site, even though Claimants did not have any construction permits;
- The term of the EV that Claimants had previously submitted to the Municipality had lapsed.

224. On August 18, 2010, Mr Juan Diego Pacheco Polanco from SETENA inspected the Project Site and concluded in his report that there were no "bodies of water" (lakes) on the site.[230] On September 1, 2010, SETENA, relying on Mr Pacheco's Report (albeit somewhat imprecisely), dismissed the complaint filed with the *Defensoría* on the existence of wetlands at the Project

222 **R-115**, Request for Dismissal of Criminal Charges of Forgery and Disobedience to Authority, October 21, 2011.
223 **R-40**, Complaint with the *Defensoría de los Habitantes*, July 20, 2010.
224 **R-40**, Complaint with the *Defensoría de los Habitantes*, July 20, 2010.
225 **R-46**, Letter from the *Defensoría de los Habitantes* to the TAA (08952-2010-DHR), August 7, 2010.
226 **R-44**, Letter from the *Defensoría de los Habitantes* to the Municipality (08947-2010-DHR), August 7, 2010.
227 **R-45**, Letter from the *Defensoría de los Habitante* to SETENA (08949-2010-DHR), August 7, 2010.
228 **R-47**, Letter by the *Defensoría de los Habitantes* to SINAC (08948-2010-DHR), August 7, 2010.
229 **R-49**, Municipality Report to the *Defensoría de los Habitantes* (DeGA-200-2010), August 18, 2010.
230 C-78.

Site.[231] However, SETENA's determination was substantially undermined by the circumstances in which it was reached:

- The Resolution relied on the Forged Document and its false findings regarding the Project;
- The wetland had been refilled and drained by Claimants during the last years;
- The conclusion that there was no evidence of wetlands was not a precise summary of the brief findings of Mr Pacheco Polanco;
- Finally, as was known at the time, SETENA did not have the competence to identify wetlands, so it was always going to be conditional on the appropriate authorities and experts opining on the issue – namely SINAC.

225. On August 27, 2010, SINAC replied to the *Defensoría* reporting that:[232]

- A report dated April 2, 2008 had noted the existence of two wetlands at the Project Site and requested that the department of wetlands issue technical criteria;
- Two reports within SINAC had warned the authorities of irregularities involving the Las Olas Project, including impact on the environment and the existence of forged documents to obtain the permits;
- A report from SINAC had indicated that the inspectors had not identified any wetlands at the Project Site;
- No permits for the felling or removal of trees had been granted.

226. On November 23, 2010, the *Defensoría* received a copy of a complaint filed by the neighbors of Esterillos Oeste requesting SINAC to confirm if the Forged Document was an official and valid document.[233] Therefore, on that same date, the *Defensoría* sent a request for information to SINAC on the matter.[234]

227. On November 25, 2010, SINAC replied to the *Defensoría* informing that SINAC had confirmed that the Forged Document was indeed false. Further, SINAC informed that it had requested Mr

231 C-83.
232 C-80.
233 C-80
234 C-91.

Picado Cubillo to conduct an inspection of the Project Site and prepare a report, no later than December 3, 2010, on whether there was any environmental damage at the Project Site.[235]

228. By December 9, 2010, SINAC had not reported the results of the inspection of Mr Picado Cubillo, therefore, on that same date, the *Defensoría r*equested from SINAC information regarding the results of the inspection.[236]

229. On March 2, 2011, SINAC sent two communications to the *Defensoría* reporting:

- The findings of the inspections conducted by Mr Picado Cubillo during December of 2010 and the request for two surveys made to the PNH and INTA;[237]
- Given the findings of Mr Picado Cubillo's inspection report, a criminal complaint had been filed against Claimants for forgery, impact to a forest and the refilling of a wetland.[238]

230. Since the *Defensoría* is incompetent to hear claims over which there is a pending judicial resolution, on February 28, 2011, the *Defensoría* suspended its investigations of Claimants' misconduct due to the filing of the criminal charge with the criminal courts of Costa Rica.[239]

e. *Investigation proceedings conducted by the TAA*

231. The TAA investigation arose out of three complaints filed by the Municipality, a neighbor of Esterillos Oeste and SINAC:

- On June 15, 2010, Ms Vargas from the Municipality filed a complaint due to the impact on a wetland and other damage inflicted by Claimants on the environment;[240]
- On March 1, 2011, Mr Bucelato filed a complaint for the refilling of a wetland and commencement of works in the site that affected the environment;[241]
- On March 2, 2011, Mr Burgos from SINAC filed a complaint for the illegal cutting of trees and refilling of a wetland.[242]

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235 C-92.
236 **R-61**, Letter from the *Defensoría de los Habitantes* to SINAC (13835-2010-DHR), December 9, 2010.
237 **R-78**, Letter from SINAC to the *Defensoría de los Habitantes* (ACOPAC-D-83-11), March 2, 2011.
238 **R-72**, Letter from SINAC to the Defensoría de los Habitantes (ACOPAC-D-115-11).
239 **R-58**, Letter from the Defensoría to Steve Bucelato (02282-2011-DHR), September 19, 2010.
240 C-69.
241 C-110.
242 **R-73**, Police Report (ACOPAC-CP-052-11-DEN), March 1, 2011.

232. In light of the serious conclusions of the PNH Report on Wetlands, on April 13, 2011, the TAA issued an injunction against Claimants ordering the enjoinment of works at the site.[243] Claimants also failed to comply with this injunction and kept performing works. In its April 13, 2011 Resolution, the TAA:[244]

- Requested information from the Municipality relating to the construction permits granted to the Las Olas Project;
- Ordered the inspection of the site by TAA officers;
- Requested SINAC to produce a report on the economic assessment of the damage caused by Claimants to the environment.

233. On June 23, 2011, TAA officers inspected the Project Site.[245] In their report, the officers informed the TAA of the existence of a house in the process of being built in the area despite the notification to Claimants of the injunction. On June 14, 2012, the TAA requested from the Municipality the name of the owner of the property where the house was being built.[246]

234. The Municipality had reported earlier on June 5, 2011 that the lot belonged to Mr Tory Mills, one of Claimants' alleged buyers and that it had a construction permit.[247]

235. On July 17, 2012, the TAA decided to consolidate the three complaints into one record given that the subject matter and the defendants were all the same.[248]

236. On May 28 and December 2 2014, the TAA requested that SINAC produce an economic assessment report on the environmental damage caused by Claimants.[249]

f. *The criminal investigation by the Environmental Prosecutor*

237. The criminal complaint filed by Mr Picado Cubillo was assigned to Prosecutor Martínez, who had also been involved in the criminal investigation of the crime of forgery against Mr Aven.[250]

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243 C-121.
244 C-121.
245 **R-105**, Visual inspection report by TAA officers, June 23, 2011.
246 **R-121**, TAA Inspection Report (TAA-DT-129), June 14, 2012.
247 **R-101**, Municipality report on house built in David Tory Lane Mills property, June 5, 2011.
248 **R-123**, TAA consolidates three complaints (695-12-TAA), July 17, 2012.
249 **R-151**, TAA Request of Report to SINAC (391-14-TAA), May 28, 2014; **R-153**, TAA Request of Report to SINAC (1103-14-TAA), December 2, 2014.
250 First Witness Statement, Luis Martínez Zúñiga, ¶17.

Upon receiving the findings of the January 2011 SINAC Report, the Prosecutor immediately requested SINAC to confirm the existence of wetlands at the Project Site.[251]

238. On February 4, 2011, SINAC requested of the PNH to provide an official determination as to whether there were wetlands located at the Project Site.[252] SINAC also requested of the National Institute for Agricultural Innovation and Technology Transfer ("**INTA**"), a body of the Ministry of Agriculture to perform a survey of the soil.[253]

239. Accordingly, on March 16, 2011, Mr Gamboa from the PNH and Mr Cubero from INTA joined Mr Picado Cubillo on a visit to the Project Site. Mr Gamboa and Mr Cubero conducted some studies at the site and reported their findings to SINAC and to the Prosecutor Martínez.[254]

240. On March 18, 2011, Mr Gamboa issued its official report confirming the existence of a palustrine wetland on the Project Site (the "**PNH Report on Wetlands**").[255] Mr Gamboa reported that:

- There was a wetland located on a plain at the foot of the hills surrounding it;
- There was machinery operating at the site and moving land and installing sewage systems over the draining channel in the wetland;
- The wetland had been adversely affected by the construction of roads and sewage;
- The activities breached Article 45 of the Environmental Organic Law;
- In light of the findings, the *indubio pro natura* principle should be applied and immediate measures to prevent more harm should be taken, in accordance with Article 11, item 2 of the Biodiversity Law No. 7788.

241. On May 5, 2011, Mr Cubero, of INTA, also submitted his report to the Prosecutor and SINAC.[256] INTA was competent to draw conclusions regarding the soil samples (albeit not wetlands), and Mr Cubero did consider that the land presented hydrological characteristics. Mr Cubrero opined, however, that under the "Official Methodology for the Classification of Land of the Country" used to classify land for agricultural purposes, the characteristics of the soil did

251 **R-70**, Request to SINAC of Determination of Existence of Wetland, February 8, 2011.
252 **R-68**, Request of report to PNH (ACOPAC-D-80-11), February 2, 2011.
253 **R-67**, Request of report to INTA (ACOPAC-D-81-11), February 2, 2011.
254 First Witness Statement, Luis Martínez Zúñiga, ¶22.
255 **R-76**, PNH Report on Wetlands (ACOPAC GASP-093-11), March 18, 2011.
256 C-124.

not meet the typical criteria of a wetland.[257] However, such methodology is not the relevant one to determine the existence of wetlands and soil is only one of the factors to consider in the determination of wetlands. This will be developed below.

242. Further to the conclusions of the PNH Report on Wetlands, the Prosecutor requested SINAC to conduct another visit to determine the area of extension of the wetland.[258] This was clearly necessary given the importance of wetlands in the environmental protection scheme and the necessity for the Prosecutor to ascertain whether the Project created risk wetlands may be affected. Therefore, on May 13, 2011, Mr Picado Cubillo and Prosecutor Martínez visited the Project Site to determine the area of extension of the wetland.[259] The report from this visit dated May 18, 2011 (the "**Delimitation of Wetland SINAC Report**") concluded that:[260]

- The wetland's area was approximately 1.35 hectares;
- The site's topography had been directly affected by a drainage channel and sewage system;
- The palustrine wetland had been completely refilled by Claimants;
- Claimants' damage to the environment had been committed, in breach of Article 45 of the Environmental Organic Act; and
- Recommended requesting Claimants perform a restoration plan for the damage caused to the ecosystem.

243. On July 7, 2011 SINAC submitted another report to the Prosecutor which confirmed the existence of a forest and the damage caused to that ecosystem (the "**July 2011 SINAC Report**").[261]

244. On October 3, 2011 ACOPAC reported to the Prosecutor that during an inspection four men were found illegally cutting down trees in the area of the Project (the "**October 2011 SINAC Report**").[262] At this point the Prosecutor concluded that there was sufficient evidence to file criminal charges.

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257 C-124.
258 First Witness Statement, Luis Martínez Zúñiga, ¶56.
259 First Witness Statement, Luis Martínez Zúñiga, ¶53.
260 R-265, Delimitation of Wetland SINAC Report (ACOPAC GASP-143-11), May 18, 2011.
261 C-134.
262 **R-264**, October 2011 SINAC Report (ACOPAC-CP-129-2011-DEN), October 3, 2011.

245. The criminal proceedings against Mr Aven and Mr Damjanac arose out of two criminal complaints filed by Steve Bucelato on February 2, 2011,[263] a resident of the Esterillos Oeste area, and Mr Picado Cubillo on behalf of SINAC on March 18, 2011.[264]

246. On October 14, 2011, the Prosecutor requested the criminal Court of Quepos issue a judicial injunction against the continuance of works at the Project Site,[265] which was granted on November 30, 2011.[266] The Attorney General's Office, on behalf of the State, also filed a civil claim against Claimants seeking damages for the environmental damage caused to the ecosystems.[267]

247. On October 21, 2011, after having conducted a thorough investigation, which involved, among other things, requests for information to public entities, requests for the preparation of surveys, and in person visits to the Project Site, the Prosecutor officially filed criminal charges against Mr Aven and Me Damjanac for the refilling of wetlands and illegal felling of trees.[268] The Prosecutor had gathered sufficient evidence of the environmental damage caused by Claimants. Particularly:

- The January 2011 SINAC Report detailed the impact to the wetland;[269]
- The PNH Report on Wetlands submitted by the Coordinator of the PNH which had confirmed the existence of a palustrine wetland at the Project Site and the damage caused to the ecosystem;[270]
- The Delimitation of Wetland SINAC Report determined the area of the palustrine wetland to be 1.35 hectares;[271]
- The July 2011 SINAC Report which confirmed the existence of a forest and the damage caused to that ecosystem;[272]
- The October 2011 SINAC Report whereby ACOPAC reported the felling of trees on the Project Site.[273]

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263 C-110.
264 **R-66**, Criminal complaint filed by SINAC (ACOPAC-CP-015-11-DEN), January 28, 2011.
265 **R-114**, Prosecutor's request of criminal injunction, October 14, 2011.
266 **C-187**.
267 **R-200**, Civil Law Suit for Damages, November 17, 2001.
268 C-142.
269 **R-262**.
270 C-116.
271 **R-265**, Delimitation of Wetland SINAC Report (ACOPAC GASP-143-11).
272 C-134.
273 **R-264**, October 2011 SINAC Report (ACOPAC-CP-129-2011-DEN), October 3, 2011.

6. In view of the risks of negative impacts on the Las Olas Ecosystem, Claimants were enjoined to suspend works on the Project Site

248. In view of the risks of further environmental damage caused by Claimants' activities, the authorities enforced Costa Rica's environmental laws and applied the *in dubio pro natura* to stop Claimants from continuing with their environmentally damaging activities.

249. SINAC, the TAA and the Criminal Court of Quepos have all issued injunctions ordering Claimants to refrain from construction and other work on the Project Site until the situation regarding the risks of further environmental damage is resolved:

- The SINAC Injunction was granted on February 4, 2011.[274] Claimants have acknowledged that they violated this injunction and continued the works on the site.[275] The SINAC Injunction was confirmed by SINAC on February 23, 2011[276] and the Contentious Administrative Tribunal on March 25, 2011;[277]

- The TAA injunction from April 13, 2011[278] was notified to Claimants on the same day it was issued.[279] Claimants also failed to comply with this injunction because they kept performing works until June 27, 2011.[280] The injunction will remain in place until the TAA renders a final decision in relation to the impact on the environment or until such moment when it is proven that the continuance of works would not carry the risk of environmental damage;

- The criminal Court of Quepos' injunction from November 30, 2011 was extended during the course of the proceedings several times[281] and will remain in effect until the issue is resolved by a final ruling of a court of law.[282]

250. These injunctions from three different enforcement bodies in Costa Rica show that there was a real concern of the risk of damage caused by the continuance of the construction works at the Las Olas Project. If Claimants were so confident that they were not causing any damage, they

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274 C-112.
275 Claimants' Memorial, ¶¶138-140.
276 C-114.
277 **R-193**, Administrative Tribunal rejects motion to revoke SINAC Injunction, March 25, 2011.
278 C-121.
279 **R-84**, Notification of TAA injunction to Claimants, April 13, 2011.
280 **R-97**, SETENA Inspection Report, May 18, 2011; **R-103**, Inspection Report of the Department of Inspectors to the Social and Urban Development Manager, June 10, 2011; **R-104**, Police Inspection Report, June 22, 2011; **R-106**, Police Inspection Report, June 27, 2011; **R-108**, Letter from the Municipality to SETENA and MINAET (DeGA-0111-2011), June 28, 2011.
281 C-146.
282 **R-143**, Extension of injunction, September 26, 2013.

should have participated in those proceedings and exhausted all the administrative and judicial remedies they had at their disposal to prove it.[283] They did not.

251. Quite to the contrary, while Claimants challenged the SINAC Injunction through administrative appeals and started an action before the Administrative Contentious Tribunal, they completely abandoned such action soon after filing it. It was due to such disengagement by Claimants that on March 25, 2011 the Court reprehended Mr Aven, acting as the legal representative of Inversiones Cotsco, for his lack of responsiveness and failure to comply with four judicial orders issued by the Tribunal:

> "It called to the attention of the presiding Judge the fact that the claimant [Inversiones Cotsco] seems not to have an interest in the continuation of the proceeding, given that this office has made a request FOUR times for a very simple procedural requirement, being the submission of copies of relevant documents so that it could grant a hearing to the defendants."[284]

252. As to the injunction from the TAA, Claimants never even engaged in those proceedings not having appeared there once, even though they were duly served.[285]

253. As to the criminal proceedings, as it will be further explained below, Mr Aven is now a fugitive from justice for having absconded from the proceedings against him, fleeing the country in the middle of a trial.

254. As explained by the witness testimony of Prosecutor Martínez, Mr Aven could have reached a settlement by agreeing to repair the environmental damage caused and to re-design the Project in a way that respects Costa Rica's environmental laws.[286] The area of wetlands and forest only covers a small portion of the Project Site. Therefore, there was a possibility of developing the Project on the rest of the property not affected by wetlands and forest.

255. All the injunctions are interim measures and therefore it was up to Claimants to seek revocation either by proving that the works did not cause environmental damage or by agreeing to modify their plans and develop the Project in a way that would not endanger the environment. Claimants simply did not do this, something which is fatal to their case.

IV. CLAIMANTS CANNOT AVAIL THEMSELVES OF THE PROTECTIONS OF DR-CAFTA

256. The Claims are based, in large part, on Mr David Aven's interactions with the Costa Rican authorities and judiciary. Claimants contend that these interactions interfered with their

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283 First Witness Statement, Julio Jurado, ¶126.
284 **R-193**, Administrative Tribunal rejects motion to revoke SINAC Injunction, March 25, 2011.
285 **R-84**, Notification of TAA injunction to Claimants, April 13, 2011.
286 First Witness Statement, Luis Martínez Zúñiga, ¶88.

development of the Project. According to Claimants, this interference triggers several protections provided to U.S. investors by Chapter 10 of DR-CAFTA.

257. Before dealing with the nature of the Claims, Respondent contests the jurisdiction of this honorable Tribunal and the admissibility of the Claims for two principal reasons. First, (**A**) Mr Aven, the individual at whom Costa Rica's alleged violations were directed, is a dual national of Italy and the U.S. and has held effective and dominant Italian citizenship throughout the period relevant to the Claims

258. Second, Claimants' deliberately violated imperative norms of Costa Rican environmental protection, thereby invalidating the legality of their purported investment. Thus, (**B**) Claimants' misconduct bars them from claiming under the Treaty. Respondent reserves its right to supplement these jurisdictional objections subject to the information that will be requested (and disclosed) in the disclosure phase of these proceedings.

A. Due to David Aven's Italian effective and dominant citizenship, all claims arising out of alleged wrongful treatment of David Aven under the Treaty are barred

259. Unlike a number of other multilateral or bilateral investment treaties, DR-CAFTA specifically excludes from the scope of the Treaty dual nationals whose DR-CAFTA member state nationality is not their "dominant and effective nationality:"

> **"Investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."[287] (emphasis added.)

260. Article 10.28 of the DR-CAFTA has rightly been understood as incorporating by reference "the customary international law on dual nationality, as reflected in the *Nottebohm* decision."[288]

261. In *Nottebohm,* the International Court of Justice established the "genuine link" theory as the test to be applied in international law to determine the effective nationality of individuals. The Court defined nationality in the following terms:

> "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is

[287] **RLA-6**, DR-CAFTA, Chapter 10.
[288] **RLA-18**, Christopher Dugan and others, *Investor-State Arbitration*, p. 304.

> conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State."[289]

262. In practice, tribunals have considered a different set of factors to determine the effective nationality of a claimant. The Tribunal in *Champion Trading v. Egypt* considered that the fact that the alleged investors had used their Egyptian nationality to set up their investment in Egypt was enough for them to be deemed Egyptian nationals and therefore excluded them from investment treaty protection:

> "What is relevant for this Tribunal is that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality. According to the documents, Dr. Mahmoud Wahba acted in this connection as the legal guardian of his then still minor three children. The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention."[290]

263. Mr Aven has used his Italian, not his U.S., nationality in the conduct of businesses both outside and in Costa Rica. Indeed, multiple databases show records of Mr Aven, as an Italian national, acting as a director in several companies.[291] Further, an Annual Return of one of those companies, Litchfield Associates Ltd., issued by the United Kingdom Companies House lists Mr Aven (as a shareholder of that corporation) as an Italian national. Respondent further notes that Ms Paula Murrillo, the Costa Rican alleged to be holding 51% in the La Canícula Concession is also a shareholder of this company: [292]

Company Director *1*

Type: **Person**
Full forename(s): **DAVID**

Surname: **AVEN**

Former names:

Service Address recorded as Company's registered office

Country/State Usually Resident: **COSTA RICA**

Date of Birth: **20/06/1942** *Nationality:* **ITALIAN**
Occupation: **DIRECTOR**

289 **RLA-9**, *Nottebohm (Liech. v. Guatemala)*, International Court of Justice, 6 April 1955, p. 23.
290 **RLA-10**, *Champion Trading Co. v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, p. 17.
291 **R-268**, David Aven's corporate appointments as Italian national.
292 **R-212**, Litchfield Associates Ltd. Annual Return, August 8, 2015.

264. Moreover, Mr Aven became a Costa Rican resident in 2009. Throughout the residency application process with the Costa Rican immigration authorities, Mr Aven does not appear to have ever held himself out as a U.S. citizen. Instead, Mr Aven conducted his entire residency application process in Costa Rica, as an Italian national:

- On February 26, 2009, Mr Aven applied for residency with the Costa Rican immigration authorities using, exclusively, his Italian nationality;[293]

- As part of the proceedings, Mr Aven presented a Criminal Record granted to him by the Italian Ministry of Justice;[294]

- On June 8, 2009, Mr Aven was granted Costa Rican residency.[295] On his Costa Rican identity card, only his Italian nationality appears:

[296]

265. On June 16, 2011, Mr Aven applied for the renewal of his residency, once again using only his Italian nationality.[297]

266. Likewise, for the purposes of the development of the Project, and for all applications submitted in Costa Rica in relation to the Project, Mr Aven held himself out consistently, and exclusively, as an Italian national. For example:

- Mr Aven filed his criminal complaint against Steve Bucelato for defamation and slander on October 20, 2010, exclusively as an Italian citizen;[298]

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293 **R-208**, David Aven's Application for Costa Rican residency, February 26, 2009.
294 **R-207**, Criminal Record for Costa Rican residency, February 26, 2009.
295 **R-209**, Resolution granting Costa Rican residency to David Aven, June 8, 2009.
296 **R-210**, David Aven's Costa Rican Identification Document.
297 **R-211**, David Aven's Application for Renovation of Residency, June 16, 2011.

- In a letter he addressed to MINAE on January 6, 2011 requesting an inspection of the Project Site;[299] Mr Aven also held himself out, exclusively, as an Italian citizen;

- Again on May 6, 2011, Mr Aven submitted his sworn declaration to the Prosecutor's office[300] exclusively as an Italian national;

- And once more on September 16, 2011, Mr Aven filed a criminal complaint against Mr Bogantes, exclusively as an Italian, and not a U.S. citizen.[301]

267. Having consistently interacted with the Costa Rican authorities and judiciary as an Italian national, Mr Aven cannot now claim that he should benefit from the protections of DR-CAFTA in relation to those same interactions, but this time as a U.S. national. DR-CAFTA expressly and specifically precludes such conduct.

B. Claimants' development at Las Olas was illegal and all Claims arising out of the Project's impact of the Las Olas Ecosystem must be barred

268. As briefly explained above, the protection of the environment is a constitutional protection benefiting all Costa Rican nationals and residents.[302] This compliance with environmental protection rules is a key factor in the assessment of any investment contemplated in Costa Rica. Claimants enumerate a series of considerations on which they allege to have relied regarding Costa Rica's openness to foreign investment.[303] Yet, Claimants fail to mention the importance of the environmental sustainability of foreign and local investments in Costa Rica.[304]

269. The framework of environmental norms in place in Costa Rica is specifically intended to address this requirement. Thus, developers in Costa Rica must certify to the competent Costa Rican authorities, in this case, SETENA and the Municipality, that their project does either not affect the environment, or, when it does, that they are willing and able to take measures to avoid the likely impact caused by the project. Once works start, a developer has a continuing obligation to ensure that its works do not cause any illegal impact of the environment.

270. At every step of the Project, Claimants deliberately disregarded this framework of environmental protection: They deliberately violated their obligation to submit a good faith

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298 C-89.
299 **R-64**, Letter from David Aven to MINAET, January 6, 2011.
300 **R-90**, Sworn Declaration of David Aven, May 6, 2011.
301 C-139.
302 First Witness Statement, Julio Jurado, ¶33.
303 Claimants' Memorial, ¶¶17-22.
304 **R-274**, Impact of Tourism Related Development on the Pacific Coast of Costa Rica Summary Report, April 2010.

certification that their Project would not illegally affect the Las Olas Ecosystem; and they committed multiple breaches in the performance of their works. Claimants' illegal and bad faith conduct bars them from claiming under the Treaty. In the following paragraphs we set out with greater specificity the nature of this illegal conduct. In the section thereafter, Respondent sets out the basis for this jurisdictional objection under international law.

1. Claimants' EV application deliberately misled the Costa Rican authorities as to the likely negative impact of their development plan on the Las Olas Ecosystem

271. Claimants' entire application process to obtain SETENA's EV was tainted by their misrepresentations as to the nature of the Las Olas Ecosystem on the Project Site, and how their Project was going to affect that ecosystem. This misrepresentation was deliberate and misled SETENA and the other agencies involved in the EV process. Moreover, it has been the cornerstone of the entire debacle represented by Claimants' belligerent insistence to build on wetlands and destroy protected forests, often with the complete absence of lawful permission from the relevant State authorities.

272. Under Costa Rican law, Claimants' primary duty in the EV application process was to provide information on a transparent and good faith basis to SETENA, setting out the conditions of the Project Site. However, Claimants knowingly concealed the information that would have alerted SETENA to the nature of the Las Olas Ecosystem. This foundational point is only emphasized by the findings of Respondent's expert KECE.

a. *Claimants duty of transparency and good faith during the EV application process*

273. As previously discussed, Claimants failed to:

- identify the ecosystems present on the Project Site and those forming the Las Olas Ecosystem of forest and wetlands;
- conduct a biological survey to identify the large number of species that lived in those ecosystems; and
- identify the impact of the Project on the Ecosystem and propose measures to protect the species and wetlands that were going to be affected.

274. To divert the Tribunal's attention from Claimants' illegal conduct, they try to focus on a series of site visit reports from SETENA and SINAC that reached different conclusions as to the existence of wetlands with varying degrees of detail and specificity. But by doing so, Claimants misrepresent to the Tribunal their duties as developers under Costa Rican law and the limited

effect the reports had on Claimants' continuing obligations to comply with Costa Rican environmental law.

275. Put in its simplest form, Claimants were under a very clear duty to ensure the State was fully informed of the environmental conditions in existence on the Project Site. It was not open to Claimants to "try their hand" and see if they could obtain permissions in the absence of duly verifying the relevant conditions in existence on the whole Project Site. Hoodwinking the authorities and subsequently relying on reports with varying degrees of detail and specificity from the authorities was not (and is not), under Costa Rican law, a means of legitimate way of allowing Claimants to shun their principal obligations.

276. Indeed, when describing the legal framework in Costa Rica, Claimants fail to explain that the principal obligation of good faith they were under directly impacted their EV applications to SETENA, and is central to the implementation of Costa Rican environmental laws and regulations.

277. Good faith is a key driver in the relationship between the Costa Rican administration and its users. It binds the administration and addresses the risk of an abuse of power. But it also governs the users' conduct when they deal with the administration.

278. In the context of EV applications, the applicant's duty to submit a good faith assessment of the conditions on the land is supported by the sworn certifications the applicant must submit as part of the application. This is made clear in Dr Jurado's Statement:

> "Thus, we can conclude that the principle of good faith is contemplated, intrinsically, within the obligations imposed by the Administration to the developer regarding the Environmental Impact Assessment. In particular, the principle of good faith is reflected in the requirement of the Affidavit of Environmental Commitments:…"[305]
>
> "Document with format established by SETENA that must be completed and signed by the developer, with the support of an environmental consultant, when needed, in which, in addition to starting the phase of the Initial Environmental Evaluation, a description of the activity, work or project to be developed is presented, its environmental aspects and impacts, the geographical space where it will be installed and an initial assessment of the significance of the environmental impact that will occur."[306]
>
> "Likewise, the definition of environmental impact assessment assumes that the developer will act in good faith as it raises the application for such a study to the category of affidavit."[307]

[305] First Witness Statement, Julio Jurado, ¶91.
[306] First Witness Statement, Julio Jurado, ¶91.
[307] First Witness Statement, Julio Jurado, ¶92.

> "Environmental Impact Assessment (EIA): Procedure of analysis of the environmental characteristics of the activity, work or project, regarding its location to determine the significance of the environmental impact. It involves the submission of an environmental document signed by the developer, with the nature and scope of an affidavit. From its analysis, it can derive the granting of an Environmental Viability (license) or the environmental conditioning of it to the submission of other instruments of the EIA."[308]

> "From the above, we can conclude that the process of processing the Environmental Impact Assessment is based, primarily, on the principle of good faith and that the administration categorically states that the information and documents submitted in relation to the environmental impact of a project will be taken as true."[309]

279. Thus, unless an applicant truthfully identifies the likely impact of its project on the environment, and its proposed measures to mitigate that impact, SETENA is compromised from conducting an exhaustive environmental impact study that instead is the responsibility of the applicant. Essentially, neither SETENA nor SINAC have the resources to conduct thorough, exhaustive studies of all properties on behalf of each applicant. Costa Rican law is also not formulated on such an assumption. To expect this would delay the issuance of EVs by months if not years. For this reason, the site visits conducted by any of SETENA's specialized agencies necessarily have to be summary.

280. The entitlement that Claimants assert – to construct on and develop the Project Site – was intrinsically linked, not to internal visit reports of the agencies, but to Claimants' preparatory work which is so clearly lacking. This failure – and indeed Claimants' continuing failure to grasp this concept of Costa Rican law, as is evidenced in their Memorial – is one of the most compromising factors to their Claims.

281. Moreover, the site visit reports that Claimants bring into question to detract the Tribunal's attention from their own misconduct are not final and binding acts on which Claimants may rely to allege the harm they are claiming. As Dr Jurado explains:

> "One can speak of two types of administrative acts: the final acts and procedural acts (*actos de trámite*) or preparatory acts. The final acts are those that resolve the administrative procedure, with full effect in the legal sphere of the user. That is, these impose obligations or confer rights. On the other hand, procedural acts, usually, are mere acts of preparation that integrate the procedure before issuing a decision. They themselves are not able to generate direct legal effects since they lack the power to decide the merits of the matter."[310]

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308 First Witness Statement, Julio Jurado, ¶92.
309 First Witness Statement, Julio Jurado, ¶93.
310 First Witness Statement, Julio Jurado, ¶105.

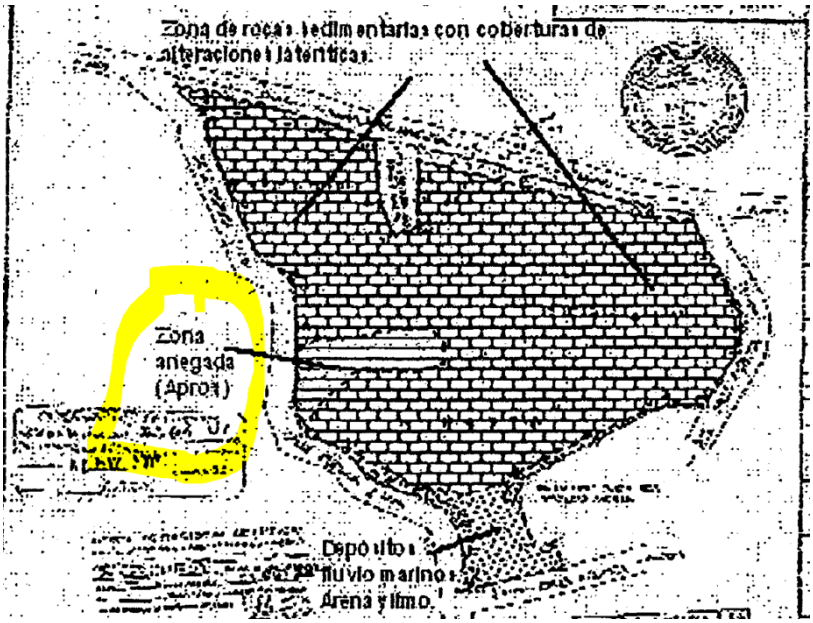
282. Accordingly, the alleged contradictions between certain site visit reports will not change the key issue in this case: Claimants applied for permits, and conducted works, knowing that the conditions on the site warranted for a different course of action that would have prevented the impact on the Las Olas Ecosystem.[311]

b. *Claimants' wrongful omissions as to the conditions on the Project Site misled SETENA into issuing an EV that Claimants were not entitled to obtain*

283. First, Claimants knew that the Las Olas Ecosystem included wetlands, but they failed to alert SETENA and properly complete the D1 form in order to reflect that fact.

284. As mentioned,[312] Claimants also contracted a well-known hydrogeologist, Roberto Protti, in order to perform a Geological Hydrogeological survey of the Condominium site in 2007.[313] Critically, Claimants did ***not*** include this survey within their initial submission to SETENA of November 8, 2007. The Protti Report was only filed with SINAC in 2011,[314] ***after*** Claimants obtained SETENA's Condominium EV in 2008.

285. Unlike Claimants' application to SETENA, the Protti Report noted the existence of a central zone that presented swamp-type flooded areas (*areas anegadas de tipo pantanoso*) with poor draining, which the Protti Report mapped:

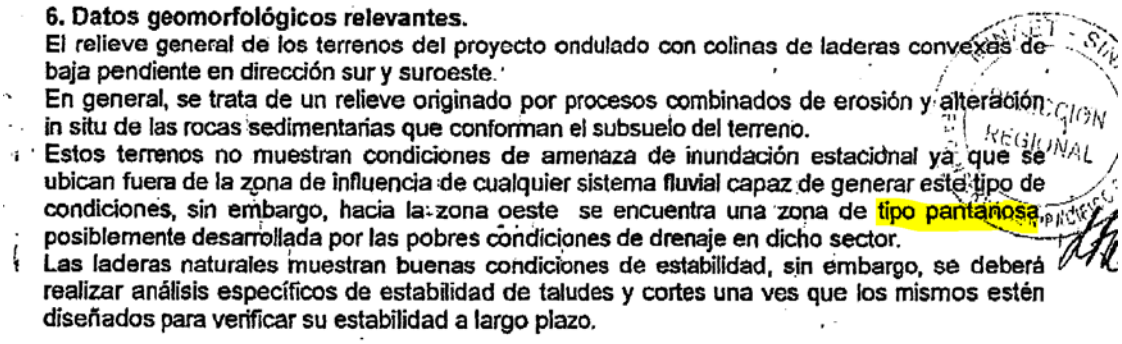


311 First KECE Report, Section IV.

312 See, section III.B.4.d.

313 **R-11**, Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007.

314 **R-11**, Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007. The survey rests in the files of SINAC for Las Olas Project.



6. Datos geomorfológicos relevantes.
El relieve general de los terrenos del proyecto ondulado con colinas de laderas convexas de baja pendiente en dirección sur y suroeste.
En general, se trata de un relieve originado por procesos combinados de erosión y alteración in situ de las rocas sedimentarias que conforman el subsuelo del terreno.
Estos terrenos no muestran condiciones de amenaza de inundación estacional ya que se ubican fuera de la zona de influencia de cualquier sistema fluvial capaz de generar este tipo de condiciones, sin embargo, hacia la zona oeste se encuentra una zona de tipo pantanosa, posiblemente desarrollada por las pobres condiciones de drenaje en dicho sector.
Las laderas naturales muestran buenas condiciones de estabilidad, sin embargo, se deberá realizar análisis específicos de estabilidad de taludes y cortes una ves que los mismos estén diseñados para verificar su estabilidad a largo plazo.

286. Thus, Claimants had the means of identifying the presence of wetlands and Decree 32712[315] compelled EV applicants to conduct an "assessment of the biological aspects" of a projects' impact. This should have set off loud alarm bells for Claimants, triggering the obligation of notification. Instead, the Protti Report was buried.

287. Further, the Geotechnical Survey submitted by Claimants also gave indicia of the existence of wetlands. The results after conducting several boreholes for the infiltration survey indicated "no infiltration, water table is at surface level" (*"no filtra el nivel freático se encuentra superficial"*).[316] This showed the presence of water saturating the soil, which is one of the conditions of wetlands. Thus, it should have been investigated further.

288. The developer declared in the Environmental Management Plan that it acknowledged the trend in the area, identified as the "developed alluvial valleys between the coast and the foothills of the Cordillera de Talamanca and Fila Costanera" Álava formation of wetlands: ... the area at issue corresponds to "flat deposits prone to flooding, so the formation of mangroves is common near the rivers mouths." [317] These observations lead to the identification of wetlands and to connections to the mouths of nearby rivers, as in the case of the creek and Aserradero wetland.[318]

289. Second, in their EV application, Claimants failed entirely to inform SETENA that the Las Olas Ecosystem was within a few meters of the Aserradero River, which is a protected wetland categorized as Site 531 on the National List of Wetlands.[319] As explained in the First KECE Report, any study of the environment impact of the Project on the Las Olas Ecosystem had to also include the impact on the connected system of the Aserradero River.[320]

315 C-215.
316 C-222, p. 137.
317 C-222, p. 59
318 First KECE Report, ¶84.
319 **R-268**, National Wetlands Inventory of Costa Rica, 1998.
320 First KECE Report, ¶84.

290. Third, Claimants' submission for the Condominium was extremely weak as to the assessment of biological aspects, failing to identify key ecosystems such as wetlands and forest. Both of these are classified under the General Regulations on the Procedures for Environmental Impact Assessment as "Environmental Fragile Areas",[321] an issue that should have been identified, clarified and deeply analyzed by Claimants and their advisors in charge of the environmental assessment.

291. This lack of identification by Claimants would have significantly changed the environmental assessment process conducted by SETENA and would have possibly allowed them to cure the flaws of information attributable to Claimants. Claimants misled SETENA, especially because:

- In the D-1 Form, Claimants affirmed that the Project will have "no affectation" to flora or fauna;[322]

- In the D-1 Form, point 6, "Accumulative and Synergic Impacts," when answering question 6: "Will the environmental effects of the proposed activity, work or project generate any pressure over the flora and fauna existing in the zone?" Claimants answered no;[323]

- In the Environmental Management Plan, the measures proposed by Claimants for the protection of biological resources (flora and fauna) are extremely "stunted" given the richness that the Las Olas Ecosystem is known to have.[324] As to the elimination of flora, Claimants proposed:

> "Only vegetation indispensable for construction sites will be eliminated. Efforts will be made not to cut trees, but if necessary, a permit will be requested. Areas will be re-vegetated with species specific to the area."[325]

- Regarding the effects of the Project over fauna, Claimants proposed:

> "Signs prohibiting hunting or damage to wildlife will be placed and operators will be instructed in this regard. Vegetal species that provide shelter and nourishment to fauna will be planted."[326]

292. SETENA did not request that these measures be complemented with suitable measures for the protection of wetlands and forest, due to the lack of identification by Claimants who were in charge of the environmental assessment.

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321 C-208.
322 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007, p. 36.
323 C-222, p. 213.
324 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007.
325 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007, pp. 61-63, 74.
326 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007, p. 61-63, 74.

293. The overall omissions helped Claimants obtain a low score in order to avoid the conducting an EIS, instead of an Environmental Management Plan as SETENA did. As explained earlier, based on Claimants' first submission of the D-1, SETENA will determine whether a project requires a (i) Affidavit of Environmental Commitments, (ii) an Environmental Management Plan or (iii) a EIS.

294. By omitting in their assessment, Environmental Fragile Areas, Claimants were able to use weighting criteria Beta No. 1.5, applicable to areas without a regulation plan, to obtain a final score of 429, which allowed them solely to perform an Environmental Management Plan.[327] If Claimants had identified all of the ecosystems that were within the Condominium site and the ecosystems outside the Condominium site that would also be affected by the development, Claimants should have used weighting criteria Beta No. 2 which applies to projects in "fragile areas."[328]

295. The use of the weighting criteria Beta No. 2 would have doubled the initial score of Claimants and would have (i) informed SETENA of the existence of fragile areas to be affected by the Las Olas Project and (ii) led SETENA to require an EIS instead of an Environmental Assessment Plan.

296. Fourth, while the criminal prosecution was unable to positively prove a link[329] between the submission of a forged document certifying that the Project was not a threat to the biodiversity in the area, it is worth mentioning that this document only appeared in Claimants' application file after SETENA had raised Claimants' omission to address the existence of a protected forest or protected vegetation and requested a certification from Claimants to that effect.[330]

297. Thus, SETENA issued its EV based on material omissions and misrepresentations from Claimants. SETENA's cursory site visit while it was reviewing Claimants' misleading EV application was also based on the misrepresentation from Claimants that they complied with their duty to conduct an exhaustive and transparent study of the conditions on the Project Site. SETENA had no reason to suspect Claimants' deception. As a result:

- SETENA did not request SINAC to opine on the wetlands or the forest condition on the land;

327 C-222, p. 214.
328 C-215, p. 14; **R-269**, Amendments to D1 Decree 32712, Decree 34375, October 8, 2007, p. 12.
329 First Witness Statement, Luis Martínez Zúñiga, ¶38.
330 C-222.

- SETENA thought that in the absence of any identification by the applicants of a natural condition that warranted specific accommodation measures, all that was necessary was confirmation that the Project Site did not fall within a protected WPA, which it did not.[331]

298. Having been duped by Claimants, it is probable that some public officials at SETENA and SINAC sought to avoid varying the initial EV. But, contrary to Claimants' allegations, the existence of certain inconsistent site visit reports by SETENA and SINAC is irrelevant:

299. As demonstrated above, Claimants had the information regarding the existence of multiple wetlands on the Project Site, yet they failed to disclose it in their EV application.

300. SETENA's and SINAC's site visit reports do not constitute final administrative acts on which Claimants can somehow rely to breach Costa Rica's environmental laws.

301. Even if SETENA'S and SINAC's site visit reports were to constitute final administrative acts, which they do not, they would not exonerate Claimants from their imperative obligation to refrain from knowingly impacting endangering the wetlands and forest in the Las Olas Ecosystem.

302. Claimants' attempts to clutter the debate with multiple site visit reports from Costa Rican agencies, and an improbable conspiracy theory from various organs of the Costa Rican state are but a subterfuge to avoid a very simple truth in this case: Claimants acquired a cheap piece of property with a rich ecosystem, and they sought to develop it with no effort to accommodate the natural conditions of the site, by misleading SETENA as to the true conditions of the Project Site.

c. *Claimants' fragmentation of their EV application misled SETENA as to the natural conditions on the Project Site and their likely impact by Claimants' Project*

303. Claimants allege that, "due to the size of the project," they have "notionally divided the [Project Site] in 4 areas."[332] But Costa Rican law prohibits a developer from fragmenting its EV applications in relation to a single project. Pursuant to Article 94 of the Biodiversity law:

> "The environmental impact assessment as it relates to biodiversity shall be undertaken in its entirety, even when the project is programmed to be developed in stages."[333]

331 C-48.
332 Claimants' Memorial, ¶50.
333 C-207.

304. Further, the criteria against fragmentation in residential projects, like the Las Olas Project, are evident from the highly regulated framework the Urban Planning Act and the Construction Act set forth.[334] The reason behind these strict regulations is that the bigger the project, the greater the impact the project can have on the environment, thus, the above mentioned statutes establish a series of legal and technical requirements to ensure that fragmentation within residential projects will not be adverse to the environment. This obligation is not limited to developments in Costa Rica. Indeed, the same rule applies under U.S. federal regulations, of which Claimants, who allege to be experienced developers, were no doubt aware. The principle is obvious – if a divide and rule approach was permissible, it would undermine the very high standards of protection that all environmental laws pursue.

305. In this case, Claimants' master plan for the Project Site included several sub-projects in relation to which Claimants applied for separate EVs.[335] This led to a fragmented environmental assessment of the Project. Such fragmentation made it significantly more difficult for the authorities to evaluate the impact on the ecosystems affected by the Project, namely, the forest and the wetlands.

306. Indeed, Claimants initiated works based on an EV obtained for the sole Condominium Site. By limiting the scope of their EV application to that group of lots,[336] Claimants omitted addressing the impact of their Project on the entire ecosystem on the Project Site. In particular:

- Likewise, as the First KECE Report explains, some of the affected wetlands on the Las Olas Ecosystem were left out from the Condominium site:[337]

> "While much of this Western Wetland area was not part of the Las Olas Condominium site, and was not submitted by Claimants for review under the Environmental Viability Assessment for the Condominium (1597-2008-SETENA)[338] or associated management plan (GeoAmbiente S.A., 2007),[339] the area was part of the Project Site. This area of the Project Site has been identified as "Easements and other lost site."

- The boundaries of the Condominium site also left out the connections to the Aserradero River system.

334 C-205, Articles 8, 15; C-219, Articles 8, 15, 16, 24, 32-40.
335 See, section III.B.4.
336 C-222.
337 First KECE Report, ¶80.
338 C-52.
339 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007.

307. This fragmentation of the Project Site thus reinforced Claimants' omissions in the application process. It permitted Claimants to present a truncated, opaque submission of the likely impact of their Project on the Las Olas Ecosystem, thus acting in bad faith and violating their obligation under Costa Rican law.

2. Claimants' work was conducted illegally, damaging the Las Olas Ecosystem

308. Claimants have committed numerous irregularities in the performance of works to develop the Project in breach of Costa Rican laws. First, Claimants failed to comply with the rules that apply to the beach Concession. Second, Claimants went ahead with the development despite the EV having lapsed. Third, Claimants started works without having obtained the relevant permits from the Municipality for the Condominium. Fourth, Claimants obtained the Municipality permits irregularly. Fifth, Claimants continued working in violation of the injunctions to suspend work.

a. *Claimants failed to comply with the rules that apply to the Concession in breach of Costa Rican law*

309. The Concession Agreement is regulated by the Maritime Terrestrial Zone Law (the **"MTZ Law"**).[340] Under Clause Eight of the Concession Agreement, La Canícula expressly assumed the obligation to abide by all of the provisions of the MTZ Law and its Regulations.[341] Claimants failed to comply with all of their obligations under the Concession Agreement, each of which, according to Article 53 of the MTZ Law, is sanctioned with the cancellation of the Concession by the corresponding municipality.

310. First, under Clause Six of the Concession Agreement and Article 28 of the MTZ Law, Claimants had a duty to pay annual taxes calculated based on the 4% of the appraisal of the land.[342] **Through the more than fourteen years that Claimants held the Concession, Claimants never paid any tax to the Municipality**. Costa Rican case law has stressed that the burden to comply with this duty is on the licensee, who has assumed a contractual commitment to pay the tax every year.[343]

311. Second, under Clause Nine of the Concession Agreement, Claimants had a duty to initiate the development of works within one year from the registration of the Concession Agreement with the National Registry of Concessions. La Canícula was awarded the Concession on March 6,

340 C-221.
341 **R-2**, Concession Agreement between La Canícula and the Municipality of Parrita.
342 **R-2**, Concession Agreement between La Canícula and the Municipality of Parrita; C-221.
343 **R-175**, Ruling No. 225-2004, Attorney General's Office July 19, 2004.

2002 and the Concession was registered with the National Registry of Concessions on June 4, 2004.[344] Therefore, Claimants should have started works at the latest by June 4, 2005.

312. Claimants failed to start works within that mandatory timeframe. Claimants admit that they obtained two construction permits for the Concession in 2007 and on August 29, 2008[345] (i.e. 2 years later than the deadline established in the Concession Agreement). Thus, Claimants failed to start the development within the required timeframe in breach of the Concession Agreement.

313. Third, under Clause Thirteen of the Concession Agreement, Claimants had the duty to submit declarations on the value of the constructions to be performed on the land to the Municipality. Claimants built four cabins on the Concession's land;[346] however, they have not proved that a declaration of the value of each of those works was submitted to the Municipality in accordance with Clause Thirteen of the Concession Agreement.

314. Fourth, under Article 31 of the MTZ Law, in case a corporation is awarded a concession, a Costa Rican national must, at all times during the period of the concession, own more than 50% of its shares. On March 6, 2002, when La Canícula was awarded the Concession, it was 100% owned by Mr Carlos Alberto Monge Rojas, a local Costa Rican national. On April, 2001, Mr Aven acquired 100% of the shares of La Canícula from Mr Monge.[347] Mr Aven's acquisition of the shares violated Article 31 of the MTZ Law because the totality of the shares of La Canícula (the Concession holder) were now owned by a foreign national.

315. Claimants have conveniently omitted the exact date when the 51% of the shares of La Canícula was sold to Paula Murillo (the local national). However, during the period that Mr Aven had title to the shares, the Concession was owned in its totality by a foreign national in breach of Articles 47 and 31 of the MTZ Law.

316. All of Claimants' wrongdoings are sanctioned under the MTZ Law with the cancellation of the Concession. Under Article 53 of the MTZ Law, a municipality or the Costa Rican Institute of Tourism can cancel a concession on the following grounds, among others:[348]

- The licensee's failure to pay the respective taxes;
- The licensee's non-compliance of the obligations undertaken in the concession agreement;

344 **R-8** Registration of the Concession, June 4, 2004.
345 C-14; **R-98**, Municipality's certification of construction permits granted to Claimants to TAA, May 19, 2011.
346 C-56; Witness Statement, Jovan Damjanac, ¶47.
347 C-8.
348 C-221, Article 53.

- The licensee's violation of the provisions of the MTZ Law.

317. Claimants' misconduct and disregard for the rules applicable to the Concession and the provisions of the MTZ Law during the performance of the Concession Agreement prevents them from claiming it as a valid investment for purposes of this Arbitration.

b. *Claimants started the development of the Easements and related lots site without an EV from SETENA*

318. As part of Claimants' fragmentation scheme, Claimants segregated an area of the terrain for the construction of easements and other lots to be part of the Las Olas Project.[349] Claimants did not obtain an EV from SETENA for the development of this part of the Project neither did the EV for the Condominium site cover the area for the Easements and related lots site.

319. As the First KECE Report explains, the EV granted for the Condominium site did not cover the Easements and related lots site:

> "While much of this Western Wetland area was not part of the Las Olas Condominium site, and was not reviewed under the Environmental Viability Assessment for the Condominium (1597-2008-SETENA) or associated management plan (GeoAmbienteS.A., 2007), the area was part of the Project Site. This area of the Project Site has been identified as Easements and other lost site:
>
> **Easements and other lots site**
>
> 
>
> This area of Easements and other lots site was included in the revised site plans (DEPPAT, 2007) (Appendix 12), submitted by the developer to the Municipality of Parrita on July 22, 2010 (following the construction activities to

[349] Claimants' Memorial, ¶ 50 (c).

> alter this area to urban use, which occurred prior to June 2010), in order to obtain construction permits for easements."[350]

320. From Claimants' submission to the Municipality of the Environmental Contingencies Plan for Land Movements, the Easements and related lots site was to comprise "the segregation of 72 lots in front of the public road through urban easements."[351]

321. As described in Section , starting July 16, 2010, Claimants obtained permits for the construction of seven easements within the Las Olas Ecosystem[352] without even having filed for much less obtained the EV from SETENA for the development of such areas.

322. Once again, Claimants "took a short cut" through the environmental clearing process in flagrant breach of Article 17 of the Environmental Organic Act which establishes that:

> "Any human activity that alters or destroys elements of the environment or which generates waste, toxic or hazardous materials, shall require an environmental impact assessment by the National Environmental Technical Secretariat [SETENA] created under this law. **Prior approval from this agency shall be an indispensable pre-requisite to the commencement of any activities, works or projects**. The laws and regulations shall indicate what activities, works or projects require environmental impact assessment."[353] (emphasis added)

323. Claimants' liability for failure to comply with the EIA process is prescribed in Article 93 of SETENA's General Regulations on the Procedures for Environmental Impact Assessment:

> "If the SETENA finds that the developer has commenced activities, works or projects without complying with the EIA process, it will order, in accordance with Article 99 of the Environmental Organic Act, as appropriate, the following actions:
>
> 1. Suspend, close down temporarily or permanently, the activity, work or project.
>
> 2. The demolition or modification of existing infrastructure works.
>
> 3. Any other protective measure of prevention, conservation, mitigation or compensation as necessary."[354]

324. Apart from the sanctions described above, Claimants are also liable for the damage caused to the portion of the wetland located in the Easements and related lots site. According to the last paragraph of Article 93 of SETENA's General Regulations on the Procedures for Environmental Impact Assessment:

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350 First KECE First Report, ¶¶80, 81.
351 **R-42**, Environmental Contingencies Plan for Land Movements (Plan de Mitigación Ambiental), July 22, 2010.
352 C-71.
353 C-184, Article 17.
354 C-208, Article 93.

> "Notwithstanding the foregoing, in accordance with Article 101 of the Environmental Organic Act, the perpetrators of the infringement, by action or omission, will be liable for the corresponding sanction, if it is established that environmental damage has occurred, by holding an ordinary administrative procedure on the basis of the General Law of the Public Administration and in full observance and respect of the constitutional guarantee of due process."[355]

c. *Claimants breached Costa Rican law by starting construction on the Condominium site despite the EV having lapsed*

325. The EV granted to Claimants on June 2, 2008 for the Condominium site had a term of two years lapsing on June 2, 2010. On June 14, 2010, when the EV had already lapsed, Claimants notified SETENA that Claimants had allegedly started works on June 1, 2010.[356]

326. Claimants failed to comply with the express provisions of the EV that required them to notify SETENA of the intention to start works, one month in advance of the initiation of works.

327. Further, on June 1, 2010, Claimants did not have the construction permit from the Municipality for the Condominium (which was only granted on September 2010).[357] Therefore, (i) either Claimants lied to SETENA to avoid the EV from lapsing; or (ii) Claimants initiated works illegally without having obtained the construction permits from the Municipality. Both being serious illegal conducts under Costa Rican law.

d. *Claimants started works without holding the necessary construction permits from the Municipality for the Condominium*

328. Under Article 74 of Law No. 833 (the **"Construction Act"**), any works related to construction within the national territory of Costa Rica, be it provisional or permanent, require a permit granted by the corresponding municipality.[358]

329. The construction permits for the easements were granted by the Municipality to Claimants on July 16, 2010 and the permit for the construction of infrastructure for the Condominium was granted on September 7, 2010. Nonetheless, Claimants started works at the Project Site in 2009.

330. On April 26, 2009, Ms Vargas visited the Project Site due to complaints from neighbors of works being conducted at the site. Ms Vargas later reported that on that visit she saw paved

355 C-208, Article 93.
356 **R-31**, Delayed notice of the start of works to SETENA, June 14, 2010.
357 C-85.
358 C-205.

roads.[359] On May 21, 2010, Ms Vargas visited the Project Site for a second time and saw that works were being undertaken.[360]

331. Given Claimants wrongdoings, on June 14, 2010, the Municipality notified Claimants of the complaints that works were being performed without obtaining any construction permits. The Municipality demanded that Claimants obtain the required permits to carry out work and warned Claimants of further legal action to be undertaken by the Municipality against the Project, such as the closure of roads and commencing legal action.[361]

332. Therefore, Claimants infringed the provisions of Costa Rica's Construction Act.[362]

e. *Claimants obtained the Municipality permits irregularly*

333. After the granting of the EV, Claimants had to obtain construction permits for Las Olas Project from the Municipality. In order to grant construction permits, the Municipality requires that the developer submit:[363]

- A certification of the Land Use for the construction site;[364]
- 3 copies of the maps of the construction site certified and signed by a responsible engineer or architect or member of the Federate College of Engineers and Architects of Costa Rica;[365]
- Alignment certificates, if necessary;[366]
- Letter of availability of rainwater drainage;
- Letter of electricity availability;
- An insurance policy for the works to be performed;[367] and
- The payment of a fee.[368]

359 C-70.
360 C-170.
361 **R-35**, Letter from the Urban and Social Development Department (OIM No. 114-2010), June 14, 2010.
362 C-205
363 **R-199**, Munipality of Parrita construction permits requirements.
364 C-219, Article 28.
365 **R-192**, Article 54, January 10, 1966; C-205, Article 18.
366 C-205, Article 18.
367 **R-191**, Insurance Policy provisions, Labor Code.
368 C-205, Article 79.

334. Where the property is located within a concession in the Maritime Terrestrial Zone, the Municipality requires the registration of such concession. If the property will be developed, the Municipality requires from the developer the submission of the current EV granted by SETENA.[369]

335. Claimants communicated to SETENA that they had started works on June 1, 2010. However, on July 19, 2010, the Municipality denied the permit for construction for the Condominium for several reasons: [370]

- The term of the EV had expired;
- Claimants failed to submit a copy of the hydrological study;
- Claimants failed to submit drawings for the rainwater drainage within the Project Site; and
- Claimants failed to submit a copy of the cadastral drawing.

336. On September 7, 2010, the Municipality issued a certification of the Land Use for the Project's specific lot.[371] On the same date, the Municipality approved the grant of the construction permit to Claimants to start construction work for the Condominium for property No. 2881-M-000.[372]

337. As Ms Vargas explains in her witness statement,[373] on September 7, 2010, Mr Sebastián Vargas, on behalf of Claimants, went to the Municipality to submit the outstanding documents. After his visit, the Municipality issued the permit.

338. However, on September 13, 2010, the Department of Municipal Engineering of the Municipality noted that:[374]

- The Condominium lacked two Alignment Certificates from the National Institute of Housing and Urban Development, and from the Ministry of Public Works and Transportation; and
- The Federate College of Engineers and Architects of Costa Rica had notified the Municipality that the Project did not have a professional in charge as required by the law.

369 **R-199**, Munipality of Parrita construction permits requirements.
370 **R-39**, Denial of construction permit (OIM 133-2010), July 16, 2010.
371 **R-53**, Certification of Land Use for the Condominium (US No. 182-10), September 7, 2010.
372 C-85.
373 First Witness Statement, Mónica Vargas Quesada, ¶25.
374 **R-57**, Municipality report on outstanding documents (ADU No. 013-10), September 13, 2010.

339. In fact, Claimants failed to submit the Alignment Certificates from the two institutions prior to the approval of the construction permit.

340. Therefore, Claimants illegally obtained the construction permit for the Condominium by failing to present the necessary documents.

f. *Claimants continued working in violation of the injunctions that sought to suspend works*

341. Several agencies involved in the investigation of Claimants' misconduct filed injunctions against the continuation of the Las Olas Project. Particularly:

- On February 4, 2011, SINAC issued an injunction ordering Claimants to refrain from construction and other work on the Project Site;[375]
- On April 13, 2011, SETENA issued an injunction ordering that any works at the site be suspended and that the Municipality refrain from granting any construction permits to the project;[376]
- On April 13, 2011, the TAA issued an injunction ordering the enjoinment of any works or activity that could cause an environmental damage involving the impact of a wetland by the felling of trees and the installation of drainage tubes.[377]

342. On February 14, 2011 SINAC notified Claimants of the injunction which ordered them to stop all work on the Project.[378]

343. On May 11, 2011, the Municipality gave notice to Claimants of the injunction issued by SETENA and requested that Claimants stop all works at the site.[379] Since Mr Damjanac refused to receive the notification of the injunction, the Municipality had to request the intervention of the local police in order to serve Claimants.[380]

344. On April 13, 2011, the TAA notified Claimants of the injunction in Claimants' offices.[381]

345. Claimants state in their Memorial that "following receipt of the Shutdown Notice [of May 11, 2011], Claimants stopped all work on the Project Site, with the exception of some necessary maintenance work."[382]

375 C-112
376 C-122.
377 C-121.
378 C-112, SINAC Notification, February 14, 2011
379 **R-92**, Letter by the Municipality to Claimants giving notice of the injunction (OIM-119-2011), May 11, 2011.
380 C-125.
381 **R-84**, Notification of TAA injunction to Claimants, April 13, 2011.

346. However, just one day after receiving notice of the injunction, the inspection report of May 12, 2011 revealed that Claimants were still performing works on roads with a backhoe: [383]

347. Certainly, these works do not constitute "maintenance works" but show the disregard of Claimants of Costa Rican law and of its authorities.

348. Likewise, on May 18, 2011, SETENA officers conducted an inspection on the Project Site and reported that work was still being performed.[384]

349. On June 9, 2011, almost one month after Claimants had notice of SETENA's injunction, the Municipality reported again that work was being performed on Claimants' property No. 156482, an easement that belonged to Noches de Esterillos S.A., now Mis Mejores Años Vividos, S.A.[385]

350. On June 23, 2011, TAA officers also conducted a visual inspection of the Project. In their report to the TAA, the officers reported the existence of a house being built in the area.[386] Neighbors[387] and the Municipality[388] also alerted the authorities of the non-compliance with the injunction orders.

351. On June 22 and June 27, 2011, the Parrita police visited the Project Site and reported that on both days, works kept being performed.

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382 Claimants' Memorial, ¶157.
383 **R-270**, Inspection Report of works being on the Project site, May 12, 2011.
384 **R-97**, SETENA Inspection Report, May 18, 2011
385 **R-103**, Inspection Report by the Department of Inspectors to the Social and Urban Development Manager, June 10, 2011.
386 **R-105**, Visual inspection report by TAA officers, June 23, 2011.
387 **R-104**, Police Inspection Report, June 22, 2011.
388 **R-108**, Letter from the Municipality to SETENA and MINAET (DeGA-0111-2011), June 28, 2011.

352. Therefore, on June 28, 2011, the Municipality informed SETENA and SINAC that Claimants continued to disregard the injunctions and sent the two police reports.[389]

353. Claimants allege, wrongly, that they were not required to comply with the SINAC Injunction because SINAC had no power over the permits granted to Claimants by SETENA and the Municipality.[390] As Dr Jurado explains in his statement:

> "First, SINAC does have the power to issue injunctions of this kind. On the one hand, this power is established in the Environmental Organic Act, which aim is to provide Costa Ricans and the State with the necessary tools to achieve a healthy and ecologically balanced environment. In addition, the Law indicates that by applying it, the State shall defend and preserve that right. In addition, the Act provides that, when facing the violation of regulations of environmental protection or harmful behavior towards the environment, the Government may, among other measures, order the full or partial, temporary or final closure of the events or facts causing the complaint, or the total, permanent or temporary, partial cancellation of permits, licenses, premises or businesses causing the complaint, the act or the polluting or destructive fact.
>
> This also goes hand in hand with the provisions of Article 11 of the Biodiversity Law regarding the precautionary approach, the principle *in dubio pro natura*, the environmental public interest criteria and the criteria of integration, all discussed above. As mentioned, these criteria are guidelines for the Administration, which authorize it to act for environmental conservation, especially when there is possible damage to [the environment].
>
> In addition, the Wildlife Conservation Law establishes the framework of action for SINAC to perform all activities and establish the necessary measures for the proper management and conservation of wildlife in Costa Rica.
>
> Therefore, Claimants are not right in stating that SINAC had no authority to issue those injunctions. On the contrary, SINAC fulfilled its mandate and its obligation to prevent any environmental damage, so its act was adjusted to law.
>
> The second reason why Claimants' assertion is wrong is because a user just cannot decide to "ignore" and disrespect an administrative order. That is why the order contained a legend stating that "if there is a violation to this administrative injunction, it is a cause for disobedience of the authority, and the case will be taken to the appropriate judicial authorities."[391]

354. Further, the official Environmental Criminal Prosecution Policy establishes as a duty of the administrative officer to undertake precautionary measures when they find that a crime might be committed against wetlands and forests. As to the crime of refilling of wetlands, the Policy establishes that:

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389 **R-97**, SETENA Inspection Report, May 18, 2011; **R-103**, Inspection Report by the Department of Inspectors to the Social and Urban Development Manager, June 10, 2011; **R-104**, Police Inspection Report, June 22, 2011; **R-106**, Police Inspection Report, June 27, 2011; **R-108**, Letter from the Municipality to SETENA and MINAET (DeGA-0111-2011), June 28, 2011.

390 Claimants' Memorial, ¶¶ 138-140.

391 First Witness Statement, Julio Jurado, ¶¶95-99.

> "**When the administrative officer discovers drainage works, he shall order that the party responsible immediately suspend the works**, and if the officer does not, or if despite his order the offender does not stop the works, the prosecutor who receives the complaint shall request the judge, as a precautionary measure and with immediate effect, the suspension of such work and the performance of the necessary work to return the wetland to its original state."[392] (Emphasis added).

355. As to the precautionary measures that administrative agencies and prosecutors have to take to prevent or cease the commissioning of forestry related crimes, the Policy establishes that:

> "In the forestry field, administrative bodies have a number of preventive powers to prevent any ongoing damage to the environment. These [bodies] can issue, for example, administrative orders for the suspension of illegal logging or activities in violation of a permit issued by the same state forestry body. In such instances, it is, MINAE who has the duty / power to issue these orders and if a person against whom an order is issued subsequently fails to comply with that order, they may be charged with the crime of disobedience to authority.
>
> Prosecutors must also order, as precautionary measures, any act or omission that is required from the offender to return things to the state they were in before the fact or simply to cease the effects of the acts to the detriment of the environment. Such powers are conferred in articles 139 and 140 of the Criminal Procedure Code."[393]

356. SETENA, SINAC and the TAA complied with the precautionary principle when issuing the injunctions and therefore acted reasonably and within the boundaries of law.

357. As explained above, public agencies in Costa Rica have to comply with the precautionary principle when it comes to their knowledge that there is a likelihood of impact to the environment. The agency does not have to be certain of the existence of damage, but the likelihood of it is sufficient for it to undertake the necessary measures to prevent any impact on the environment. This stands to reason given the often irreversible damage that can be caused by unauthorized construction work.

358. In this sense, the Constitutional Chamber of the Supreme Court of Justice, explained that:

> "Properly understood, the precautionary principle refers to adopting measures, not against the lack of awareness of risk generating facts, but against the lack of certainty of whether those facts will actually cause harmful effects to the environment."[394]

359. The Costa Rican Supreme Court has recognized that state agencies, acting within the field of environmental protection, have the power to apply the precautionary principle as well:

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392 **R-216**, Environmental Criminal Prosecution Policy, General Attorney's Office of Costa Rica, 2005, Section 3.7.
393 **R-216**, Environmental Criminal Prosecution Policy, General Attorney's Office of Costa Rica, 2005, Section 9.26.
394 **R-201**, Decision 3480-03, Constitutional Chamber, Supreme Court of Justice, May 2, 2003.

> "There is an obligation on the State, as a whole, to take necessary measures to protect the environment, to avoid certain degrees of pollution, deforestation, extinction of flora and fauna, excessive or inadequate use of natural resources, which endanger the health of the users. [This includes] both the Central Government-Ministries, such as the Ministry of Environment and Energy and the Ministry of Health, that because of the subject matter, have wide participation and responsibility involving the conservation and preservation of the environment, entities that most of the time, act through their specialized agencies in the field such as the Wildlife General Management, the Forestry Department and the National Environmental Technical Secretariat (SETENA)….."[395]

360. The Supreme Court has also said:"

> Well, as the plaintiff argues, the Chamber has indeed established that undertaking a precautionary or anticipated measure, under the precautionary principle, implies an objective assessment of the risk and the cost-benefit analysis of taking or failing to take precautionary action, so that there are no arbitrary or discriminatory measures. Nonetheless, the plaintiff must consider that this refers to those cases where one has all of the necessary elements to determine whether there is a causal relationship between the human activity that would be affected by the measure and the potential damage to the environment that is to be prevented […]. Conversely, and according to the principle in question, it is not possible to undertake the assessment indicated above, when there is no scientific information or when this is insufficient in order to determine with absolute certainty which are the factors that could cause damage to the environment, and especially when dealing with situations where the damage could be serious and irreversible. It is in these situations where the preservation and protection of the environment prevails, where measures must be taken to ensure the minimization of any damage to the environment, even when such measure can impose a serious restriction on a particular interest, since the former is a superior interest that benefits the entire community, including that particular individual. Note that even though there may be doubts about the existence of serious or irreversible damage to the environment, the rule compels one to adopt the precautionary measure and even provides for the possibility of postponing "the activity in question", all of which is justified, ultimately, in the notorious fact that natural resources are an essential element to the maintenance of human life, and to the extent that the environment is threatened, the health of human beings is also threatened.[396]

361. On November 30, 2011, the Criminal Court of Quepos issued a judicial injunction, which was extended during the course of the proceedings.[397] On September 26, 2013, the Court extended the injunction from September 2013 onwards until the issue is resolved by a final ruling of a court of law.[398] Consequently, that injunction remains in place as at the date of this Counter-Memorial.

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395 **R-189**, Decision 14219-2012, Constitutional Chamber, Supreme Court of Justice, October 12, 2012.
396 **R-187**, Decision 53-2009, Contentious Administrative Tribunal, June 30, 2009.
397 C-146.
398 **R-143**, Extension of the injunction, September 26, 2013.

362. Finally, on June 5, 2012, TAA inspectors and SINAC officers inspected the Project Site and reported that the house that they saw being built in June of last year was almost finished.[399]

363. To conclude, Claimants disobeyed multiple injunctions against the continuation of works in the Las Olas Project issued by SINAC,[400] SETENA,[401] the TAA,[402] and the criminal Court of Quepos.[403] Such injunctions, which are consistent with the application of the precautionary principle under Costa Rican environmental law, ordered Claimants to suspend works on the Project from April 2011. However, Claimants not only refused to receive the notification of the injunction which triggered the intervention from the local police,[404] but also completely disregarded such orders and works continued on the Project for many months.[405]

364. Claimants' failure to comply with the various injunctions was in violation of Article 89 of the Construction Acts.[406]

g. *Claimants' works on the Project Site illegally damaged the Las Olas Ecosystem*

365. Claimants allege that Costa Rica acted arbitrarily by halting the continuance of the illegal construction works in the Las Olas Project because such actions were based on the incorrect assumption that there were wetlands and forests in the Project Site.[407]

366. However, as we will see below (i) there have always been wetlands and forests in Las Olas Ecosystem. (ii) Claimants knew about it, decided to conceal that information from the environmental authorities and pursue harmful activities which they continue with even after they have been subject to injunctions. Claimants' flagrant violation of Costa Rica's environmental laws (iii) caused grave environmental damages.

i. *There are and have always been wetlands and forests in the Las Olas Ecosystem which were severely impacted by Claimants' illegal works*

367. (a) As it has been proved by the competent authority to determine the existence of wetlands in Costa Rica (*i.e*. SINAC and it's PNH). There are and always have been wetlands and forest in

399 **R-121**, TAA Inspection Report (TAA-DT-129), June 14, 2012.
400 C-112.
401 C-122.
402 C-121.
403 C-146.
404 C-125.
405 **R-270**, Inspection report of works conducted after notification of injunction, May 12, 2011. **R-97**, SETENA Inspection Report, May 18, 2011; **R-103**, Inspection Report by the Department of Inspectors to the Social and Urban Development Manager, June 10, 2011; **R-104**, Visual Ocular inspection report by TAA officers, June 23, 2011; **R-104**, Police Inspection Report, June 22, 2011; **R-108**, Letter from the Municipality to SETENA and MINAET, (DeGA-0111-2011), June 28, 2011; **R-121**, TAA Inspection Report (TAA-DT-129), June 14, 2012.
406 C-205.
407 Claimants' Memorial, ¶216.

the las Olas Project Site. Those wetlands and forest were seriously damaged by Claimants. (b) This has been confirmed by the independent expert opinion of KECE. Claimants' try to rely in certain field visit reports to challenge such findings. However, (c) none of those site visit reports can alter the conclusion that there have always been wetlands and forests in the Las Olas Ecosystem.

(a) SINAC and PNH have determined the existence of wetlands and forest in the Project Site which were seriously damaged by Claimants

368. As it was discussed above SINAC and in particular it's specialized PNH is the competent body within Costa Rica administration to decide the existence of wetlands and forest. This entity has conducted a series of site visit to assess the environmental conditions of the Project Site and concluded in more than one occasion that there were wetlands and forest there in the following reports:

- ACOPAC-SD-087-08 visit report from October 1, 2008 documented that on September 30, 2008, two inspectors of SINAC and MINAE inspected the Project Site and concluded that two separate areas could be categorized as wetlands.[408]

- ACOPAC-OSRAP 371-2010 visit report from July 16, 2010 documented burning trees and bushes and requested the developer to stop cutting the vegetation that was in recovery in a wooded patch and to obtain the necessary permits from the SINAC office in Aguirre-Parrita.[409]

- ACOPAC-CP-03-11 visit report[410] from January 3, 2011 documented natural conditions typical of wetlands, such as a water with a yellow color and characteristic flora and fauna. It further, stated that more than 400 trees have been cut down without a permit.[411]

- GASP-093-11 visit report from March 18, 2011 indicated that there was a wetland in the western sector area of the Project Site, where the demonstration house was built. This was directly affected by the construction of a drainage channel and sewage.[412] It also concluded that piping work, construction of access roads and landfills had affected the natural dynamics of the wetland, in breach of Article 45 of the Environmental Organic Act.[413]

408 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008.
409 C-72.
410 **R-262**.
411 Ibid., p. 2 and 3.
412 **R-76**, PNH Report on Wetlands (ACOPAC-GASP 093-11), March 18, 2011.
413 Ibid., p. 20.

- ACOPAC GASP-143-11 visit report from May 18, 2011 identified: (i) the existence and extension of a wetland on the Project Site; (ii) that the site's topography had been directly affected by a drainage channel and sewage system; (iii) that the palustrine wetland had been completely refilled by Claimants; and (iv) that Claimants' damage to the environment had been committed in breach of Article 45 of the Environmental Organic Act.[414]

- ACOPAC-CP-099-11 visit report from July 7, 2011 again confirmed the existence of a forest and harm caused to that ecosystem.[415]

- ACOPAC-129-2011visit report from October 3, 2011 reported that four men were identified illegally cutting trees on the Project Site in violation of Costa Rican Forestry Law.[416]

- ACOPAC-CP-064-12 visit report determined the impact on a wetland in the Project Site.[417]

(b) Confirmation from the independent expert report from KECE

369. To further support the scientific evidence showed in the SINAC visit reports in relation to the existence and impact caused to the wetlands and forest in the Project Site, Costa Rica instructed Mr. Kevin Erwin, an independent ecologist to inspect the area and provide an expert opinion.

370. Mr Erwin is an ecosystem ecologist specializing in wetland and watershed evaluation, restoration and management. He is a Certified Senior Ecologist from the Ecological Society of America (1985) and a Professional Wetland Scientist from the Society of Wetland Scientists (1996-Charter). Me Erwin has studied, designed, and implemented hundreds of wetland and watershed projects over the past four decades. Since 1980 he has served as the President and Principal Ecologist of Kevin L. Erwin Consulting Ecologist, Inc. in Ft. Myers, Florida. His recent work has focused on large-scale wetland restoration, watershed evaluation and management to improve the functional capacity of wetlands to implement source water protection and mitigate the impacts of climate change. His expert opinion is based on over 40 years of experience providing expert assessments of projects, land impact, and land restoration, in wetland areas around the world. Such expert assessments have been provided, throughout the years to private parties, national authorities and leading international organizations such as, amongst other institutions: RAMSAR, IUCN, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the Federal and State Governments of Malaysia, Wetlands International, Ontario Ministry of Natural Resources, South Florida Water Management District,

414 **R-265**, Delimitation of Wetland SINAC Report (ACOPAC GASP-143-11), May 18, 2011.
415 C-134.
416 **R-264**, October 2011 SINAC Report (ACOPAC-CP-129-2011-DEN).
417 **R-124**, ACOPAC Report to the Municipality (ACOPAC-CP-064-12), July 27, 2012.

Environment Canada, the U.S. Fish and Wildlife Service, the Chinese Academy of Science, Florida Department of Environmental Protection, the U.S. Department of Interior, and the U.S. Congress.

- Independent expert confirmation of the existence and impact on wetlands in the Project Site

371. Mr Erwin conducted a two day visit of the Project Site in March 2016 and observed that the Las Olas Ecosystem is composed of wetlands and highland forested habitats.[418] He identified a total of **eight (8) distinct wetland systems located onsite within the Las Olas Ecosystem**.[419] The First KECE Report demonstrates that the Project Site is connected to the Aserradero River system through, a wetland areas listed on Costa Rica's national list of wetlands.

372. The First KECE Report provides a map of the Project Site and the location of these wetlands in Appendix 7 of the First KECE Report. The wetlands identified by Mr Erwin are "palustrine freshwater wetlands (herbaceous and forested) occurring in depressions lower than their immediate surrounding landscape. These wetland areas are hydrated by rainfall, groundwater seepage and water flows from adjacent higher elevations. They are seasonally inundated, with alternating periods of saturation/inundation and drought that are directly related to the region's wet and dry seasons.[420]

373. Mr Erwin also observed that the "majority of the Las Olas Ecosystem may be considered forested, with variable percentages of canopy closure, depending on specific onsite location."[421] Relying on past studies performed for Claimants, Mr Erwin has noted wooded areas with native tree species of different sizes and ages, with a density greater than 60 trees/hectare, consistent with the definition of a forest under Costa Rican law.[422]

374. The First KECE Report further concluded that Claimants have filled and drained the wetlands in the southwestern portion of the property adjacent to a house it was constructed.[423] It explains that claimants have used heavy machinery to alter the landscape and that roads and drainage ditches have been constructed throughout the property by terracing the hillsides to drain and flatten the land for constructing home sites.[424] Further, KECE First Report shows that

418 First KECE Report, ¶¶52-54.
419 First KECE Report, ¶55.
420 First KECE Report, ¶¶53, 60, 62, 63 144, 188.
421 First KECE Report, ¶52
422 First KECE Report, ¶25.
423 First KECE Report, ¶59.
424 First KECE Report, ¶61.

culverts and drainage ditches have been installed throughout the Project Site, which is a typical way of affecting wetlands and draining them. [425]

375. Claimants rely on a report prepared by Mr Barboza to support the "inexistence" of wetlands.[426] It is impossible to arrive to that conclusion from Barboza's report.

376. Mr Barboza did not conduct a thorough review of all available project case documents although he identified that he had the option of requesting these documents. He also seemingly did not conduct his own site visit to evaluate the ecological conditions of the property. There was no attempt to create project habitat maps based on photointerpretation of aerial photography. There also was no reference to project technical information such as existing site topographical information or geological reports in his report. Mr Barboza has not even identified a project history to put the reviewed agency reports in context with the alleged impacts, or with the overall project review.[427]

- Independent expert confirmation of the existence of and impact on a forest in the Project Site

377. As confirmed by the expert evidence of Mr Erwin the Las Olas Ecosystem includes a forest, with variable percentages of canopy closure, depending on specific onsite location.[428] He further observed that there has been a removal of mature and immature trees of variable sizes representing multiple species in the Project Site.[429]

378. Claimants argue that there was no forest on the Project Site and they rely on two forestry reports, one prepared by Mr Arce Solano in September 2010 and another by INGEOFOR in December 2011.[430]

379. However, as explained by the Mr Erwin the report prepared by Mr Arce Solano does not provide sufficient information to identify which specific areas and activities were reviewed during the visit nor does it provide specific site information to refute the government claims of unpermitted forest cutting on the Las Olas site. Further, the report notes areas of wetlands and of natural recruitment of trees onsite and in this report Arce Solano advises the developer of

425 First KECE Report, ¶62.
426 Claimants' Memorial, ¶¶228-236.
427 First KECE Report, ¶¶[191,192.
428 First KECE Report, ¶¶53,53.
429 First KECE Report, ¶68.
430 Claimants' Memorial, ¶¶220-225.

the need to apply for tree clearing permits, which the Las Olas representative apparently ignored.[431]

380. Further, Dr Erwin explains that Mr Arce Solano's witness statement contains several factual errors, ignored the ongoing tree cutting activities that had been reported as affecting vegetative structure, and used unsupported interpretations in coming to his conclusions. Most importantly Mr Arce Solano does not refute that Claimants conducted unpermitted logging onsite and he presents no specific site information to establish that the area of logging was not a forested when logging activities took place.[432]

381. As to the reported commissioned from INGEOFOR in 2011 Dr Erwin concludes that it suffers from:

> "a series of methodology choices which invalidate their findings including: 1) Conducting a post impact assessment without attempting to consider the previous impacts being evaluated; 2) Imposing a highly selective subsample of the reported impacted area; 3) Only considering trees on site which are larger than 15cm DBH as being a part of the existing tree species and forest vegetation composition; 4) Imposing a strict definition of tree maturity which is not supported by language of the the law or by tree biology; and 5) They did not consider the forest canopy as being made up of different sizes, ages, and species of trees. We also identified a number of inconsistencies in their tree numbers reported. KECE has found that faulty methods utilized by INGEOFOR as well as unsupportable interpretations of forestry criteria has significantly minimized the value of the report in assessing vegetative conditions of the area reported to have been by impact by ACOPAC or to refute the government identification of the area as a forested ecosystem."[433]

(c) Claimants' reliance on certain site visit reports do not alter the conclusion that there have always been wetlands and forests in the Las Olas Ecosystem

382. Claimants further rely on a few documents and try to hide from the evident fact that they were damaging wetlands and forest on the Project Site, such as: (i) the SETENA visit reports for the Condominium EV and; (ii) a letter from SINAC in April 20, 2008; (ii) the July 2010 SINAC Report; and (iii) the INTA Report from May 2011.[434]

- The SETENA site visits for the Condominium EV

[431] First KECE Report, ¶¶117-127; 197.
[432] First KECE Report, ¶¶153-182; 201-202.
[433] First KECE Report, ¶199.
[434] Claimants' Memorial, ¶¶217-218.

383. A crucial part of Mr Barboza's rational for a finding of "no wetlands" is his reference to the original Environmental Viability Assessment for the Condominium site[435] and its associated Master Plan.[436] The same goes for Claimants who rely heavily on the fact that SETENA inspected the Condominium Site in the context of the EV.[437]

384. However, these documents and site visits were undertaken in relation to the Las Olas "Condominium site" and therefore do not cover much of the area of the impacted wetland, which is located in the "Easements and other lost site", on which Claimants constructed illegally without having an EV from SETENA.[438]

- The SINAC letter from April 20, 2008

385. Claimants rely on a letter from SINAC from April 20, 2008 stating that the area is not in a WPA to support that there were no wetlands and forests in the Project Site.[439] However, the protection of wetlands and forests in Costa Rica is completely independent to the characterization that the State can give to a certain area as a WPA. In other words, it is not necessary for an area to be considered as a WPA in order for Costa Rican authorities to protect its environment, particularly if there are protected ecosystems such as wetlands and forests on the relevant site.

386. Article 41 of the Environmental Organic Act has declared every wetland in Costa Rica of public interest, regardless of its location:

> "Wetlands and their conservation are hereby declared of public interest, for being of multiple use, **whether or not protected by the laws governing this matter**." (emphasis added.)

387. Article 42 of the Environmental Organic Act grants MINAE the authority to delimit protection zones in maritime and coastal areas and wetlands. As Dr. Jurado explains, this is a power not an obligation, and therefore the declaration of a location as a protected zone is not an intrinsic characteristic of wetlands, that is, not every wetland has to be declared as a protected area.[440] Therefore, there are two types of wetlands under Costa Rican law, wetlands that are included within a protected area by express declaration of MINAE and wetlands located on private

435 C-52.
436 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007.
437 Claimants' Memorial, ¶¶217; 219.
438 First KECE Report, ¶¶80, 81, 86-89.
439 Claimants' Memorial, ¶¶217, 136, 140, 159.
440 First Witness Statement, Julio Jurado, ¶63.

property, that do not lose their nature for that reason.[441] In this sense, the Constitutional Chamber of Costa Rica's Supreme Court has explained:

> "If in the specific case MINAE certifies that the property of the private is not within a Wildlife Protected Area, according to the areas administered by it, that does not imply in any form that the wetland that was found [there] does not have to be protected. We ought to remember that the International Convention subscribed by our country established the obligation of a state party to promote the conservation of wet zones and aquatic birds that create natural reserves in the wetlands, regardless of their inclusion or not in the "List" […]."[442]

388. Similarly, the administrative courts have held:

> "Relating to the protection of wetlands, the Constitutional Chamber has established with sufficient force the duty of the State and its institutions to protect the zones of wetland, regardless of them being or not declared by Executive Decree, as a derivation of the public obligations that arise from article 50 of the Constitution."[443]

389. Criminal courts also acknowledge the protection of wetlands even if they are not located in a specific WPA:

> "When the Wildlife Conservation Law was published, wetlands were not wildlife protected areas therefore Article 7 intended to make official wetlands in public property through an executive decree. It is clear that the State is interested in acquiring a property that holds a wetland through the procedure of expropriation and previous payment. However, even when wetlands are in private property, they are protected and the crime of draining of wetlands can be configured according to the Wildlife Law. We ought to remember that by express provision of article 39 of the Environmental Organic Act, wetlands are of public interest and therefore, subject to protection."[444]

390. Finally, Prosecutor Martínez has also explained the criteria in his witness statement:

> "… The fact that there is a wetland or a forest that has not yet been categorized by SINAC as a conservation area does not imply that these ecosystems do not exist and do not merit protection. There is plenty of jurisprudence in this regard."[445]

391. Therefore, Claimants' reliance on the 2008 letter from SINAC stating that the Condominiums were not in a WPA has absolutely no bearing on the fact that Claimants illegally impacted wetlands and forest on the Las Olas Ecosystem.

- The July 2010 SINAC Report

441 First Witness Statement, Julio Jurado, ¶61.
442 **R-172**, Decision 12817-2011, Constitutional Chamber, Supreme Court of Costa Rica, December 14, 2001.
443 **R-184**, Decision 48-2014, Contentious Administrative Tribunal, April 7, 2014.
444 **R-177**, Decision 01209-2005, Criminal Court of Appeals, November 15, 2005.
445 First Witness Statement, Luis Martínez Zúñiga, ¶72.

392. Claimants also rely on the July 2010 SINAC Report which indicated that after a visual inspection, there was no wetland on the Condominium site. However, the conclusions reached by Mr Manfredi in his report are undermined by the fact that Claimants had been draining and filling the wetlands since 2009. As a result, he was misled by the condition of the wetlands at the time of the visual inspection. Further, the July 2010 SINAC Report expressly relied on the Forged Document[446] thus distorting the ultimate conclusions reached.

393. The July 2010 SINAC Report was prepared by Mr Manfredi as part of SINAC's investigations into the Las Olas Project. It was addressed to his superior at the time, Mr Bogantes, who was the Chief of SINAC's Sub regional Office in Quepos. It was a preparatory act within the administration which had no legal effects on Claimants or Las Olas Project. As Dr Jurado explains:[447]

> "During these preliminary investigations, it is not required that the user participates since at this stage it is inappropriate to call for liability or to impose any sanction. It is solely when a decision to initiate an ordinary procedure is taken, that the user is formally notified, with the accusation and intimidation and notice of charges and facts.
>
> SINAC's inspection reports in this case were part of this preliminary investigation. These were internal documents of the Administration, which as usual, belong to the fact-finding phase to eventually determine the need to proceed with a formal procedure, either in the administrative or judicial fora. In accordance with what has been explained above, these are mere preparatory acts given that they do not produce a legal effect on the user, and are not capable of being challenged.
>
> The Constitutional Chamber has also ruled in this regard, holding that in the preliminary investigation stage, the Administration has no duty to observe all the precepts of due process. This occurs until [the administration] decides to proceed with the ordinary procedure. Also, as indicated by other local courts, "[i]f one considers that the participation of those on whom liability may fall as necessary, we would come to the absurdity of forcing investigators to act together with counsel and potential defendants, which besides the obvious risk of leakage of information it represents, it would hinder the acts within the investigation."
>
> That is why the Administration had no duty to notify the user about the inspection reports, or to involve him within the moment when the preliminary investigation of the facts was being carried out."

394. Moreover, Claimants could not have relied on a report made in July 2010 since they said that they only had notice of it in March 2011.[448] There is enough evidence on the record showing

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446 C-47.
447 First Witness Statement, Julio Jurado, ¶¶113-116.
448 Claimants Memorial, ¶¶143-144; 364-365; 391; David Aven's Witness Statement ¶¶161-163.

that since 2009 Claimants have drained and filled wetlands on the Project Site,[449] and they could have not relied on a report which they only became aware of in 2011.

- The INTA Report

395. Claimants erroneously allege that the INTA Report proves that there were no wetlands in the Project Site.[450] Claimants further affirm that "INTA is a national agricultural research institute with specific expertise in wetlands classifications".[451] However, they do not provide support for that statement.

396. Under Costa Rican laws and regulations, INTA is not competent to determine the existence of wetlands. The Department of Investigations for the agricultural and livestock sector of the Ministry of Agriculture and Livestock was transformed in 2001 into INTA.[452] INTA was created to contribute to the improvement and sustainability of the agricultural and livestock sector through the generation, innovation, validation, research and technology for the benefit of Costa Rica.[453] INTA has three special departments: (i) the Department of Investigation and Technological Development; (ii) the Department for the Management of Projects and Resources; and the Administrative Financial Department. Among the competencies of the Department of Investigation and Technological Development are:[454]

- Performance of projects involving the generation, innovation and transfer of technology;
- Definition and establishment of the technology available for producers according to products, agricultural culture, scales of production and technological level;
- Design, organization and performance of training events and the dissemination of technological information;
- Promotion and funding of publication of technical documents;
- Provision of laboratory services of physio microbiological-chemical analysis of soil, water, entomology, plant pathology, biotechnology, nematology, certifications of appropriate use of land, production and sale of seeds, assistance and technical support, conduction of specific surveys.

449 First KECE Report, ¶¶61-68; R-262, January 2011 SINAC Report (ACOPAC-CP-003-11), January 3, 2011; R-76, PNH Report on Wetlands (ACOPAC GASP-093-11), March 18, 2011.
450 Claimants' Memorial, ¶176; 218.
451 Claimants' Memorial, ¶176.
452 **R-202**, National Institute for Agricultural Innovation and Technology Transfer Law, November 22, 2001.
453 **R-202**, Article 2, National Institute for Agricultural Innovation and Technology Transfer Law, November 22, 2001.
454 **R-203**, Articles 35-37, Regulations to the National Institute for Agricultural Innovation and Technology Transfer Law, May 19, 2004.

397. The methodology used by INTA to analyze the soil is based on land issues for agricultural purposes, related to the Law on the Use of Land. The fact that this methodology determines that the land is not typical of a wetland, does not imply that there is no wetland in the area. This is confirmed by Prosecutor Martínez's testimony:

> "In addition, the defense placed significant emphasis on the report prepared by INTA that determined that the land of the area at issue was not typical of a wetland. Nevertheless, INTA does not have any jurisdiction regarding the issue of wetlands. INTA is the national agricultural and livestock institute, under the Ministry of Agriculture and Animal Livestock. The methodology used by INTA is based on issues of land for agricultural purposes. The fact that this methodology determines that the land is not typical of a wetland, does not imply that there is no wetland in the area. INTA was not requested to determine whether there was a wetland on the site (it could not have issued a determination on the issue because it does not have any jurisdiction in this regard), but rather it was requested to determine whether the type of land satisfied the Law on the Use of Land. The visit by INTA that led to the report that the defense referred to, was prepared together with the Coordinator of the 'Programa Nacional de Humedales' of SINAC, who did have jurisdiction to determine the existence of wetlands and who confirmed that there was a palustrine wetland in the area."[455]

398. In fact, Mr Cubero in his witness testimony given in the criminal trial against Mr Aven also stated that as a specialist from INTA he used the methodology for classification of types of land with agricultural and livestock purposes, which is not intended to be used for real estate purposes and that he did not have jurisdiction to determine the existence of a wetland.[456]

399. Soil is just one of a series of environmental aspects that are considered when determining the existence or not of a wetland. What is clear is that it is not determinative in and of itself.

400. Further, the First KECE Report explains that the INTA Report:

> "describes the sampled area as having wetland characteristics including location, surface water inputs, poor drainage, anaerobic soil process and having severe limitations for agriculture and development use due to climatic and drainage limitations [….] However, the INTA reviewer concludes that the site does not have soils typical of a wetland ecosystem due to anthropic changes that have occurred over decades due to land use. This conclusion is based on a methodology used to assess soils for agricultural use, which is not the proper methodology to consider the existence of wetlands."[457]

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455 Witness Statement, Luis Martínez Zúñiga, ¶78.

456 Witness Statement, Luis Martínez Zúñiga, ¶104.

457 First KECE Report, ¶114. In this sense the KECE Report explains that "The May 2011 INTA Report the reviewer identifies the presence of anaerobic (wetland) soil process increasing with depth including radical glazing at 80 cm. and that the water table at the time of the survey was below 120 cm., identifying anaerobic evidence significantly above the current water table."

401. Actually, as explained by the First KECE Report, the INTA Report "actually describes a filled wetland area, but instead of attributing this fill to the Las Olas development activities, it makes the supposition that the filling of the wetland occurred over a period of time due to land use."[458]

402. Clearly, if we considered that at the time of this soil survey Claimants had been draining and filling the wetland for months if not years, it is quite obvious that the condition of the soil described in the INTA Report - which shows an impacted wetland - is entirely attributable to Claimants' conduct. In fact, when asked under oath Mr Cubero acknowledged that there was refilling and that drainage works had been carried out in the area of the wetland.[459]

403. Accordingly, Claimants' reliance on the INTA Report to attempt to justify the "inexistence" of wetlands on the Project Site is completely flawed.

ii. *Claimants knew about the existence of wetlands and forest, they concealed the information from the authorities and continue working even after injunctions ordering the suspension of works*

404. As previously demonstrated,[460] Claimants were aware of the presence of wetlands on their property since at least 2007 when they commissioned the Protti Report.[461] Claimants chose to omit that fact in their subsequent EV application, and chose to fragment the Project Site in an attempt to conceal the presence of a fragile ecosystem.

405. Further, on September 30, 2008, two officers from SINAC and MINAE inspected the Project Site and concluded that two separate areas of the Project Site could be categorized as wetlands.[462] Claimants' agent (Mauricio Mussio) joined the inspectors in their visit.[463] So by 2008, Claimants were on notice that the authorities were conducting inspections regarding the existence and impacts on wetlands in the site.

406. Moreover, on 9 September 2010 the Municipality informed Claimants that the Project Site was located in a mangrove area.[464]

407. Claimants were also well aware that the Project Site was located in a forestry area and that they will have to obtain permits from SETENA to cut any tree. The vegetation cover maps that SETENA had requested showed that the vegetation cover was a forest.[465]

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458 KECE Report, ¶115.
459 Witness Statement, Luis Martínez Zúñiga, ¶106.
460 See, section IV.B.1.a.
461 **R-11**, Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007.
462 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008
463 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008.
464 **R-57**, Municipality Reporto n outstanding document (ADU No. 013-10), September 13, 2010.

408. However, once again Claimants misled SETENA by submitting a letter on March 14, 2008, during the EV application procedure, denying the existence of a forest in the property and disputing what the vegetation cover maps that SETENA already had in the record clearly reflected. The letter referred to an alleged site inspection of March 26, 2008 where “MINAE officers had verified that there was no forest."

409. Claimants' affirmation lacks any logic. First, the letter was dated March 14, 2088; how could the MINAE officers have done an inspection that post-dated his letter? Second, there is no record within SINAC or SETENA of such inspection or a report that confirms “the verification by MINAE of no forest" in the Project site.

410. Nevertheless, in the EV for the Condominium site, SETENA (i) acknowledge the existence of trees within the Project Site, and (ii) warned Claimants of their legal obligation to obtain a permit from MINAE, namely SINAC, if Claimants were to cut *a* tree in the development of the ecosystem:

> "'4. […] the vegetation cover is composed of grass with scattered trees and small sectors of vegetation cover.
>
> 7.[…] If the removal of a tree is required, a permit must be obtained at the MINAE office "[466]

411. The protection of wetlands and vegetation systems is key to the protection of a healthy environment. In particular, the preservation of wetlands contributes greatly to biodiversity, and to the control of climate change and carbon emissions.[467] That is why Costa Rica has a strong policy of protecting those ecosistems through the enforcement of its environmental laws and regulations.

412. As we have seen Claimants misled the authorities as to the "inexistence" of wetlands and forest to obtain the EV and construction permits and start construction.

413. As explained by Dr Erwin, "Claimants conducted many activities since 2009, including the drainage and filling of wetlands by construction of the roads, excavation of ditches, placement of culverts, and the removal of the vegetative strata of the forest, that have directly impacted the Las Olas Ecosystem."[468]

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[465] C-222, p. 241.
[466] C-52.
[467] First KECE Expert Report, ¶32.
[468] First KECE Expert Report, ¶190.

414. On notice of investigations from the environmental enforcement agencies on their misconduct, they continued with their illegal construction activities damaging the environment, even after they were notified of several injunctions to halt further work.

iii. *Claimants illegal actions caused severe environmental damages*

415. Claimants' illegal activities caused severe environmental harm to the Las Olas Ecosystem. In this sense, the First KECE Report concludes that:

> "[s]ome of the most important consequence that can derive from such actions are:
>
> a. significant increase in soil sedimentation into the surrounding natural drainage features, and potentially the Aserradero River watershed and estuary;
>
> b. decrease in the local area's water storage capacity which can cause improper drainage and potential flooding downstream and degradation of regional water quality;
>
> c. the destroy of the habitat for fish and wildlife species thus reducing the biological diversity of the Las Olas Ecosystem; and
>
> d. a dramatic decrease in the capacity of the forest to properly store and naturally convey water."[469]

416. Claimants' drying of the wetlands on the Las Olas Ecosystem, and removal of trees and vegetation, have worsened the flooding situation for Claimants' neighbors.

417. On July 8, 2011, the Municipality of Parrita notified Claimants of complaints of neighbors regarding emergencies caused by floods to Esterillos Oeste.[470] Amongst the complaints, neighbors reported the carrying of pluvial water from the Project Site down to public streets, causing floods to people's homes. This flooding is typical of drying of wetlands and removal of trees and vegetation. The First KECE Report explains that one of the functions of the wetlands and its vegetation was to filter the rain water and prevent it from running down the hill with no natural conditions to retain it:

> "[f]illing of wetlands decreases the local area's water storage capacity and can cause improper drainage and potential flooding downstream. Degradation of regional water quality may also occur following the filling of wetlands. Wetlands not only store water, but they also trap sediments and filter pollutants that would otherwise flow downstream. First, and most likely of greatest consequence (i.e., of highest negative impact to the ecosystem), the claimants have used heavy machinery to alter the landscape. Roads and drainage ditches have been

469 First KECE Expert Report, ¶190.

470 **R-110**, Municipality notifies Claimants of complaints of neighbors and requests documentation (OIM No. 244-2011), July 8, 2011.

> constructed throughout the property by terracing the hillsides to drain and flatten the land for constructing home sites."[471]

418. As a result of the complaints, the Parrita Municipality requested that Claimants provide an explanation as to the draining system they were constructing.[472] Claimants never replied to this demand.

419. Claimants have tried to suggest that the neighbors of Esterillos Oeste had always been concerned with flooding problems in the area and that their alleged concern reflected in their submission to SETENA for the Condominium site:

> "In fact, problems with drainage of rainwater hand long been apparent in the area, a fact that was reflected in the sociological survey Inversiones Costco undertook as part of its application for the Environmental Viability for the Condominium Section."[473]

420. However, in their Environmental Management Plan, Claimants affirmed the contrary, stating "the project will not be affected by flooding, according to neighbors the property has never been affected by the overflowing of gorges and rivers."[474] Further, when trying to revoke the SINAC Injunction, Claimants used this same argument to rebut the claims of the existence of a wetland on the Project site.[475] In Claimant's motion to revoke they submitted as an evidence of the non-existence of wetlands the Protti Report:

> "E. Copy of the Geological Survey performed by the company Geotest that concludes there are neither wetlands nor problems of flooding in the property."[476]

421. Claimants' entire argument regarding their contribution to stop flooding in Esterillos Oeste falls apart because, unlike the other surveys submitted by Claimants' to SETENA, the Protti Report actually proved the existence of wetlands in the Project site.[477]

422. The truth is that as Claimants were draining the wetland, the flooding started to affect the neighbors living close to the Las Olas Project because the wetland was no longer able to capture the excess of rainwater from the rainy season. Claimants tried to hide the adverse effects of the refilling by pretending to build a drainage system to aid the Municipality "to deal

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471 First KECE Expert Report, ¶¶61, 62.
472 **R-110**, Municipality notifies Claimants of complaints of neighbors and requests documentation (OIM No. 244-2011), July 8, 2011.
473 Claimants' Memorial, ¶111.
474 **R-1**, Environmental Management Plan (Plan de Gestión Ambiental), 2007, p. 35.
475 C-113.
476 C-113.
477 See, Section IV.B.1.a.ii.

with flooding caused by heavy rains."[478] However, Claimants have not shown any proof of this alleged agreement with the Municipality.

423. What is more concerning is that in a prior phase of their development, Claimants allege having entered into other agreements with the Municipality to collaborate in public works related projects.[479] Claimants have proved those understandings with the local authorities by submitting a copy of the written agreement.[480] If that was a prior practice by Claimants, why did they not enter into a written agreement with the Municipality to memorialize the alleged collaboration with the installation of the drainage system?

424. Finally, the Municipality itself confirmed the non-existence of such agreement to Claimants' counsel, Mr Ventura, on December 4, 2012:

> "There is no record of neither reception of materials or works performed by the [Las Olas Residential Condominium] in benefit of any community."[481]

425. Therefore, it is evident that Claimants' activity severely damaged the environment of the Las Olas Ecosystem causing flooding in the Esterillos community.Claimants' illegal conduct bars them from claiming under the Treaty

3. Claimants' illegal conduct bars them from claiming under the Treaty

426. Under international law investors are barred from the substantive protections of an investment treaty when they have obtained or operated their investments illegally in breach of the host State law. This is confirmed by numerous authorities.

427. For example, in *Inceysa v. El Salvador,* the misrepresentations made by the investor during the bidding process led the tribunal to dismiss its claims under the view that international investment law cannot protect illegal investments. The tribunal stated:

> "It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy."[482]

428. Similarly, in *Plama v. Bulgaria*, the tribunal dismissed the Claimant's claims on the basis that unlawful investment would not be protected by substantive obligations of the Energy Charter Treaty.[483]

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478 Claimants' Memorial, ¶111.
479 Witness Statement, David Aven, ¶ 78-81.
480 C-51.
481 **R-137**, Municipality confirms no works in benefit of the community (OIM No. 865-2012), December 4, 2012.
482 **RLA-11**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID case No. ARB/03/26, Award, 2 August 2006, ¶249.

429. Furthermore, the tribunal in *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of* Myanmar expressly acknowledged that the legality of the investment is a general rule in international law.[484]

430. Scholars also support this approach. Professor Newcombe explains that investors' misconduct at different phases of investment such as non-compliance with regulatory requirements in order to obtain operational permits should be denounced and tribunals should dismiss the claims based on admissibility grounds.[485] Professor Douglas also explains that illegality is a ground for inadmissibility.[486]

431. This rule of international law applies even when the applicable treaty does not include specific wording to that effect, as is the case of DR-CAFTA. This has been held for example by the tribunal in *Fraport v. Philippines* in the following terms:

> The Tribunal is also of the view that, even absent the sort of explicit legality requirement that exists here, it would still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly **well-established international principle which makes international legal remedies unavailable with respect to illegal investments**, at least when such illegality goes to the essence of the investment.[487] (emphasis added)

432. In this case, the Tribunal should dismiss the claims brought in this Arbitration and hold them inadmissible. Claimants deliberately misled the Costa Rican authorities by purposefully lessening the extent of the impact of their project on the Las Olas Ecosystem.

V. RESPONDENT'S CONDUCT COMPLIES WITH ITS OBLIGATIONS UNDER THE TREATY

433. Claimants' Memorial provides, in the abstract, a presentation of various principles of international law as applied to investor-state disputes, some applying directly to DR-CAFTA. But Claimants fail to prove their case under those principles. Thus, should the Tribunal consider that Claimants' deliberate violation of imperative norms of Costa Rican environmental protection do not bar their Claims under the Treaty, the Tribunal will have everything available to them to conclude that Claimants fall short of proving their case.

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

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

485 **RLA-16**, Andrew Newcombe, "Investor Misconduct: Jurisdiction, admissibility or merits?" in *Evolution in Investment Treaty Law and Arbitration* (CUP 2012), p. 190; 199.

486 **RLA-17**, Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration," *ICSID Review*, Vol. 29, No. 1 (OUP 2014), p. 185.

487 **RLA-14**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶332.

A. Applicable law

434. The arbitration is conducted under the 1976 UNCITRAL Rules of Arbitration (the "**UNCITRAL Rules**"). Article 33(1) of the UNCITRAL Rules provides that the Tribunal "…shall apply the law designated by the parties as applicable to the substance of the dispute".

435. Article 10.22(1) of the DR-CAFTA provides: "the tribunal shall decide the issues in dispute in accordance with [DR-CAFTA] and applicable rules of international law." But in an effort to evade their obligations and the consequences of their illegal conduct, Claimants completely misconstrue the meaning of Chapter 17 of the DR-CAFTA, and in so doing fundamentally overlook the principal obstacle to the legitimacy of their Claims

436. Undeniably, the ability for DR-CAFTA signatories to implement sound and efficient measures to protect the environment is key to the implementation of the Treaty. Even leaving aside Claimants' illegal conduct, this is a case of sound and reasonable implementation of one of the world's most recognized frameworks of environment protection.

1. International norms of environmental protection are binding

437. Chapter 17 is a very clear articulation of how the Parties to DR-CAFTA agreed that environmental matters would not be subject to the same kind of protection envisaged in Chapter 10.

438. In paragraphs 243 to 249 of Claimants' Memorial, Claimants spend considerable time setting out what is trite law – namely the application of the Vienna Convention on the Law of Treaties to the interpretation of the DR-CAFTA. However, despite such an expenditure of effort, their conclusion is utterly flawed and functions so as to ignore precisely the express and unequivocal terms of Chapter 17.

439. For example, in paragraph 248, Claimants seemingly conclude: "If it appears that certain Costa Rican officials exercised discretionary authority in a manner inconsistent with the object and purpose of the Agreement, and otherwise in an unfair or inequitable manner, the breach should be recognized." This is a crude and primitive conclusion to reach with no intervening analysis of any kind. It is so conclusory as to be redundant – and not the kind of test the Tribunal should apply.

440. Instead, we hope the Tribunal reads Chapters 10 and 17 of the DR-CAFTA. If it does, it will encounter Article 10.2(1) which provides:

> "In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency."

441. Therefore, it is clear that Chapter 10 and the protection contained therein, is subordinated to other Chapters to the extent they refer to the standards of protection afforded to any investment.

442. Thereafter, upon consulting Chapter 17, the Tribunal will realize immediately one critically important aspect. Chapter 17 is an express and deliberately agreed policy space that the Parties to DR-CAFTA negotiated with regard to the environment. Thus, while the Parties could have included a reservation or interpretative Annex in Chapter 10 to prescribe how investor protection in environmental matters should be applied (or dis-applied), the Parties went further. Instead, they drafted and agreed an entire Chapter of the DR-CAFTA to expressly reserve a policy space for environmental issues. In doing so, they enunciated the Parties' intention to dis-apply other Chapters of the DR-CAFTA, including Chapter 10, by virtue of Article 10.2(1).

443. It is necessary to review Chapter 17 in order to understand precisely how the Parties saw domestic environmental laws being upheld and insulated from the scrutiny of international arbitral tribunals applying the standards contained in Chapter 10. Article 17.1 provides:

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

444. This is not only a clear statement of the aspirational goals of DR-CAFTA in terms of policy making in the environmental sphere, but also a statement of how pre-existing "levels of domestic environmental protection" that already meet the desired standards of environmental protection, will be maintained going forward. To suggest otherwise would be to presuppose that all Parties to the DR-CAFTA, when they signed the treaty, had yet to enact any domestic environmental legislation that satisfied the standards that DR-CAFTA was promoting. Clearly that was not the case, so when Article 17.1 refers to "the right of each Party to establish its own levels of domestic environmental protection", it includes pre-existing laws.

445. Article 10.11 CAFTA – Investment and Environment

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

446. Article 17.2 then considers the "*Enforcement of Environmental Laws*". Claimants in paragraph 253 of their Memorial argue that this Article is designed to police "*intentional under-enforcement*". Claimant is not even on the right track if it were referring to Article 17.2(1)(a) alone, because both Article 17.2(1)(a) and the remainder of Article 17.2 do much more.

447. Article 17.2(1)(a) provides in pertinent part:

> "A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction…." (Emphasis added)

448. Respondent concurs with Claimants that this is designed to police against under-enforcement (i.e., "inaction"). However, the pursuit of "effectiveness" does not only mean avoiding under-enforcement – it also means maintaining certain levels of activity (i.e., "action"). Therefore, the "failure" to ensure effective enforcement does not only mean under-enforcement.

449. Moreover, Article 17.2(1)(b) provides:

> "The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities."

450. If this were also to police against under-enforcement alone, it would render redundant Article 17.2(1)(a), given the "investigatory, prosecutorial, regulatory and compliance" competences of a Party are all part of the enforcement regime (which Claimants acknowledge is embodied in Article 17.2(1)(a)).

451. Therefore, consistent with Article 31 of the Vienna Convention, it becomes apparent that the investigatory, prosecutorial, regulatory and compliance discretion upheld for the benefit of a Party, is not only a means of pursuing the aspirational goals contained in Chapter 17, but also a way to ensure a Party can, as it sees fit, implement its own environmental laws without fear of violating DR-CAFTA (and in particular, Chapter 10).

452. The nature by which the "effective" enforcement recognized in Article 17.2(1)(a) is to be assessed (whether it be "action or inaction") is set out in Article 17.2(1)(b), where it continues:

> "Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources."

453. This is the standard required by the State when exercising its "investigatory, prosecutorial, regulatory and compliance" discretion. This standard does little more than require a modicum

of reasonableness and bona fide decision making from the State when enacting its own environmental laws. This is a very modest threshold that Respondent invites the Tribunal to apply when reviewing the conduct of Costa Rica explained in this Counter-Memorial. Such standard is nowhere near the standards contained in Chapter 10.

454. If the object and purpose of Chapter 17 were not clear enough from the above, Article 17.2(2) drives the point home with no ambiguity, where it provides:

> "The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws."

455. In short, this is saying that the investment protection contained in Chapter 10 should not operate so as to weaken or reduce the protection Costa Rica has already established in its domestic environmental laws. Claimants labor over the purported "object and purpose" by torturing every preambular term available, whereas, Respondent invites the Tribunal simply to read Chapter 17.[488]

456. Article 17.2(2) continues:

> "Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory."

457. In light of the preceding paragraphs of Chapter 17, the natural ensuing question is what standard should such domestic environmental laws uphold? Substantively, DR-CAFTA clearly defers to each Party and their respective domestic laws - which is precisely the reason why Chapter 17 exists. However, procedurally, Article 17.3 does articulate a minimum standard, which in paragraph (1) is described to provide a judicial, quasi-judicial or administrative remedy "in accordance with its law". Thereafter Article 17.3 provides, "[s]uch proceedings shall be fair, equitable, and transparent and, to this end, shall comply with due process of law…." Again, this sentence does not import the standards of Chapter 10 otherwise, it would not have been necessary to prescribe a procedural minimum standard. If Chapter 10 standards were to apply, it would also render redundant the purpose and object of Chapter 17, which is to carve

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[488] **RLA-45**, *Federal Reserve Bank v. Iran, Bank Markazi,* Case A28 (2000-02) 36 Iran-US Claims Tribunal Reports 5, p. 22. "While the preamble may be used as the source of a convenient summary of the object and purpose of a treaty, both the Vienna Convention (article 31(2)) and practice make it clear that an interpreter needs to read the whole treaty. Thus, the substantive provisions will provide the fuller indication of the object and purpose. In addition, as broadly recognized … the object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text.".

out the policy-making and enforcement space for each Party in relation to environmental issues.

458. All of the above sections of Chapter 17 identify the need for the enforcement of domestic environmental laws. Claimants maintain that Chapter 10 operates to do precisely the same – i.e., enforce environmental laws. Chapter 17 sets out in Article 17.2(1)(b) the standards to be recognized. Claimants maintain that Chapter 10 sets out the standards applicable, namely those contained in Articles 10.5 and 10.7.

459. Consequently, there is (even on Claimants' case) an inconsistency between the applicable standards recognized in Chapter 17 and the standards recognized in Chapter 10. As a result, Article 10.2 would operate to marginalize the standards contained in Chapter 10, in favor of those contained in Chapter 17. "Logic" (as Claimants argue in paragraph 255 of their Memorial) does not permit the Tribunal to ignore the express provisions of the DR-CAFTA, such as Article 10.2.

2. Neither the Treaty, nor customary international law exonerate Claimants from complying with Costa Rica's framework for the protection of its environment

460. Overlooking the specificity of environmental measures under DR-CAFTA, Claimants omit to address the illegality of their conduct and seem to consider that the entire framework of environmental protection in Costa Rica is somehow irrelevant to them. For example, when SINAC enjoins them from ceasing their works pending a determination of the extent of the Project's impact on the Las Olas Ecosystem, Claimants admit, blatantly, that they will just not comply with such measure.[489]

461. As summarized above, several decades ago, Costa Rica recognized the dangers to which it was exposing its population through an intensive exploitation of its resources, and Costa Rica has put in place rules to ensure that economic development in Costa Rica would no longer take place without ensuring that development happens with due regard to the protection of nature.

462. Indeed, recognizing the direct link between people's health and the natural conditions that surround them, the Costa Rican Constitutional Court raised the protection of the environment to a constitutional principle, at the same level as the state's duty to protect its population's health, which was an existing principle of Costa Rica's Constitution.[490]

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489 Claimants' Memorial, ¶140.
490 First Witness Statement, Julio Jurado, ¶32.

463. Thus, under Costa Rican Constitutional law, the "protection of a healthy and ecologically balanced environment"[491] constitutes a "transversal principle in the sense that it applies to entire legal order, obliging [the state] to model and reinterpret its agencies/institutions so that they can achieve the objective of environmental protection."[492] Environmental protection being viewed as central to the public interest, it falls upon all organs of the Costa Rican state to intervene "each time that there is a possibility that human activity might cause irreparable harm to the environment."[493]

464. Costa Rica's constitutional and administrative case law, as well as the practice of its decentralized administrative agencies has developed around this imperative of prevention of the environmental damage. While Costa Rica has been praised for its achievements in this field, sustaining a healthy and balanced natural habitat for humans and animals is a complex, continuing, and challenging task that is implemented within the framework of the constitutional principles of equality, sustainability, precaution, and prevention.[494] These principles are implemented under an overarching principle of due process of law. In fact, Costa Rica has been consistently recognized for affording processes that are compliant with fundamental principles of due process.[495]

465. As explained in the First KECE Report, wetlands and forests are of particular importance to the sustainability of a healthy environment.[496] Their importance to communities' health, and their contribution to the curbing of the effects of carbon emissions and global warming is uncontested.[497] Indeed, in the face of accelerated species extinction, the international community has long realized that protecting the natural habitat of species was indispensable to sustaining a biologically diverse environment.[498]

466. As a result, Costa Rica, which hosts, on its small territory, amongst the most diverse habitats on the planet, has devised a legislation that puts great emphasis on the protection of wetlands and forests. MINAE's decentralized environmental agencies, such as SETENA and MINAE, are key to Costa Rica's environmental prevention system. While SETENA and SINAC also have police powers in their pursuance of the prevention of environmental damage, the

491 First Witness Statement, Julio Jurado, ¶26.
492 First Witness Statement, Julio Jurado, ¶28.
493 First Witness Statement, Julio Jurado, ¶30.
494 First Witness Statement, Julio Jurado, ¶¶24-32.
495 **R-271**, Costa Rica a natural partner for OECD, Ministry of Foreign Trade of Costa Rica, 2012, p. 39 ("Several other indicators confirm Costa Rica's commitment - and success – to the rule of law: it occupied third place in Latin America in the International Property Rights Index in 2011 (Property Rights Alliance), third place also as the country with less Corruption Perception (Transparency International) and it is the safest country in the region (Latin Business Chronicle, Latin Security Index, 2011).").
496 First KECE Report, Exhibit C.
497 First KECE Report, Exhibit C.
498 **RLA-37**, Philippe Sands, *Principles of International Environmental Law* – 2nd Ed., p. 544.

judiciary, both the environmental criminal branch and the environmental administrative court, the TAA, are the enforcement arms of the Costa Rican environmental protection nomenclature. Institutions such as the *Defensoría de los Habitantes*, in its role of harmonization of the relations between the administration and its users, provides one of the segways into that system of environmental protection. The municipalities, and their environmental protection offices, are another avenue for users to access the environmental protection system in Costa Rica.

467. It is these rules, principles, and framework, that Claimants hope the Tribunal will disregard, to only focus on abstract norms of international law as applied to investor-state disputes. But no rule of international law exonerated Claimants from developing their Project in a way that would not damage the Las Olas Ecosystem.

468. First, the Costa Rican norms of environmental protection that Claimants sought to circumvent, and that every organ of the Costa Rican government followed in this case, echoed international principles of environmental law, also recognized as principles of customary international law. Thus, the principle of preventative action, reflected in Costa Rica's constitution, requires Costa Rica to prevent damage to the environment, and to otherwise to reduce, limit or control activities which might cause or risk such damage. This principle was recognized in the 1972 Stockholm Declaration on the Human Environment,[499] and relied upon, directly, or indirectly, in numerous International Court of Justice decisions.[500] In view of the specificity of the protection of nature under international law, the "*overriding importance* [of the preventative principle] *in every effective environmental policy*" is recognized as "*it allows action to be taken to protect the environment at an earlier stage. It is no longer primarily a matter of repairing damage after it has occurred.*"[501]

469. Likewise, while the precautionary principle has been of a more recent application by international instruments, Principle 15 of the Rio Declaration provides:[502]

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

470. The Rio Declaration, like the RAMSAR Convention and the Biodiversity Convention were signed by both the United States and Costa Rica. Pursuant to DR-CAFTA Article 17.12:

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499 **RLA-43**, Principle 21/2 of the Stockholm Declaration on the Human Environment, 1972.
500 **RLA-37**, Philippe Sands, *Principles of International Environmental Law*, 2nd Ed., pp. 246 *et sec.*.
501 **RLA-37**, Philippe Sands, *Principles of International Environmental Law*, 2nd Ed., p. 247.
502 **RLA-40**, Rio Declaration on Environment and Development, Principle 15, 1992.

> "The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. (…)"

471. Key to the implementation of the precautionary principle is the shift of the burden of proof, "require[ing] *the person who wishes to carry out an activity to prove that it will not cause harm to the environment*."[503] This application of the precautionary principle, which is already implemented in Costa Rica through Article 109 of the Biodiversity Law, for example for the purposes of EV applications,[504] is now supported by a growing number of states.[505] In fact, in his Principles of International Environmental Law, Philippe Sands identifies the precautionary principle as "*critical*" to the development of international law in this field. "*Some international courts have now been willing to apply the precautionary principle, and others have been willing to do so with stealth. It is surely only a matter of time before other courts follow suit*."[506]

472. In this case, the First KECE Report leaves very little doubt that Claimants' Project affected an ecosystem, the Las Olas Ecosystem, which included both forest and wetlands. All actions taken by the Costa Rican authorities with respect to the protection of the Las Olas Ecosystem were therefore a measured and reasonable application of these norms of Costa Rican and international environmental protection, and were fully consistent with Claimants' due process rights.

B. Claimants were treated fairly and equitably

473. In the remainder of this section, we consider Claimants' allegations that the fair and equitable treatment standard has been violated. The difficulty this Tribunal faces is that Claimants have fallen woefully short of articulating with any degree of specificity how they perceive the fair and equitable treatment standard to have been breached in this case.

474. It is quite remarkable how lacking Claimants' pleadings are. They spend numerous pages expounding a series of broad brushed statements regarding the content and scope of DR-CAFTA with seemingly no direction. When it comes to then applying the law to the facts (or vice versa), that exercise is overlooked: an independent articulation of the law is made in a factual vacuum. Thereafter, an independent articulation of the facts is made without any analysis of how the facts are meant to operate alongside Claimants' supposed legal thresholds. This Tribunal (and Respondent) requires the two to be inter-connected in some way, and yet

503 **RLA-37**, Philippe Sands, *Principles of International Environmental Law*, 2nd Ed., p. 273.
504 C-207, Article 109; See also, section IV.B.1.a.i.
505 **RLA-37**, Philippe Sands, *Principles of International Environmental Law*, 2nd Ed., p. 273.
506 **RLA-37**, Philippe Sands, *Principles of International Environmental Law*, 2nd Ed., p. 290.

this is simply not done. As a result, the Tribunal is left without any clear statement of what facts are purportedly relied upon to satisfy thresholds of relevance.

475. The burden that befalls Claimants to prove their case does not fall to the Tribunal. Neither should Respondent have to shadow box and anticipate how the facts are – according to Claimants – meant to apply to the law. As a result, Respondent is left in a unique position of wanting to respond to Claimants' case, but finding itself in a position that we are none the wiser as to what – precisely and specifically – is Claimants' case.

476. To divert the Tribunal's attention from Claimants' manifest violation of imperative norms of environmental protection, Claimants mount an improbable scenario, alleging a "secret process"[507] in which a few Costa Rican officials would have taken it upon themselves to raise obstacles against Claimants' Project. For no fathomable reason, this alleged conspiracy would have involved several employees of SINAC, the environmental administrative tribunal (the TAA), an environmental prosecutor, an employee of the Parrita Municipality, and even a director of the *Defensoría de los Habitantes*.

477. As the Tribunal will soon realize, the reality is much simpler: the authorities were alerted by Claimants' neighbors to the damage being caused to Las Olas' wetlands and forest; the authorities investigated matters; and steps were taken to ensure that no further damage was incurred until a final decision was reached regarding the impact on the Las Olas Ecosystem.

3. Claimants could not have legitimately expected Costa Rica not to enforce its environmental Law

478. Investors rely on the standard of "legitimate expectations" as part of the FET standard to argue that Costa Rica has breached Article 10.5 of the DR-CAFTA.[508]

479. Claimants rely on the oft-cited passage from *Tecmed v. Mexico*.[509] Zachary Douglas QC, when referring to the exact same paragraph of the *Tecmed v. Mexico* award on which Claimants rely explained:

> "There are signs that the adjudicative process in investment treaty cases is suffering from the lack of scrutiny of the burgeoning corpus of precedents. By way of example, the fierce competition among tribunals to author a pithy single-paragraph proclamation of what the fair and equitable standard of treatment actually means for posterity has, for the time being, produced a fortuitous winner – the so-called "*Tecmed* standard":

507 Claimants' Memorial, ¶364.
508 Claimants' Memorial, ¶¶283-292; 322-334.
509 Claimants' Memorial, ¶284.

> "[The fair and equitable standard of treatment is] to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."
>
> It is a fortuitous winner because this passage from the award in [*Tecmed*] did *not* supply the test that the tribunal actually applied to Mexico's conduct on the facts of the case. Perhaps for this reason, *no* authority was cited by the tribunal in support of its *obiter dictum*. **The "*Tecmed* standard" is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain**. But in the aftermath of the tribunal's correct finding of liability in *Tecmed*, the quoted *obiter dictum* in that award, unsupported by any authority, is now frequently cited by tribunals as the *only* and therefore *definitive* authority for the requirements fair and equitable treatment. This remarkable use (or abuse) of precedent features in two of the awards that feature in this article."[510] (bold added, italics in the original)

480. As we can see from the commentary of Zachary Douglas QC the paragraph quoted by Claimants from *Tecmed v. Mexico* does not reflect the standard that that tribunal applied in that case, and it is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain. Accordingly, this was not the relevant, dispositive part of the *Tecmed* tribunal's findings.

481. Investment treaty tribunals have clarified that not every expectations of an investor is subject to the protection that FET provides. Qualifying elements must be met:

- "Legitimate expectations may arise only from a State's specific commitment or representation made to the investor, on which the latter has relied;
- The investor must be aware of the general regulatory environment in the host country;

[510] **RLA-47**, Zachary Douglas, "Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex", *Arbitration international*, Vol. 22, No. 1, pp. 27-28.

- Investors' expectations must be balanced against legitimate regulatory activities of host countries."[511]

482. Claimants admit that the test for legitimate expectations is based on a promise made by the State to the investor that it will not act in certain way. Actually, Claimants state in their Memorial that "*[t]he less ambiguous the promise, the more reasonable the expectation. The more specific the promise, the more reasonable the expectation*."[512]

483. Costa Rica has never made any specific promise to Claimants that it would not enforce its Law on the face of environmental violations. Claimants further accept that to legitimize the expectations the investor shall "perform a reasoned and prudent assessment of "the state of the law and the totality of the business environment" prior to, and in the process of, establishing his investments."[513]

484. If Claimants were aware of the state of the law and the totality of the regulatory environment in Costa Rica, they should have known that environmental protection is a priority in Costa Rica's policies. Of course, Claimants were on constructive notice of Costa Rican law and policies the moment they made their investment (and therefore, the moment any purported legitimate expectations were formed).

485. If Claimants' expectations were that they would be able to develop and exploit their real estate project, they should have known that they were required to do it respecting Costa Rican environmental laws. Otherwise, such expectations would not be legitimate (i.e., objective) when balanced against Costa Rica's legitimate regulatory powers to enforce its environmental law.

486. Claimants argue that they reasonably expected that, upon obtaining the EV from SETENA and the construction permits from the Municipality, they would be able to establish their investment in conformity with their plans.[514] However, the EV could not have generated a legitimate expectation that their developments would not be stopped if it caused damage to the environment.

487. As has been demonstrated above,[515] Claimants misled SETENA in the process of obtaining the EV. Under Costa Rican law, it is the responsibility of the developer to discover whether there are protected ecosystems such as wetlands and forests in the relevant area and thereby

511 **RLA-48**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment ("UNCTAD FET"), p. 68.
512 Claimants' Memorial, ¶ 283.
513 Claimants' Memorial, ¶ 286.
514 Claimants' Memorial, ¶ 332.
515 See, section IV.B.1.a.

inform the environmental agencies of any relevant information concerning their intended developments before applying for the environmental clearing process before SETENA.[516]

488. The General Regulations on the Procedures for Environmental Impact Assessment impose liability on the developer and its consultant for the accuracy of the information submitted to SETENA:

> "The developer of the activity, work or project in question and its consultant team, shall be liable for the information submitted to the Environmental Impact Study and must present any answer, clarification or addition that SETENA requires through the submission of an official annex to the Environmental Impact Study."[517]

489. Likewise, precisely because the responsibility for the submission of information lies with the developer, Article 45 of the General Regulations on the Procedures for Environmental Impact Assessment establishes that every resolution from SETENA granting an EV shall contain a Fundamental Environmental Commitments Clause, under which:

> "The Environmental Viability (permit) is hereby granted with the understanding that the developer of the project, works or activity will strictly comply with all the regulations and technical, legal and environmental rules in force in the country and to be enforced before other authorities of the Costa Rican state. The violation of this clause by the developer will not only merit sanctions involving non-compliance with such regulation, but also, since it constitutes a fundamental foundation on which the [Environmental Viability] rests, will automatically annul the [Environmental Viability] with all of the technical, administrative and legal implications for the activity, work or project and its developer, particularly with regard to the scope of application of Article 99 of the Environmental Organic Act."[518]

490. In this sense, the constitutional jurisprudence of Costa Rica has acknowledged the operation of the system and the obligation the developer is under to present accurate information to SETENA for the development of its intended project.[519]

491. Claimants were well aware of the operation of the system and their duty to provide all required information for SETENA's assessment of the impact the Las Olas Project would have on the environment because:

- The Fundamental Environmental Commitments Clause was expressly referred to in granting the EV for the Concession site as well as for the Condominium site.[520]

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516 First Witness Statement, Julio Jurado, ¶¶91-93.
517 C-208, Article 36.
518 C-208, Article 45.
519 **R-186**, 3446-2009, Constitutional Chamber, Supreme Court of Justice, February 26, 2009.
520 C-36, Clause 3; C-52, Clause 4.

- For the Concession site, Claimants submitted a Sworn Statement or Affidavit on Environmental Commitments, in which, under oath, they promised to wholly and entirely comply with the terms and conditions stipulated in the regulations derived from the Environmental Impact Assessment process.[521]

492. However, even when Claimants' were completely aware of the existence of wetlands and forest in the Project site, they kept this information from SETENA. As previously demonstrated,[522] Claimants were aware of the presence of wetlands on their property since at least 2007 when they commissioned the Protti Report.[523] Claimants chose to conceal that fact in their subsequent EV application, and chose to fragment the Project Site in an attempt to conceal, through omissions and fragmentation, the presence of a fragile ecosystem on the site.

493. Further, on September 30, 2008, two inspectors of SINAC and MINAE inspected the Project Site and concluded that two separate areas of the Project Site could be categorized as wetlands.[524] Claimants' agent (Mauricio Mussio) joined the inspectors on their visit.[525] Therefore, by 2008 Claimants were on notice that the authorities were conducting inspections regarding the existence and impact on wetlands on the site.

494. Therefore, Claimants are barred from relying on the SETENA EV for the Condominium site to argue the inexistence of protected ecosystems in the area, as the SETENA EV is a consequence of Claimants' own misconduct of hiding relevant information from SETENA.

495. Furthermore, as explained by Prosecutor Martínez, Claimants' reliance on the EV issued by SETENA cannot excuse the commission of the crimes and their subsequent impact on the environment in the Las Olas Ecosystem:

> "As to the merits, the main defense put forward by the defendants was that they held permits issued by the public administration to perform the acts of which they were accused. In this regard, they relied on the environmental viability granted by SETENA on 2 June 2008 and on the permits of the Municipality of Parrita for easements of 16 July 2010 and construction of 7 September 2010. However this argument lacks any value if one considers the following.
>
> SETENA analyses whether a project is environmentally viable once it receives all studies from the developer. [The environmental viability] is simply a requirement to start a project; SETENA does not grant permission to perform works. This is regulated by Article 17 of the Environmental Organic Act, which

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521 **R-13**, Complete D-1 form for Condominium site, November 8, 2007, p. 123. Note that this Affidavit is incomplete.

522 See, section IV.B.1.a.

523 **R-11**, Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007.

524 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008.

525 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008.

> is even quoted by the claimants in their submission, which shows that they know of it.
>
> The developer has to go to SINAC-MINAE to request permission to cut down trees, to affect a wetland; to the Municipality to obtain construction permits; to the mining authority if it is to exploit mines, etc. The environmental viability can never authorize the affectation of a wetland or the cutting down of trees on a site.
>
> In fact, the environmental viability that SETENA granted to the Condominio Horizontal Residencial Las Olas expressly mentions and highlights in the third recital, point seven "*If the removal of a tree is required, a permit must be obtained at the MINAE office.*"[526]

496. Moreover, as the Fisrt KECE Report demonstrates most of the construction work conducted to drain and fill wetlands on the Project site, was done not on the Condominium site for which Claimants had obtained the EV, but on the Easement and other lost site.[527] Claimants have never even applied for the EV with SETENA for the Easement and other lost site, and therefore their work was completely illegal.[528]

497. Lastly, the same applies for the construction permits, which as was demonstrated above, were obtained illegally. Clearly, Claimants' cannot hide behind the EV or the construction permits to allege a legitimate expectation that Costa Rica would not enforce its environmental law and shirk responsibility for their illegal acts.

498. Claimants also rely on a letter from SINAC from April 20, 2008 stating that the area is not in a WPA.[529] However the protection of wetlands and forests in Costa Rica is completely independent to the characterization that the State can give to a certain area as a WPA. In other words, it is not necessary for an area to be considered as a WPA in order for Costa Rican authorities to protect its environment, particularly if there are protected ecosystems such as wetlands and forests on the relevant site.

499. Article 41 of the Environmental Organic Act has declared every wetland in Costa Rica of public interest, regardless of its location:

> "Wetlands and their conservation are hereby declared of public interest, for being of multiple use, **whether or not protected by the laws governing this matter.**" (emphasis added.)

500. Article 42 of the Environmental Organic Act grants MINAE the authority to delimit protection zones in maritime and coastal areas and wetlands. However, this is a power not an obligation, and therefore the declaration of a location as a protected zone is not an intrinsic characteristic

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526 First Witness Statement, Luis Martínez Zúñiga, ¶¶67-70.
527 First KECE Report, ¶¶80-81.
528 See Section IV, B, 2, b.
529 Claimants' Memorial, ¶¶217, 136, 140, 159.

of wetlands, that is, not every wetland has to be a protected area.[530] Therefore, there are two types of wetlands under Costa Rican law, wetlands that are included within a protected area by express declaration of MINAE and wetlands located on private property, that do not lose their nature for that reason.

501. The Constitutional Chamber of Costa Rica's Supreme Court has explained:

> "If in the specific case MINAE certifies that the property of the private is not within a Wildlife Protected Area, according to the areas administered by it, that does not imply in any form that the wetland that was found [there] does not have to be protected. We ought to remember that the International Convention subscribed by our country established the obligation of a state party to promote the conservation of wet zones and aquatic birds that create natural reserves in the wetlands, regardless of their inclusion or not in the "List" […]."[531]

502. The administrative courts have held:

> "Relating to the protection of wetlands, the Constitutional Chamber has established with sufficient force the duty of the State and its institutions to protect the zones of wetland, regardless of them being or not declared by Executive Decree, as a derivation of the public obligations that arise from article 50 of the Constitution."[532]

503. Criminal courts also acknowledge the protection of wetlands even if they are not located in a specific WPA:

> "When the Wildlife Conservation Law was enacted, wetlands were not categorised as wildlife protected areas therefore Article 7 intended to make official wetlands in public property through an executive decree. It is clear that if the State is interested in acquiring a property that holds a wetland, it must do so through the procedure of expropriation and corresponding payment. […] However, even when wetlands are on private property, they are protected and the crime of draining of wetlands can be committed according to the Wildlife Law. We ought to remember that by express provision of article 39 of the Environmental Organic Act, wetlands are of public interest and therefore, subject to protection."[533]

504. Finally, Prosecutor Martínez has also explained the criteria in his witness statement:

> "… The fact that there is a wetland or a forest that has not yet been categorized by SINAC as a conservation area does not imply that these ecosystems do not exist and do not merit protection. There is plenty of jurisprudence in this regard."[534]

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530 First Witness Statement, Luis Martínez Zúñiga, ¶¶71-72.
531 **R-172**, Decision 12817-2011, Constitutional Chamber, Supreme Court of Costa Rica, December 14, 2001.
532 **R-184**, Decision 48-2014, Contentious Administrative Tribunal, April 7, 2014.
533 **R-177**, Decision 01209-2005, Criminal Court of Appeals, November 15, 2005.
534 First Witness Statement, Luis Martínez Zúñiga, ¶72.

505. Therefore, Claimants' reliance on the 2008 letter from SINAC stating that the Condominiums were not in a WPA has absolutely no bearing on the fact that Claimants illegally impacted wetlands and forest on the Las Olas Ecosystem.

4. Costa Rica has accorded Due Process to Claimants

506. According to Claimants, Costa Rica breached Article 10.5 DR-CAFTA since its officials failed to conduct themselves in a manner consistent with the principle of due process (i.e. transparency; notice; and the right to be heard).[535]

507. Keen to apply past arbitral decisions with no application to the facts of the case, Claimants do not hesitate to mischaracterize the conduct of the Costa Rican administration and judiciary. However, Claimants' contentions do not withstand a review of the relevant facts.

508. Claimants allege a sudden and arbitrary change in the Costa Rican administration's position in relation to the development of their Project, and a denial of their due process rights. This is misplaced. On the contrary, Claimants' offensive, defamatory, but unsubstantiated comments on some Costa Rican public employees will not cure the monumental defects in their case.

509. Claimants misled the Costa Rican administration regarding the natural conditions on the Project Site.[536] But Claimants' neighbors knew, and could see how the works were affecting the Las Olas Ecosystem. As they started filing complaints with various organs of the state, it became necessary to make inquiries into such complaints.

510. In 2009, July 2010, and May 2011, neighbors of the Project Site complained to the Municipality regarding the refilling of wetlands and the harm to animal life, and vegetation on and off-site.[537] In July 2010, neighbors also alerted the *Defensoría de los Habitantes* of the impact to the wetlands on the Project Site.[538] In July 2010, [539] November 2010,[540] and October 2011,[541] neighbors complained to SINAC regarding the impact to the wetlands on the Project Site, the felling of trees, and the existence of the Forged Document in Claimants' Condominium EV application.

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535 Claimants' Memorial, ¶343.
536 See Section IV, B, 2, a.
537 **R-23**, Complaints by neighbors of Parrita with the Municipality, 2009; **R-37**, Complaints by members of Esterillos Oeste, July 5, 2010, **R-74**, Letter from the Terrestrial Maritime Zone Department to the Municipal Council, March, 7, 2011.
538 First Witness Statement, Hazel Díaz Meléndez, ¶18.
539 C-72;
540 **R-59**, Complaint of neighbors re Forged Document, November 18, 2010.
541 **R-264**, October 2011 SINAC Report (ACOPAC-CP-129-2011-DEN), October 3, 2011.

511. In February 2011, criminal complaints were filed by a neighbor against Mr Aven and Mr Damjanac.[542] SINAC had also filed a criminal complaint in January 2011 in relation to the cutting of trees on the Project Site. In March 2011,[543] a neighbor of the Project Site also filed a complaint for the refilling of a wetland and the Project's impact on the environment.

512. As these complaints emerged, so did the concern that Claimants' EV certification might, in fact, have been a total misrepresentation, and that the Project may well present a serious risk to the Las Olas Ecosystem. As previously explained, pursuant to the precautionary and preventative principles,[544] regardless of scientific certainty, if a serious risk of harm to the environment is raised with an organ of the state, it is mandatory for that organ to assess the risk of environmental harm. Costa Rica pledged both at the domestic and international levels that it would actively seek to prevent the commission of environmental harm. Thus, both under Costa Rican constitutional law, and under international law, complaints regarding possible harm to the environment cannot be left unanswered.

513. Yet Claimants seem to suggest that, to comply with Costa Rica's obligations under Article 10.5 of DR-CAFTA, the Municipality, the *Defensoría*, SINAC, the TAA, and the environmental prosecution office should have remained idle, and omitted to act after they received the complaints.[545] Quite condescendingly, Claimants take the position that "*in one small country, a clutch of determined bureaucrats*" should have ignored the complaints and refrained from initiating "*so many investigations*."[546]

514. Regarding their neighbors' complaints, Claimants suggest that the administrative and judicial organs with which these complaints were filed should essentially have refused to make inquiries, and instead simply taken Claimants' word that these complaints were "false and recycled."

515. However, the harm to the Las Olas Ecosystem was far from "false." And the complaints were not "recycled." Instead, the repeated complaints reflected continuing and well-founded concerns of those aware of the true conditions of the property, and reflected misconduct on the part of Claimants. This is confirmed by KECE, whose First Report clearly identifies that Claimants' draining and terracing of the land, as well as the felling of trees affected the wetlands and the forest on the Project Site.[547] Accordingly, contrary to Claimants' disdaining

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542 C-110.
543 C-110.
544 See, section III.A.1.
545 Claimants' Memorial, ¶366.
546 Claimants' Memorial, ¶366.
547 First KECE Expert Report, ¶¶60-70.

contentions, the investigations and inquiries into the existence of a risk of impact on the Las Olas Ecosystem were reasonable, justified and necessary.

516. To shift the focus away from their misconduct, Claimants make unsubstantiated allegations of solicitations of bribery by a SETENA employee, and an employee from the Municipality. It appears that Claimants' entire conspiracy theory hangs on their purported refusal to pay. But, as will be further explained below, Claimants' allegations are not credible and insufficient to rise to the level of a state's violation of one of its international law obligations.

517. Moreover, this alleged bribery solicitation does not stand up to scrutiny given that other organs of the Costa Rican government, with no knowledge of the allegedly corrupt employee, have also reached the conclusion that a serious risk of harm to the environment existed in this case.[548]

518. The allegations of an allegedly secret process are equally weak. Claimants themselves admit that developers do not need to be notified of an investigation into environmental violations prior to a final administrative act occurring.[549]

519. Unfortunately, in light of the conclusions of the First KECE Report, the affectation of the Las Olas Ecosystem was more than a risk. Kevin Erwin of KECE found actual marks of affected wetlands and forests on the Project Site. Claimants were afforded a fair and reasonable access to Costa Rica’s judicial and administrative processes

520. Further to the Costa Rican authorities' scrutiny into the Project's negative impact on the Las Olas Ecosystem, it became apparent that the Project's impact on the wetlands and the forest had already happened. Allowing for the works to continue would likely have resulted in further irreversible damage. As a result, injunctive relief was ordered in both the administrative and criminal proceedings.[550] But Claimants, who still have counsel in Costa Rica, decided to remain idle in the on-going proceedings and initiate international Treaty arbitration instead.

521. Claimants have sketched a defamatory theory in the hope of concealing the serious violations of Costa Rica's environmental laws they committed. Claimants have tried to create a picture in order to blame Costa Rica's officers for enforcing the law. Claimants have defamed those officers without any consideration or respect for their professional qualifications and the authority they hold as public officers.

548 See, section V.B.3.d.
549 Claimants' Memorial, ¶70, citing to Section 30 of the Constitution of Costa Rica.
550 See, section III.B.6.

522. Claimants' portrayal of those officials is nothing more than fiction in view of an objective description of the facts. Claimants have made serious accusations against Mr Bogantes, Ms Vargas, Ms Díaz and Prosecuto Martínez. Claimants' completely unsubstantiated assertions comprise the use of constant inflammatory terms, among others:

> "Mr Bogantes's conduct represented the **epitome of high-handedness**…Mr Bogantes display of **selfishness and deceit**…"[551] (emphasis added)
>
> "The conduct of Mr Martínez **typifies the very essence of arbitrariness in official decision-making**."[552] (emphasis added)
>
> "But for the evident disposition, held by each of Bogantes, Díaz and Vargas – to remain **wilfully blind** as to the fact that Las Olas was being developed in accordance with all applicable laws and regulations, and to subvert SETENA's exercise of supervisory authority over the Project."[553] (emphasis added)
>
> "Mónica Vargas Quesada, an official working in the Municipality's Environmental Management Department, **exemplifies the idea of a bureaucrat who had only peripheral involvement in the smooth-functioning approval process, but whose meddling constituted a gross violation of the Claimants' due process rights**…"[554] (emphasis added)

523. However, the use of such defamatory terminology does not make them true. Every single defamatory statement asserted by Claimants has been addressed and strongly repudiated by the witness testimonies of Mrs. Díaz, Ms Vargas and Prosecutor Martínez. Notably, some of these witnesses reserve their individual legal rights to bring defamation claims against Claimants. Accordingly, we would urge Claimants to take particular note of the content of the above mentioned witness statements before perpetuating further falsehoods in their upcoming filing, or before failing to offer retractions.

524. Furthermore, as we will see in the following paragraphs, Claimants' conspiracy theory falls apart in light of the serious contradictions and inconsistencies that appear from their misleadingly account of the facts.[555]

a. *Public officials never accepted facts of the complaints as true during the investigations*

525. Claimants further accuse Ms Díaz and Ms Vargas of having intentionally repeated the facts alleged in the complaints against Claimants as true:

> "Over the next month, she would demand an investigation from the Mayor's Office and make an official complaint to the TAA, each time **repeating Mr**

551 Claimants' Memorial, ¶392.
552 Claimants' Memorial, ¶369.
553 Claimants' Memorial, ¶413(I).
554 Claimants' Memorial, ¶344.
555 Claimants' Memorial, ¶¶344-368.

> **Bucelato's lies** without an ounce of independent verification – just as Ms Vargas had done."[556] (emphasis added)
>
> "Ms Vargas was called as a witness in Mr Aven's criminal trial, where she admitted that she had never actually set foot on the grounds of the Las Olas project. Nevertheless, the record includes **"reports"** drafted by Ms Vargas that appear simply to **repeat the unsubstantiated complaints** of individuals such as Mr Bucelato, against the Las Olas project, **as though they were proven facts**…"[557] (emphasis added)

526. Ms Díaz Meléndez explains that she never accepted as true the claims against the Las Olas Project but as it is the normal practice in the *Defensoría*, the allegations made in the complaint were quoted and transcribed in italics:

> "… [T]he claim against the Las Olas Project was filed with the Ombudsman by Mr Steve Allen Bucelato on 20 July 20 2010. When admitting the claim as in any other case, what was done was to literally copy in italics the content of the claim and expressly clarify that it did not imply that the Ombudsman had accepted as true certain facts that the claim contained."[558]

527. Ms Vargas also clarifies that in her reports she described what she personally had observed and that all she did was to refer the corresponding investigation to the competent authorities:

> "… It is enough to review the content of those reports to realize that they detail what was observed during the visits and that they refer the corresponding investigation to the competent authorities. At no point do these reports mention that the existence of a wetland or of a forest is a proven fact. If that were the case, then the request for an investigation that was made to the competent authorities would have lacked any sense."[559]

528. Clearly, the officials never accepted facts of the complaints as true as Claimants suggest. We trust this clarification suffices to remove any doubt. It is evident that both officials were doing nothing more than performing their jobs while investigating the allegations in relation to the Las Olas Project. In the face of such a simple explanation, it is remarkable to observe how outraged Claimants are for what is the standard execution of public officials reporting tasks and the state exercising police powers to enforce the law.

b. *Costa Rican authorities did not hide information from Claimants*

529. Claimants allege that the *Defensoría de los Habitantes*, the Municipality, SINAC and the TAA hid their investigations from Claimants:

> "But for the decisions repeatedly taken, by officials such as Vargas and Díaz, and of organizations such as SINAC and the TAA, to **hide their investigations**

556 Claimants' Memorial, ¶348.
557 Claimants' Memorial, ¶344.
558 First Witness Statement, Hazel Díaz Meléndez, ¶18.
559 First Witness Statement, Mónica Vargas Quesada, ¶62.

> from the Investors, and to not permit them to either learn of, or reply to, the accusations made against them, the falsity or those allegations could have been proved long before any interruption to the Project would have occurred."[560] (emphasis added)

530. However, there was never any concealment of information from any public official. All the information at SINAC, Municipality, the TAA and the *Defensoría* is public and accessible to an interested party. Therefore, if Claimants had any interest they simply should have gone to the public offices of such agencies and requested a copy of all the files relating to the project.

531. This is corroborated by the simple fact that every time Claimants appeared in the offices to request information or obtain copies of the internal files in relation to the Las Olas Project, they were immediately provided with it.

532. In September 2010, when Claimants' counsel showed up at the Municipality, Ms Vargas informed him about the concerns from the neighbors and environmental complaints against the Project.[561]

533. Further, Mr Aven mentions in his witness statement that when he went to the SINAC office in Quepos on March 2011 and requested a copy of the 2010 July SINAC Report, he was provided with it.[562]

534. The same happened on November 2012 when Claimants' counsel requested copies of the file from the *Defensoría*,[563] which he obtained shortly after[564] and when he requested information from the Municipality[565] which was answered in writing on the same day.[566]

535. Once again in December 2012, Claimants requested copies of the complete file of the Las Olas Project in SINAC which were granted immediately.[567]

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560 Claimants' Memorial, ¶413(l).

561 First Witness Statement, Mónica Vargas Quesada, ¶25.

562 Witness Statement, David Aven, ¶163.

563 **R-130**, Request for copies, November 1, 2012.

564 **R-131**, Delivery of copies; November 1, 2012.

565 **R-135**, Letter from Manuel Ventura to the Municipality, December 4, 2012. On December 4, 2012, Mr Manuel Ventura (Claimants' counsel) requested the Municipality information about: 1) which permits have been granted to the Las Olas project for the construction of streets and entrances; 2) which permits have been granted to Inversiones Cotsco; and 3) whether there was any work granted or materials provided by the Las Olas project for the benefit of the community for the issue of flooding.

566 **R-138**, Letter from the Municipality to Manuel Ventura Rodriguez (OIM No. 863-2012). On December 4, 2012, the Municipality responded that: 1) there were seven permits for easements; 2) there was a construction permit (**R-136**, Letter from the Municipality to Manuel Ventura Rodriguez (OIM No. 864-2012)); and 3) there were no works of materials provided by the Las Olas project to the benefit of the community. (**R-137**, Letter from the Municipality to Manuel Ventura Rodriguez (OIM No. 865-2012)).

567 **R-259**, Delivery of SINAC record to Claimants, April 15, 2013; **R-258**, Request of copies of SINAC Record, December 10, 2012.

536. Claimants however argue that they should have been notified about the investigations. This is a damning account of how disengaged Claimants were in the formalities required by Costa Rican law.

537. In relation to the proceedings within the *Defensoría de los Habitantes*, Ms Díaz explains that the investigations are conducted in relation to complaints against the public administration not private parties. Therefore, the only parties that are notified in such proceedings are the particular administrative institutions being accused. Third parties are not involved in the proceeding since the recommendations that the *Defensoría* renders only have effect on public offices and not private parties:

> "Again, the claimants' claims denote an absolute ignorance of the procedure followed by the *Defensoría the los Habitantes*. The competence of the *Defensoría the los Habitantes* is limited to a review of the legality of the acts of the Public Administration, not of private parties such as the developers of the Las Olas project. Within the scope of their competence, the Ombudsman requests information from public entities to follow up on claims filed by citizens. The procedure does not affect third parties because the acts issued by the *Defensoría the los Habitantes*, do not have an adjudicatory character that could influence the rights of private parties, rather they are limited to recommendations made to the public administration. Therefore, the legal procedure in respect of claims before the *Defensoría the los Habitantes* does not provide for the notification or the participation of third parties to the case. In fact, the Constitutional Chamber of Costa Rica has held on various occasions that the *Defensoría the los Habitantes* cannot bring a private third party into its investigations.
>
> This in no way implies that I have "*hidden my investigations from the investors and as such not allowed them to know about the accusations against them*". To start, no accusations against the investors were investigated in the record before the *Defensoría the los Habitantes*, rather the investigation involved a review of the legality of the actions and omissions of the Public Administration through the Municipality of Parrita, SETENA, the Environmental Administrative Tribunal and SINAC/ACOPAC."[568]

538. As to the investigation at the Municipality and SINAC, Dr Jurado explains that the internal visit reports those administrative bodies issue are only preparatory acts, and therefore they do not have any legal effect on the user unless they are later embodied in a final administrative act, Therefore, such preliminary reports are not notified to the "user:"

> "During these preliminary investigations, it is not necessary for the user to participate since at this stage it is *inappropriate* to attribute liability or to impose any sanction. It is solely when a decision to initiate an ordinary procedure is taken, that the user is formally notified, with the notice of the charges and related facts.
>
> SINAC's inspection reports in this case were part of this preliminary investigation. These were internal documents of the Administration, which as

[568] First Witness Statement, Hazel Díaz Meléndez, ¶¶51-52.

> usual, form part of the fact-finding phase to eventually determine the need to proceed with a formal procedure, either in the administrative or judicial jurisdiction. In accordance with what has been explained above, these are mere preparatory acts given that they do not produce a legal effect on the user, and are not capable of being challenged.
>
> The Constitutional Chamber has also ruled in this regard, holding that in the preliminary investigation stage, the Administration has no duty to observe all the requirements for due process. This does not occur until [the administration] decides to proceed with the ordinary procedure. Also, as indicated by other local courts, "[i]f one considers that the participation of those on whom liability may fall as necessary, we would come to the absurdity of forcing investigators to act together with counsel and potential defendants, which besides the obvious risk of leakage of information it represents, it would hinder the acts within the investigation."
>
> That is why the Administration had no duty to notify the user about the inspection reports, nor to involve him in the stage when the preliminary investigation of the facts was being carried out."[569]

539. Ms Vargas confirms in her witness statement that the applicable regulations to the Environmental Management Office of the Municipality does not provide for any legal notice to the developer in relation to investigations of environmental violations until there is a final act with juridical effect over the project. However, all the information in their files is publicly accessible to the developer who should have attended the Municipality to request it:

> "First, I have to clarify that the procedure followed by the Municipality to coordinate investigations of alleged environmental damage with the competent institutions, does not include the notification or the participation of the developers, who will of course have an opportunity to be heard in the relevant instances should there be sufficient elements in the investigation regarding the existence of an infringement to environmental legislation that merits the initiation of administrative or judicial proceedings.
>
> On the other hand, it is the responsibility of the developers, through their Environmental Regent, to appear before the Municipality's Environmental Management Office to report on the permits obtained before the competent institutions should the intention be to cut down trees or affect a wetland in the area of construction (for which permits from SINAC are required). Neither the developers nor their Environmental Regent ever came to the Municipality's Environmental Management Office to submit permits, obtain advice or for any other issue, which denotes a complete disregard in the environmental issue."[570]

540. Finally, as to the TAA's alleged hiding of information from Claimants, it is also the case that during the preliminary stage comprised of investigations of a complaint, the participation of the accused party is not necessary. The "Manual of Investigation of Environmental Crimes" produced by the United States Agency for International Development (USAID) for Costa Rica explains that the non-participation of the accused during the investigations conducted by the TAA are not violations of due process of individuals' rights:

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569 First Witness Statement, Julio Jurado, ¶¶117-120.

570 First Witness Statement, Mónica Vargas Quesada, ¶¶83-84.

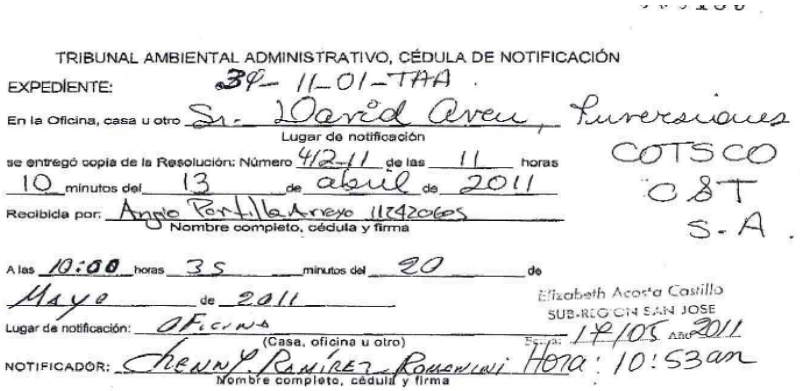
> "The fact that the alleged perpetrators are not made aware of the preliminary investigation does not constitute a violation of due process, precisely because it is at this preliminary stage where one cannot refer to a due process itself. It is important to consider that there is no specific legal rule governing the preliminary investigations but it is an implicit power that the Public Administration holds, and in this case, the TAA."[571]

541. In all the cases where the administrative agencies rendered a final administrative act that had effects on Claimants, they were immediately notified about it.

542. On February 4, 2011, the same day on which SINAC issued an injunction enjoining any works on the Project Site,[572] Claimants were notified of it.[573]

543. On May 11, 2011, the Municipality gave notice to Claimants of the injunction issued by SETENA on April 13, 2011[574]and requested that Claimants stop all works in the site.[575] It is actually ironic that Claimants complain here about not being notified, while Mr Damjanac actually refused to receive the notification of the injunction and the Municipality had to request the intervention of the local police to serve Claimants with the notice.[576]

544. Further, Claimants allege that they "never received" the TAA Injunction.[577] However, the record shows that Claimants were notified of the TAA Injunction on the very same day that such injunction was issued (i.e. April 13, 2011):[578]



TRIBUNAL AMBIENTAL ADMINISTRATIVO, CÉDULA DE NOTIFICACIÓN

EXPEDIENTE: 39-11-01-TAA

En la Oficina, casa u otro Sr. David Arce, Inversiones COTSCO COST S.A.
Lugar de notificación

se entregó copia de la Resolución: Número 412-11 de las 11 horas 10 minutos del 13 de abril de 2011

Recibida por: Angie Portilla Arroyo 117420685
Nombre completo, cédula y firma

A las 10:00 horas 35 minutos del 20 de Mayo de 2011

Lugar de notificación: Oficina
(Casa, oficina u otro)

NOTIFICADOR: Chenny Ramírez Romanini
Nombre completo, cédula y firma

Elizabeth Acosta Castillo
SUB-REGION SAN JOSE
Exp. 17/05 AÑO 2011
Hora: 10:53am

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571 **R-215**, Manual of Investigation of Environmental Crimes, United States Agency for International Development (USAID), 2010, p. 26.

572 C-112.

573 Claimants' Memorial, ¶133.

574 C-122.

575 **R-92**, Letter by the Municipality to Claimants giving notice of the injunction (OIM No. 119-2011), May 11, 2011.

576 C-125.

577 Claimants' Memorial, ¶155.

578 **R-84**, Notification of TAA injunction to Claimants, April 13, 2011. According to Article 20 of the Judicial Notifications Law and Article 18.10 of the Commercial Code, corporations shall be served with process in its corporate domicile. **R-277**, Commercial Code; **R-278**, Judicial Notifications Law.

545. Therefore, it is clear that Costa Rican officials never hide any information from Claimants who could have obtained any document in the administrative files just by requesting it, and that every single time that an administrative body issued a definitive act affecting Claimants they were immediately notified of it.

c. *The alleged fabrication of the Forged Document as an "evil plan" to frame Mr Aven*

546. Claimants have denied any involvement with the fabrication of the Forged Document. On February 9, 2011, Claimants replied to SETENA's request of January 17, 2011 denying any connection with the Forged Document and stating that according to their internal investigations Mr Bucelato, a neighbor of Esterillos Oeste, fabricated the Forged Document as part of an "evil plan".[579]

547. Claimants in this arbitration have changed their "conspiracy theory" and now accuse Mr Bogantes, an officer of SINAC, of the fabrication of the Forged Document.[580] Claimants suggest that Mr Bogantes fabricated the Forged Document in 2010 after Mr Aven's denial of an alleged bribe solicitation:

> "The record indicates that it was **Mr Bogantes** who originally "discovered" the allegedly forged document which would be used to undermine the 2008 Environmental Viability, and to briefly **implicate Mr Aven in a serious crime**."[581] (emphasis added)
>
> "Mr Bogantes' malicious and deceitful conduct abetted the respective crusades upon which Ms Díaz and Ms Vargas had already embarked. His or an unknown co-conspirator's manipulation of 2008 MINAE records allowed him to frame Mr Aven for a falsification of documents charge, which went to the heart of the approvals required for the development of Las Olas to proceed. His or an unknown co-conspirator's circulation of this fabrication to Díaz, and possibly also Bucelato, reinforced the likelihood that it would be used against Mr Aven, at a safe distance from its author(s)."[582]

548. This argument lacks any support. The Forged Document was submitted to SETENA to obtain the EV in 2008. The record shows that since 2008, official reports from SINAC already reported the authorities' concern about the irregularities with the Las Olas Project, including the existence of the Forged Document used to obtain the corresponding permits:[583]

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579 C-111; In the local proceedings Claimants first blamed Mr Bucelato, a neighbor of Esterillos Oeste, for being the author of the "decline" of its alleged investment. On October 20, 2010, Mr Aven filed a criminal complaint against Mr Bucelato for slander and defamation. In his complaint, Mr Aven mentions a visit from Bucelato on September 17, 2010 where he allegedly accused Mr Aven of being corrupt, having bribed Parrita's Mayor, Municipality's inspectors, MINAE and SETENA authorities (C-89).

580 Claimants' Memorial, ¶¶351, 413.

581 Claimants' Memorial, ¶390.

582 Claimants' Memorial, ¶413 (III).

583 **R-21**, Letter to Ronald Vargas (ACOPAC-D-1063-08), October 7, 2008.

> "…I consider it important to inform you that as part of the investigations undertaken by the responsible officer, a series of documents were obtained, among which was a document called "INFORME SINAC 67389RNVS-2008 REFUGIO NACIONAL DE VIDA SILVESTRE AREA DE CONSERVACION ESTERILLOS OESTE." This technical report is **not an official document** issued by this conservation area by any of its offices and further, [the document] points out in a categorically erroneous manner the name of the office Refugio de Vida Silvestre Playa Hermosa Punta Mala.
>
> The most worrying thing is that the report is purportedly signed by M.Sc. Gabriel Quesada Avendano, as executor biologist and you, as Director of SINAC. As you can see in the document, evidently the stamped signature does not corresponds to yours.
>
> I inform you of this, so that the condition of this document is reviewed, particularly because the conclusions state that the referenced project does not violate nature, when that has been demonstrated otherwise in the technical report ACOPAC-SD-087-08.
>
> I also recommend that you inform the College of Biologists about the matter, so if the irregularity is confirmed, they can review the qualification of the professional who signed the document."[584] (emphasis added)

549. For the avoidance of doubt, the above extract is from a letter dated October 7, 2008. Claimants fail to explain how Mr Bogantes could have fabricated the Forged Document in 2010, if another SINAC official was already flagging the irregularities of the same document as early as 2008? It is just absurd.

550. The Forged Document was submitted in the SETENA file for the EV and because it concluded that the project was not a threat to the environment it could only benefit Claimants. That is why Prosecutor Martínez explains that during the investigation, Mr Aven was suspected of having fabricated such document, as the developer of the project.[585] This thesis was supported by the strong suspicion that the person who submitted the Forged Document to SETENA was Edgardo Madrigal, Claimants' architect who generally made submissions in relation to the Las Olas Project.[586]

551. Furthermore, the records show that it was indeed Mr Aven who submitted the Forged Document to the Municipality to obtain the construction permits and to Prosecutor Martínez when he was being investigated for breaches of environmental laws:

- In a letter addressed to the *Defensoría de los Habitantes*, the Municipality reported that:

> "…Mr David Aven representative of the Las Olas project, has submitted a document named SINAC 67289RNVS-2008, signed by Eng. Ronald Vargas Brenes, SINAC director, indicating that the Las Olas Project is

584 **R-21**, Letter to Ronald Vargas (ACOPAC-D-1063-08), October 7, 2008.
585 First Witness Statement of Luis Martínez Zúñiga, ¶34.
586 First Witness Statement, Luis Martínez Zúñiga, ¶34-37.

> not an evident threat to the biological corridor of Esterillos Oeste […]"[587]

- During Mr Aven's sworn declaration, given under oath in the criminal proceedings, Prosecutor Martínez explains how Mr Aven handled him the Forged Document:[588]

> "In that meeting, Mr Aven showed me the SINAC-MINAE document identified as "67289RNVS-2008" and insisted that it was valid and that the SINAC-MINAE had indicated that there were no problems with the project…"[589]

552. Consequently, either Mr Aven was lying to Prosecutor Martínez or Mr Aven is making up an explanation for the purposes of this arbitration. For all these reasons, Claimants' accusations of Mr Bogantes fabricating the Forged Document with the "evil intentions" of framing Mr Aven are simply not credible

d. *The "allies" did not know each other*

553. Claimants' conspiracy theory names as key players Ms Díaz, Ms Vargas and Mr Bucelato:

> "The key players in this one-sided relationship were initially **Ms Díaz and Ms Vargas**. The record suggests that both may have **been working at the behest of Mr Bucelato**, for whom they had been able to launch a number of duplicative and unwarranted investigations into the Los Olas Project, which eventually had the cumulative effect of first threatening and ultimately stranding and frustrating any meaningful use of the Claimants' investments."[590] (emphasis added)
>
> "…the complaints being pressed by **Mr Bucelato and his two allies** in local government, Ms Mónica Vargas Quesada and Ms Hazel Díaz Meléndez."[591] (emphasis added)
>
> "**Ms Díaz** played a **very** similar role in this **administrative fiasco as Ms Vargas**. In fact, the two officials were not only both apparently in **close contact with Mr Bucelato**, but also with each other..."[592] (emphasis added)

554. Claimants' theory is rather pathetic and falls apart by virtue of the fact that the "allies" did not actually know each other. Ms Díaz Meléndez explains very clearly she never met or talked to Mr Bucelato or Ms Vargas:

> "The first thing I want to clarify is that I do not know any of the persons with whom according to the Claimants I kept in "close contact", were my alleged "allies" or for whom I allegedly worked. In fact, at no point during the

587 **R-49** Municipality Report to the Defensoría de los Habitantes (DeGA No. 200-2010), August 18, 2010.
588 **R-90**, Sworn Statement of Mr David Aven, May 6, 2011.
589 First Witness Statement, Luis Martínez Zúñiga, ¶33.
590 Claimants' Memorial, ¶354.
591 Claimants' Memorial, ¶327.
592 Claimants' Memorial, ¶348.

> investigation did I have direct contact with either Mr Bucelato or with any other public official."[593]

555. Likewise, Ms Vargas, in her witness statement, confirms that she never had any personal relationship or contact with Ms Díaz:

> "Nothing could be further from the truth. I do not know public official Hazel Díaz Meléndez personally nor have I ever talked to her by phone. My only contact with her related to the notifications I received from the 'Defensoría de los Habitantes' (Ombudsman) that were signed by her. Due to the requirements of the Ombudsman, I once had contact with Ms Alejandra Vega Hidalgo, as the notification of the Ombudsman mentioned her as the person we should contact by telephone regarding any procedure or information because she was the professional in charge of the investigation. That was my entire contact with the Ombudsman, so one could hardly say truthfully that public official Hazel Díaz Meléndez was my "ally"."[594]

556. Ms Vargas also explains that she has never worked at the behest of Mr Bucelato or was his "ally":

> "Regarding Mr Bucelato, he is a neighbor from the community of Esterillos Oeste where I reside. Everybody in the town knows him for his commitment to the environment. He is an American citizen who came to the Municipality on various occasions to address the environmental issues. In my opinion, he is not an extreme ecologist but rather a person who felt helpless in the face of the environmental damage and who wanted to prevent further damage to the environment. On various occasions, Mr Bucelato said he had been threatened and assaulted by the developers of the Las Olas project and came to the Municipality crying saying that he was running away because they were following him.
>
> Very much contrary to what the Claimants are inventing, Mr Bucelato did not consider that I was his "ally" much less that I worked for him. While in the performance of my duties I processed and followed up on Mr Bucelato's claim in relation to the possible environmental damage, he was very angry at me because in his opinion the Municipality was not doing enough to stop the environmental damage, to the point that nowadays if he sees me, he does not even greet me."[595]

e. *The alleged intention to prejudice Mr Aven and Claimants' investment*

557. Claimants' Memorial is plagued with slanderous accusations against Ms Díaz, Ms Vargas, and Prosecutor Martínez of intentionally working against Claimants' interest with the aim of depriving them of their investment.

> "66. It is almost inconceivable to think that in one small country, a clutch of determined bureaucrats could manage to conduct so many investigations of the same false and recycled allegations, whilst: (i) willfully ignoring determinative

593 First Witness Statement, Hazel Díaz Meléndez, ¶55.
594 First Witness Statement, Mónica Vargas Quesada, ¶94.
595 First Witness Statement, Mónica Vargas Quesada, ¶¶95-96.

findings by agencies actually charged with managing the regulatory relationship with an investor; and (ii) stubbornly but effectively managing to avoid alerting the targeted investors that anything was afoot. These **bureaucrats worked so efficiently, against the Claimants' interests**, that they succeeded in completely depriving them of any recourse, through which they might have forestalled the mandatory cease work orders and a zealously unbalanced criminal prosecution." (emphasis added)

"379. Second, and more importantly, given the plodding pace of Costa Rica's courts, victory was not necessarily going to be achieved for **the enemies and opponents of the Las Olas project** once the charges against Mr Aven had been given a fair airing, or any problems with the Las Olas site being put to rights through remedial action. **No, victory was achieved, for the likes of Mr Bogantes and Ms Vargas, simply by ensuring that the project would be shut down for at least a year**." (emphasis added)

"388. What Mr Aven did not know, outrageously, was that there were **officials who were not just capable of derailing the progress of his investment, but who were already actively engaged in achieving that very end**. At the moment that Mr Bogantes appeared in his office in late August 2010, Mr Aven had no way of knowing that Las Olas had just survived **concerted attacks by two officials, Ms Díaz and Ms Vargas,** whose efforts had only just been stymied, respectively, by SETENA and the Mayor. Mr Bogantes obviously sensed that he possessed a strategic advantage so strong that he could leverage a personal-pay-day worth several hundred thousand dollars from it. **He knew what Ms Díaz and Ms Vargas were determined to achieve**, and he apparently perceived that he was perfectly placed to either frustrate, or abet, that agenda, which they apparently also shared with Mr Bucelato." (emphasis added)

"413 (III) (III) Mr Bogantes' malicious and deceitful conduct abetted the respective crusades upon which Ms Díaz and Ms Vargas had already embarked."

558. Quite frankly, Claimants' narrative does not make any sense. The objective and absolute truth is that investigations relating to environmental damage at Las Olas Project were not started because of the public agencies' animosity towards Claimants. None of them was actually "*sua sponte*". On the contrary, every time an investigation or inspection was conducted, it was due to complaints from the neighbors of Esterillos Oeste who were being affected by the environmental damage caused by Claimants to the land. The investigations by the multiple agencies involved in this case were triggered by the community and not due to a desire to "destroy Claimants' investments", as Claimants would suggest.

559. This is explained by the witness statement of Hazel Díaz:

"60. Honestly, these excerpts seem to have been taken from a thriller novel. Nothing further from the truth. I do not know the Claimants, so it is hard to understand why I could have intended to thwart their investments. There was no "concerted attack" or "effort" or "crusade" against Claimants' project. Much less complicity with Mr Bogantes whom I have never seen in my life.

61. As I have stated in this statement, my only participation in relation to the complaint of Mr Bucelato on alleged environmental damage taking place in the

> Las Olas project was limited to requesting information from the administrative entities though six communications in order to review the legality of their acts and omissions. It is simply impossible to derive from it any intention to harm the Claimants."[596]

560. Similarly, Ms Vargas also clarifies:

> "All of these accusations are false and completely unjust. My intention was never to harm the Las Olas project, but rather to ensure compliance with environmental legislation on the basis of the position that I hold in the Municipality. In fact, as a neighbor of Esterillos Oeste, I always thought that the development of the project would be something positive for the community given that it would generate economic activity and more jobs. Of course what I most wanted was to take the project forward. But this does not mean that I can ignore claims regarding alleged environmental damage, without breaching my duties as Environmental Manager. What was most appropriate was that the development should be taken forward respecting environmental legislation and this was the only thing at which my interventions were directed. In this sense, the priority is always to behave with professional ethics and to carry out the duties that were entrusted to me as Environmental Manager. Not having done so would have made me liable to claims regarding the poor performance of my duties."[597]

561. Furthermore, Claimants make serious accusations against the ethics and professional conduct of Prosecutor Martínez:

> "The record contains such a litany of unreasonable and unjustifiable decisions taken by Mr Martínez, from which the only reasonable conclusion to draw was that he was motivated by some form of discriminatory animus against Mr Aven. His apparent animus, or studied indifference, was magnified by the various ways in which he effected abuses of right in prosecuting him. Moreover, the record does not provide so much as a single example of the Prosecutor's office handling Mr Aven's complaints with any diligence.
>
> Rather, it reveals examples of deliberate manipulation and misrepresentation of the administrative records kept by the Office of the Prosecutor and by the local MINAE office, when under the direct supervision of Christian Bogantes."[598]

562. To conclude, none of the officials accused by Claimants of working against their interests with the animus of annihilating their investment had ever had any animosity towards Claimants or their projects. Quite the contrary, all the investigations were triggered by environmental concerns from the communities and the responses given by the authorities were objective and measured.

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596 First Witness Statement, Hazel Díaz, ¶¶60-61.
597 First Witness Statement Mónica Vargas, ¶103. See, also ¶¶104-125.
598 Claimants' Memorial, ¶413 (II).

5. Costa Rican judiciary did not engage on any arbitrariness in the conduct of the criminal proceedings against Mr Aven

563. Claimants argue that Costa Rica's manifest failure to accord due process could be viewed through the lens of arbitrariness.[599] But, they fall substantively short of proving any arbitrariness.

a. *Under international law the standard of arbitrariness of the judiciary is of gross denial of justice*

564. As was correctly highlighted in *Glamis Gold v. USA*, for the Tribunal to hold that Costa Rica acted arbitrarily under customary international law, a "*mere appearance of arbitrariness*,"[600] or the Tribunal's mere disagreement with how an agency acted, is insufficient. Rather, Claimants would have had to demonstrate "*a level of arbitrariness that, as International Thunderbird put it, amounts to a 'gross denial of justice or manifest arbitrariness falling below acceptable international standards*."[601] The threshold of impropriety is high, and Claimants fail to prove either gross arbitrariness, or "willful disregard of the due process of law."[602]

565. Under international law, allegations of a lack of due process in both judicial and administrative proceedings are characterized as denial of justice allegations:

> "[D]enial of justice involves some misconduct either on the part of the judiciary or of organs acting in connection with the administration of justice to aliens."[603]

566. Claimants alleged that they suffered a "systemic miscarriage of administrative justice, which involved multiple agencies (whilst apparently excluding others) over a span of two years, has few analogues in modern arbitral practice."[604] They further argue that "[i]n this case, the only the conduct of officials exercising the executive function of the Costa Rican State is at issue. Thus the international standards traditionally considered in cases where legislative or judicial functions have been exercised are not specifically relevant for the instant case."[605]

567. However, the entire section on the alleged "arbitrariness" of Costa Rican officials is based on the conduct of Prosecutor Martínez.[606] Further, Claimants have called Mr Zumbado as a witness to attempt to construe the existence of "chronic problems with the Costa Rican criminal

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599 Claimants' Memorial, ¶369.
600 **RLA-38**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶625.
601 **RLA-38**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶625.
602 **RLA-42**, *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, ¶625.
603 **RLA-44**, Jan Paulson, *Denial of Justice in International Law* (CUP 2005), p. 53.
604 Claimants' Memorial, ¶367.
605 Claimants' Memorial, ¶342.
606 Claimants' Memorial, ¶¶369-377.

justice system."[607] Therefore, it is quite obvious that Claimants' case is based on the conduct of the judiciary and should accordingly be considered pursuant to international law under the test for denial of justice.

b. *Claimants' are barred from claiming a denial of justice for the conduct of the Costa Rican judiciary as they have not exhausted local remedies*

568. Under the denial of justice standard, for an investor to allege a violation it is necessary that all the available judicial remedies have been exhausted. As the Tribunal in *Pantechniki v. Albania* rightly held:

> "Denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole. … This is a matter of a simple hierarchical organization of civil-law jurisdictions: first instance/appeal/cassation. One cannot fault Albania before having taken the matter to the top.[608]

569. Claimants have definitely not exhausted local remedies. Quite the contrary, Claimants abandoned the action they initiated in the administrative courts to challenge the injunction on the Las Olas Project. Actually, it was due to the disengagement of Claimants that on March 25, 2011 the Court reprimanded Mr Aven for his lack of responsiveness and failure to comply with four judicial orders issued by the Tribunal:

> "It draws the attention of the presiding Judge the fact that the claimant [Inversiones Cotsco] seem not to have an interest in the continuation of the proceeding, given that this office has requested FOUR times for a very simple procedural requirement which is the submission of copies so that it could grant a hearing to the defendants."[609]

570. Even worse, Mr Aven fled from the criminal trial brought against him.

571. Claimants, probably aware that their choice not to pursue all the legal remedies available under Costa Rican law is fatal to their case on denial of justice, contend that they should not be held to the rule of exhaustion of local remedies because the three-year statute of limitations under DR-CAFTA Article 10.18.1 would somehow operate as a waiver of the exhaustion rule.[610]

572. This argument cannot succeed. Obviously, in a case of denial of justice, the statute of limitations under DR-CAFTA would not start to run until local remedies are exhausted. To suggest otherwise makes a mockery of the well-established test.

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607 Claimants' Memorial, ¶339.

608 **RLA-36,** *Pantechniki S.A. Contractors & Engineers c. Albany*, ICSID Case No. ARB/07/21, 30 July 2009, ¶¶96; 102.

609 **R-193**, Administrative Tribunal rejects motion to revoke SINAC Injunction, March 25, 2011.

610 Claimants' Memorial, ¶273.

c. *Claimants have not met the threshold of denial of due process under international law*

573. In any event, even if Claimants could somehow overcome their failure to exhaust local criminal and administrative proceedings at issue, they fail to meet the threshold of denial of due process under international law.

574. In that regard, Claimants' reliance on *Al-Warraq v. Indonesia* (*"Al-Warraq"*)[611] as an "*example of similarly egregious treatment of a foreign investor*"[612] is entirely inapposite. There is nothing similar in the way the claimant was treated in *Al-Warraq.*

575. In *Al-Warraq,* the Indonesian courts failed to hear the claimant or take any statements from him during the criminal investigation phase conducted against him.[613] Conversely, Mr Aven had the right to make a sworn statement before the Prosecutor prior to his trial and he freely did so.[614] During those same proceedings, Mr Aven had the opportunity to confront the allegedly corrupt SETENA employee, who appeared as a witness in Mr Aven's case. But Mr Aven failed to even raise his allegations of corruption during the criminal trial.

576. In *Al-Warraq*, the claimant was tried and convicted *in absentia*.[615] That is entirely unlike this case. Unlike Indonesia, Costa Rica does not recognize *in absentia* convictions. That is precisely the reason why the trial against Mr Aven is pending upon his return to the country.[616] In *Al-Warraq*, the Indonesian judgment was not properly notified to the claimant.[617] Again, in this case, Mr Aven does not contest that he was always notified of the procedural decisions of the court during his trial.

577. In *Al-Warraq*, the claimant was not able to appoint legal counsel during his trial *in absentia*.[618] This is another important point of difference with this case. Indeed, Mr Aven was and continues to be assisted by local counsel in Costa Rica. In fact, Mr Aven changed Costa Rican counsel four times in the course of the criminal proceedings alone.[619] In *Al-Warraq*, the claimant was not able to appeal his conviction,[620] whereas in this case, Claimants do not contest that Mr Aven appealed all of the criminal court decisions.

611 CLA 118.
612 Claimants' Memorial at fn. 387, ¶367.
613 CLA-118, ¶584.
614 **R-90**, Sworn Declaration of Mr David Aven, May 6, 2011.
615 CLA-118, ¶621.
616 First Witness Statement, Luis Martínez Zúñiga, ¶¶128-131.
617 CLA-118, ¶¶602, 621.
618 CLA-118, ¶¶600, 621.
619 **R-161**, Multiple appointments of criminal counsel.
620 CLA-118, ¶¶600, 621.

d. *The conduct of Prosecutor Martínez was not arbitrary*

578. Claimants allege that "the conduct of Prosecutor Martínez typifies the very essence of arbitrariness in official decision-making".[621] The following description of the conduct of Prosecutor Martínez during the investigation and prosecution of Mr Aven suffices to completely reject any allegation of arbitrariness or lack of due process by Costa Rica's judiciary.

i. *The investigation and trial*

579. On December 5, 2012, the criminal trial against Mr Aven and Mr Damjanac commenced. Judge Rafael Solís acted as presiding judge. The Prosecutor called eighteen witnesses to testify, but the Court only allowed the testimony of eleven, among them:[622]

- Mr Gamboa who presented the findings of his report where he concluded that there was a palustrine wetland on the site and that it had been drained and refilled by Claimants. Mr Gamboa explained that the instrument used by Mr Cubero to produce his report is used to classify soils from an agricultural point of view only and that the instrument used to classify wetlands was the "Wetlands Decree";

- Ms Vargas from the Municipality who testified on the multiple complaints she received against Claimants relating to the refilling of a wetland and the start of works without permits;

- Mr Manfredi from SINAC who testified to the two inspections he conducted. On the first inspection, he did not identify a mirror of water ("*espejo de agua*.") While on his second inspection, he attested to the cutting down of trees by Claimants' workers;

- Mr Bogantes from SINAC who testified to his inspections of the site and how he saw Claimants' employees cutting down trees;

- Mr Bucelato who, as a member of the community of Esterillos Oeste, expressed the concerns of the neighbors regarding the damage being caused to the ecosystems;

- Mr Burgos from SINAC who testified as to the cutting down of trees by Claimants' employees as well as to conversations he had had with neighbors of the Las Olas Project who were well aware of the existence of wetlands in the Project Site.

621 Claimants' Memorial, ¶369.
622 First Witness Statement Luis Martínez Zúñiga, ¶64, 93.

580. The witnesses the defendants called were, among others, Mr Cubero from INTA and a forestry consultant, Mr Arce Solano. Mr Cubero clarified that INTA was not the competent body to determine the existence of a wetland and explained his findings from the soil survey he had conducted on the property based solely on the "Official Methodology for the Classification of Soil of the Country", an instrument to classify soil from an agricultural viewpoint. Mr Arce Solano explained the findings of the two reports he produced for Claimants.[623]

581. By January 16, 2013, all of the witnesses and evidence had been submitted to the Court, therefore, the parties were to present their closing arguments. As Prosecutor Martínez explains in his witness statement, on that day, he had two trials ongoing, and he had to travel to Guápiles (located five hours from Quepos), for a hearing scheduled in the morning of the next day. Prosecutor Martínez requested the court to suspend the hearing and resume it within the ten-day term allowed by the Criminal Code.[624]

582. However, on January 24, 2013, after eight days had elapsed from the suspension of the trial, the Court notified the parties that Judge Solís would be unavailable to resume the trial until after January 31, 2013.

583. Article 336 of the Criminal Code of Costa Rica forbids the suspension of a criminal trial for more than 10 consecutive days. Prosecutor Martínez refused to extend the trial because he knew that the agreement of the parties on extending the suspension of a trial for more than ten days, in breach of Article 336 of the Criminal Code, was a ground to annul the judgments on appeal.[625] This is because the 10-day rule is a guarantee to the defendant and therefore a right that cannot be waived. The Court also explained the legal implications of resuming the trial to Mr Morera.[626] Therefore, on January 29, 2013, the Court declared the trial a nullity and ordered a re-trial.[627]

584. The new trial was scheduled for December 2013. On December 20, 2013, Mr Morera informed the Court that his client would not be attending the hearing due to serious threats to his life and requested that the trial be conducted through video conference.[628]

585. Another guarantee of the defendant is that they have to be present to face charges. The Costa Rican criminal system does not recognize judgments in the absence of the accused.[629]

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623 First Witness Statement Luis Martínez Zúñiga, ¶¶118-119.
624 First Witness Statement Luis Martínez Zúñiga, ¶120-121.
625 First Witness Statement Luis Martínez Zúñiga, ¶123.
626 **R-140**, Court's denial of continuation of trial, February 7, 2013.
627 **R-139**, Annulment of criminal proceedings, January 29, 2013.
628 **R-144**, Letter from Nestor Morera to criminal court informing that David Aven will not attend hearing, December 20, 2013
629 First Witness Statement Luis Martínez Zúñiga, ¶128.

Therefore on January 13, 2014, the Court rejected the arguments presented by Mr Aven's counsel and called for a trial hearing.[630] However, Mr Aven did not appear to face trial. As a result, on May 25, 2014, the Court issued an International Arrest Warrant against Mr Aven.[631] No evidence was submitted by Mr Aven's counsel of any real threat to Mr Aven relating to his appearance in the trial. In any case, there would have been a way for Mr Aven to attend the trial in Costa Rica, taking measures to ensure his security, but he never requested protection from the authorities.

586. The process of extradition of Mr Aven was handled by the International Affairs Unit of the Attorney General's Office where, according to the standard proceedings; an INTERPOL Red Notice was filed.[632] As at the date of this Counter-Memorial, Mr Aven's name has been removed from the public database of INTERPOL, while the arrest warrant remains in place.

587. From January 20, 2014 to February 5, 2014, the Court held re-trials against Me Damjanac only. On February 5, 2014, the court acquitted Mr Damjanac.[633] However, the Prosecutor[634] and the Attorney General's representative[635] filed appeals against the decision arguing the suppression of essential evidence during the trial. The Court of Appeal reversed the lower court's ruling and ordered a new trial.[636] A re-trial against Me Damjanac is pending.

ii. *Prosecutor Martínez acted objectively and reasonably*

588. In his witness statement, Prosecutor Martínez has discredited each one of Claimants' defamatory accusations. As to his alleged "discriminatory animus" against Mr Aven, Prosecutor Martínez explains:

> "In this regard, it also caught my attention that in the Claimants' Memorial and the witness statement of Mr Aven, it was suggested that I had something personal against him or an illegitimate purpose in connection with the investigation of the case because I had made the accusation without any evidence. That is not true and I strongly reject such an unjustified accusation
>
> If that were true, then it is incomprehensible why I decided to drop the charges against Mr Aven on the basis of the use of a forged document, which is a very serious crime with penalties of up to 6 years in prison. Of course even if one has well-founded suspicions, in accordance with the principle of presumed innocence, one can never accuse a person without having enough evidence that he or she has committed a crime. That is why the investigation into the use of a forged document did not allow us to determine with probability that Mr Aven

630 **R-146**, Court's decision on David Aven's absence, January 13, 2014.
631 **R-150**, International Arrest Warrant (Orden de Captura Internacional), May 25, 2014.
632 Section 1, Articles 75, 78-79, **R-142**, INTERPOL's Rules on the Processing of Data, 2013.
633 **R-147**, Judgment on Jovan Damjanac's Liability (Sentencia No. 6-TPPAP-14), February 5, 2014.
634 **R-149**, Appeal filed by the Prosecutor (Recurso de Apelación de Sentencia), March 5, 2014.
635 **R-148**, Appeal filed by the Attorney General's representative (*Fiscalia Adjunta Penal Ambienta*l), March 5, 2014.
636 **R-152**, Judgment of the Court of Appeals in proceeding against Jovan Damjanac, August 29, 2014.

> used this document or that Mr Madrigal developed or used it before the SETENA. Therefore I decided to dismiss the charge.
>
> Far from what is suggested by the claimants, my intention was never to punish Mr Aven with a long prison sentence, because of a personal issue. My role as an environmental prosecutor is to enforce Costa Rican environmental legislation and especially, if there has been environmental damage, that the person responsible repairs it. My investigation and prosecution of the case in all instances had that as the sole objective.
>
> I should add that prior to the initiation of this proceeding, I have never met Mr Aven or Mr Damjanac, and I have never in my life seen or met the other claimants."[637]

589. Claimants have also stated that Prosecutor Martínez had no evidence against them for the crimes Mr Aven and Mr Damjanac committed. The reality is Prosecutor Martínez collected substantial evidence supported by documents,[638] results from technical studies he commissioned,[639] and numerous witnesses.[640] Further, he had first-hand knowledge of the damage caused by Claimants to the environment at the Project Site:

> "One of the steps that the prosecutor that is investigating a case has to take is the visit of the site. I personally went to the site during the investigation. During that visit I was able to see the damage caused to the area of the forest and the refill and drainage that was undertaken in the area of the wetland where there was machinery working…"[641]

590. Another of Claimants' groundless attacks against Prosecutor Martínez, refers to his reliance on the PNH Report on Wetlands prepared by Mr Gamboa:

> "Further, Mr Martínez exhibited **extraordinary arbitrariness in choosing to rely primarily on a March 18, 2011 SINAC Repor**t, to attempt to make his case, which was not only contradicted by numerous other reports from independent institutions and individuals, but which **was** also the **work product of** the one person whose objectivity could not have been more in doubt: Mr **Bogantes**".[642] (emphasis added)

591. This is blatantly untrue. Mr Bogantes was not present at the site visit conducted by the PNH and had absolutely no involvement in preparing the PNH Report on Wetlands. That study was conducted by Mr Gamboa Elizondo, who was the Coordinator of the PNH, a specialized body relating to wetlands within SINAC which is the competent body to determine the existence of wetlands in Costa Rica.[643] Therefore it was only reasonable for Prosecutor Martínez to rely on

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637 First Witness Statement Luis Martínez Zúñiga, ¶¶ 37-40.
638 First Witness Statement Luis Martínez Zúñiga, ¶¶ 19-20; 64.
639 First Witness Statement Luis Martínez Zúñiga, ¶¶ 21-25; 59.
640 First Witness Statement Luis Martínez Zúñiga, ¶¶ 93-119.
641 First Witness Statement Luis Martínez Zúñiga, ¶52.
642 Claimants' Memorial, ¶374.
643 First Witness Statement, Julio Jurado, ¶19-21, **R-222**, MINAET Executive Decree No. 36427.

the findings of the PNH Report on Wetlands among many other items of evidence to file the charges against Mr Aven.[644]

6. Claimants have not proven any abuse of rights from Costa Rican officials

592. Claimants attempt to blame the "shuttering" of the Las Olas Project on Mr Bogantes, a SINAC officer who allegedly solicited a bribe from Claimants.[645]

593. Claimants rely on *EDF v. Romania* to allege that a request for a bribe by a State official constitutes a manifest violation of FET.[646] However, Claimants do not mention that in *EDF v. Romania* the Tribunal rejected the allegation of corruption since the evidence was not "*clear and convincing*"[647] as there were weaknesses and inconsistencies in the relevant witness testimony and criminal investigations had failed to prove bribery, and the claimant accordingly did not meet the burden of proof. The Tribunal held that:

> "The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption."[648]

594. Similarly, in *Rumeli Telekom v. Kazakhstan* the tribunal was faced with evidence that was "mainly, if not wholly circumstantial". Again, the conclusion was that the supporting evidence must lead "*clearly and convincingly to the inference that a [corruption] has occurred*".[649]

595. Also, in *Liman Caspian Oil v. Kazakhstan*, again involving allegations of corruption against the State, the tribunal held that:

> "The Tribunal is aware that it is very difficult to prove corruption because secrecy is inherent in such cases. Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability. However, the Tribunal considers that this cannot be a reason to depart from the general principle that **Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption**.
>
> **It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to prove corruption**….."[650] (emphasis added)

644 First Witness Statement, Luis Martínez Zúñiga, ¶25.
645 Claimants' Memorial, ¶¶162-166, 365.
646 Claimants' Memorial, ¶310.
647 CLA-91, ¶232.
648 CLA-91, ¶221.
649 **RLA-49**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award,29 July 2008.

596. Claimants had completely failed to meet the burden of proof on their allegation of corruption.

597. Claimants state that the first alleged solicitation occurred in late July to mid-August 2010, after Mr Bogantes and Mr Manfredi had conducted an inspection of the Condominium site,[651] and that there was a second attempt later in August 2010.[652]

598. However, Mr Aven only filed a criminal complaint against Mr Bogantes for such alleged bribery solicitations on September 16, 2011. If such solicitations actually occurred, why did it take Mr Aven more than a year to file a criminal complaint against Mr Bogantes?

599. Indeed, by September 16, 2011, Claimants' project had already been suspended by a series of injunctions issued by SETENA,[653] SINAC[654] and the TAA[655] and the criminal proceedings against Mr Aven had already been initiated.[656] It raises serious doubts as to the true motives for filing the criminal complaint against Mr Bogantes as it seems that Mr Aven thought that he could escape from his responsibilities by blaming a SINAC official of animosity due to that official's alleged refusal to pay a bribe.

600. Likewise, if Claimants were so concerned about the effect of Mr Bogantes' alleged actions on their investment, why did they fail to collaborate with the authorities in charge of the investigation?

601. The investigation of the alleged bribery attempt was terminated due to the lack of interest of Mr Aven in collaborating with the prosecution to continue the process of investigation.[657] Indeed, the record shows that on November 4, 2011, Mr Aven was summoned to appear in the Prosecutor's Office with the witnesses, but they never presented themselves.[658] On May 6, 2013, Mr Aven was contacted again by the Prosecutor's Office regarding his complaint against Mr Bogantes. Mr Aven refused to collaborate telling the Prosecutor in charge that "he was not interested."[659] Furthermore, the Prosecutor tried to reach Mr Aven several times in August 2013 in order to obtain the evidence needed to file charges against Mr Bogantes. However, yet again, Mr Aven was not reachable.[660]

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650 **RLA-50**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan,* ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶¶423-424.
651 Ibid.
652 Claimants' Memorial, ¶164.
653 **C-**122.
654 C-112.
655 C-121.
656 First Witness Statement, Luis Martínez Zúñiga, ¶44.
657 C-167, pp. 54-56.
658 C-167, p. 42.
659 C-167, p. 48.
660 C-167, p. 50.

602. Costa Rica takes the fight against corruption very seriously. This is evidenced by the request of the Ethics Prosecutor ("*Procuraduría de la Ética*") to participate in the criminal investigation of the alleged bribery attempts of Mr Bogantes.[661] If Mr Bogantes actually committed such offenses, Costa Rican authorities were the first interested parties in seeking a conviction against Mr Bogantes for such offenses. However, due to the presumption of innocence principle the Prosecutor was unable to file charges without the appropriate evidence. Since the only evidence of this accusation was Mr Aven's testimony and the testimony of the witnesses he identified in his complaint and all of them refused to collaborate and testify, it was simply impossible to prove the serious allegations made against Mr Bogantes.

603. Claimants once again tried to redirect the responsibility for their misconduct to Costa Rican officials, thus accusing Prosecutor Martínez for not having investigated the complaint against Mr Bogantes.[662]

604. However, how could Prosecutor Martínez be accused of not having any interest and failing to prosecute a criminal charge if he was not the prosecutor assigned to it?[663] The complaint against Mr Bogantes was filed with the Prosecutor's Office of Aguirre y Parrita (*Fiscalía de Aguirre y Parrita*), and Mr Josue Saul Araya Rivas was the prosecutor assigned the case to the case by that office. The FAA where Prosecutor Martínez works had nothing to do with this case.

605. Furthermore, if Claimants truly believed that Mr Bogantes was behind an "evil plan" to shut down their investment due to his purported animosity directed against Mr Aven due to Mr Aven's refusal to pay him a bribe, they should have raised the issue during the criminal trial involving Mr Aven and Mr Damjanac, when Mr Bogantes appeared as a witness. They failed to do so.

606. Prosecutor Martínez explains in his witness statement that this issue was never raised by Claimants during the criminal proceedings:

> "…at no point did Mr Aven or his lawyers suggest to me that the alleged bribery could have something to do with the facts established by the technical officials of SINAC-MINAE in relation to a wetland and a forest at the project. In fact, throughout the trial, the counsel for the accused placed constant emphasis on a report of a visit made by Mr Bogantes and Mr Manfredi in July 2010 in which it was mentioned that there were no areas of wetlands (ACOPAC-OSRAP-371-10)."[664]

661 C-167, p. 44.
662 Claimants' Memorial, ¶171.
663 First Witness Statement, Luis Martínez Zúñiga, ¶43.
664 First Witness Statement, Luis Martínez Zúñiga, ¶45.

607. Further, when Claimants had the opportunity to confront Mr Bogantes in court, Claimants did not ask him any questions regarding the alleged bribery. Prosecutor Martínez explains:

> "Moreover, Mr Bogantes was a witness during the trial and Aven's defense had the opportunity to interrogate him at length. There was not a single question or reference to the alleged bribery solicitation. If that fact were allegedly connected to the charges against Mr Aven for environmental damage, this would have been the correct instance to prove it. Although, as I have said before, this was never even alleged by Mr Aven's defense. When Mr Bogantes attended the hearing of the criminal trial in which he was called as a witness, the accused's counsel, Mr Nestor Morera, having the opportunity to question the witness (who was under oath) on the alleged bribe, did not do so."[665]

608. Claimants' theory of Mr Bogantes' "evil plan" lacks any credibility. Furthermore, because portraying Mr Bogantes as a corrupt official was not enough for Claimants to explain why other State officials found that Claimants were damaging the environment, Claimants have also levelled accusations against all MINAE officials on the basis of an alleged bias against the Las Olas Project:

> "The other agency that the criminal prosecutor chose to do the second study was MINAE. This was the same agency that had sought a bribe from me and that issued the SINAC Notification on February 14, 2011 which represented a one hundred and eighty degree turn on its 2008 confirmation that the Project Site was not in a protected area, its July of 2010 conclusion that there were no wetlands on the Project Site and at least three other reports all of which stated there were no wetlands on the Project Site. In my opinion, it should have been clear to the prosecutor that at this point **MINAE was not an unbiased party and should have been excluded from having anything further to do in this matter**."[666] (emphasis added)

609. Prosecutor Martínez explains:

> "… Mr Aven is offended by the fact that the studies conducted to determine the existence and involvement of the wetland and the forest were carried out by SINAC-MINAE because in his opinion it was not an impartial party. However, that accusation is completely groundless. Even if one assumes that the solicitation of a bribe from Mr Bogantes was true, which was never proved, the fact is that none of the reports that I requested were written by Mr Bogantes but by the Coordinator of the 'Programa Nacional de Humedales', Mr Jorge Gamboa Elizondo and the Coordinator of Protection of ACOPAC Luis Picado Cubillo.

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665 First Witness Statement, Luis Martínez Zúñiga, ¶47.
666 Witness Statement, David Aven, ¶191.

It is absurd to claim that all professionals working for MINAE are biased, simply by virtue of a supposed association with Mr Bogantes' – who also works for MINAE. Hundreds of people work for MINAE and no evidence of bias has been established.

On the contrary, not only do I consider that Jorge Gamboa and Luis Picado Cubillo exercised their work in an absolutely professional and impartial manner, but also they were the officers assigned by SINAC, the competent authority under Costa Rican law, to determine the existence and impact to a wetland and a forest.

In any case, counsel for the accused at no point during the trial argued that the officers of SINAC/MINAE were biased or that they could be in any way related to an alleged solicitation of bribery by Mr Bogantes, thus, I find Mr Aven's suggestion in this Arbitration completely unacceptable."[667]

610. Clearly, as explained by Prosecutor Martínez, even if we were to consider Claimants' version of the alleged bribery attempts as true, it is difficult to comprehend how such events could be related to Claimants' breaches of environmental law. This clearly had nothing to do with Mr Bogantes.

C. Claimants' have not been expropriated from their investments

611. Claimants argue that Costa Rica has breached Article 10.7(1) of the Treaty, which provides:

Article 10.7: Expropriation and Compensation

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
   (a) for a public purpose;
   (b) in a non-discriminatory manner;
   (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
   (d) in accordance with due process of law and Article 10.5.
2. Compensation shall:
   (a) be paid without delay;
   (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");
   (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
   (d) be fully realizable and freely transferable.

667 First Witness Statement, Luis Martínez Zúñiga, ¶¶48-51.

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

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

Annex 10-C Expropriation

The Parties confirm their shared understanding that:

1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
   (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:
      (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
      (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
      (iii) the character of the government action.
   (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

612. Claimants argue that Costa Rica's actions constitute an indirect expropriation under Annex 10-C paragraph (4) of the Treaty.[668] To assess whether State action can be considered as an indirect expropriation under such provision, it is necessary to apply systematically the provisions of the Treaty:[669]

- First, under Article 10.7.1 the Tribunal should correctly identify the investment which has allegedly been expropriated. For this purpose one must look at the definition of

[668] Claimants' Memorial, ¶399.
[669] **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012.

investment provided in Article 10.28 which includes the definition of "investments" covered in the Treaty;

- Second, consideration must be afforded the express exception provided in Annex 10-C.4(b) of the Treaty. Therefore, it is necessary to assess whether the actions of the host State are non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment. Only if the relevant actions do not fall within the exception, then should the Tribunal continue with the next step below;

- Third, it is necessary to analyze the economic impact of the actions under Annex 10-C.4(a)(i);

- Fourth, in accordance with Annex 10-C.4(a)(ii), one should consider whether the actions have interfered with reasonable expectations;

- Fifth, under Annex 10-C.4(a)(iii) it is necessary to analyze the character of the State's actions. In that sense, the text should consider whether the actions display the characteristics of a *bona fide* exercise of police powers by the host State;[670]

- Lastly, if the actions fall under all the categories above then, it is necessary to consider whether the expropriation is legal or illegal for compensation purposes. Claimants state that "*all indirect expropriations are per se unlawful because they are not accompanied by the payment of prompt, adequate and effective compensation – and they remain so until such time as the stipulated compensation has been paid*."[671] This is incorrect. Recent arbitral case law has considered measures that had an effect of indirect expropriation as lawful.[672] However, since this is a moot issue in this case as no expropriation has occurred, we do not consider it necessary to extend this debate at this stage.

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670 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012.

671 Claimants' Memorial, ¶407.

672 **RLA-1**, *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuela,* ICISID Case No. ARB/07/27, Award, 9 October 2014, ¶¶302-306 ("…[T]he mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of that offer. In order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case" (para. 301) The tribunal found that Venezuela made proposals during the negotiations and that there was no evidence which demonstrated that such proposals were incompatible with the requirement of "just" compensation of Article 6(c) of the BIT. Accordingly, the claim for unlawful expropriation was rejected.").

613. This above sequence has been endorsed by UNCTAD's work on Expropriation:

> "[A] measure allegedly constituting an indirect expropriation can be assessed by going through a sequence of analytical steps...
>
> [I]t is important to correctly identify the investment at issue and, in particular, to understand whether it should be considered as part of the investor's overall investment in the host State or whether it is capable of being expropriated separately.
>
> Moving on to the impact of the measure on investment, it needs to be determined whether the State conduct has resulted in a total or near-total deprivation of the investor's investment (loss of investment's value or of investor's control over the investment) and whether the effect of the measure is permanent. An additional factor to be considered here is whether the investor had a legitimate that the State would not act the way it did.
>
> If a measure is of a regulatory nature or is an enforcement of existing regulation, one would need to ask the following questions: Does the measure contain the characteristics of a bona fide exercise of police powers by the host State? Is it taken in pursuance of a genuine public purpose, in a non-discriminatory manner and in accordance with the due process of law? Was there a transfer of benefit of the investment of the State or any private party? Is there a manifest disproportionality between the aims pursued and the harm inflicted on the investor?
>
> On the basis of the above-mentioned factors, it should be possible to decide whether an indirect expropriation has taken place or whether the conduct qualifies as the State's non-compensable exercise of police powers and regulatory prerogatives. If expropriation is found, the analysis must proceed to the matters of its lawfulness or unlawfulness and the question of compensation or reparation."[673]

614. In the following sections, we will apply these standards to the facts of the case to illustrate that none of the requirements for an indirect expropriation under the Treaty are met in the instant case.

7. The construction permits are not covered investments subject to an indirect expropriation

615. As mentioned above, the first step to determine the existence of an indirect expropriation under Article 10.7.1 of the Treaty is to correctly identify the investment which has allegedly been expropriated. For this purpose we need to look at Article 10.28 of the Treaty which includes the definition of "investments".

616. In this sense, Claimants argue that "[f]or the purposes of Article 10.7(1), and consistent with sub-paragraphs (h) and (g) of the Article 10.28 definition of "investment," the investments that have been subject to measures tantamount to expropriation were: a combination of "property rights" in land and "licenses, authorizations, permits and similar rights" that had been conferred

673 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012, pp. 104-105.

by the Respondent in respect of how those property rights could be utilized…".[674] Accordingly, Claimants frame the relevant question for the Tribunal in the following terms: "[e]ither the Respondent's unlawful conduct prevented the Claimants from utilizing the construction permits granted to them or it did not."[675]

617. Claimants, however, fail to mention that paragraph (g) of the definition of "investment" under Article 10.28 of the Treaty that refers to "permits" includes a footnote (footnote No. 10) which qualifies such provision as follows:

> "**Whether a particular type of** license, authorization, **permit**, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an **investment depends on** such factors as the nature and **extent of the rights that the holder has under the law of the Party**. Among the licenses, authorizations, permits, and similar instruments that do **not** have the characteristics of an **investment** are those that **do not create any rights protected under domestic law**. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment." (emphasis added)

618. The footnote embodies what is actually a principle under international law, that the existence of property and vested rights is a matter to be determined by the domestic law of the host state.[676] As we have seen earlier, and as explained by Prosecutor Martínez,[677] under Costa Rican law no construction permits can waive the imperative of a continuing obligation not to impact the environment.

619. This means that the construction permits do not grant Claimants a right to breach Costa Rica's environmental law; and if they do, they should be immediately stopped pursuant to the precautionary principle.[678] That is exactly what the injunctions suspending construction activities in Las Olas Project have done. To claim that as an act of indirect expropriation is absurd.

620. The State cannot expropriate a right which does not exist under domestic law. Since Claimants' construction permit did not grant them a right to be immune from the application of mandatory environmental law, they cannot claim that by enforcing the law Costa Rica

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674 Claimants' Memorial, ¶409.

675 Claimants' Memorial, ¶410.

676 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012; **RLA-2**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 2 March 2006, ¶184 ("for there to have been an expropriation of an investment or return ("in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case."). **RLA-3**, *Nations Energy Inc. Electric Machinery Enterprises Inc and Jaime Jurado v. Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, ¶¶641-648.

677 First Witness Statement, Luis Martínez Zúñiga, ¶76.

678 See, section III.A.1.

expropriated such a "vested right". The analysis can justifiably end there. However, if the Tribunal were to consider otherwise, we continue in the next section with the analysis of the second step.

8. Costa Rica's actions are non-discriminatory regulatory actions designed and applied to protect the environment

621. Under paragraph (4)(b) of the interpretative Annex 10-C of the Treaty in principle non-discriminatory actions of the host State that are designed and applied to protect the environment do not constitute indirect expropriations.

622. Claimants allege that the purpose of such interpretative provision is to "*allay concerns that Article 10.7 not be used by large, multinational corporations…*"[679] However, such qualification is simply not part of the express language of Annex 10-C or the relevant test as stated by international arbitral tribunals. On the contrary, the standard applies equally to "large, multinational corporations" and small individual investors. The size of the investors is irrelevant. What the principle protects is the regulatory freedom of a State to regulate, protect and enforce public welfare.

623. Furthermore, Claimants submit a completely unsubstantiated interpretation of paragraph (4) arguing that:

> "the concerns – which paragraph (4) of Annex 10-C was included to assuage – were not about cases in which measures of creeping or indirect expropriation were adopted with the aim of impacting a single investor or investment, but rather of cases in which a measure of general application was at issue. In other words, the worry was not over run-of-the-mill cases of discriminatory expropriation *[i.e.* "actions" that singled-out one investor or investment], but over cases in which not targeting or singling-out was present. And **that** is what the Parties meant when they wrote, in subparagraph (4), that findings of indirect expropriation would only be made in "rare circumstances." Given that the case at hand involves the much more common claim of expropriation, in which a single investment bears the brunt of the governmental "actions" to be scrutinized, sub-paragraph (4)(b) is not relevant to the Tribunal's work."[680] (emphasis in the original)

624. This novel theory behind the meaning of paragraph (4) has absolutely no legal basis or rational support under international law. Notably, much like large swathes of Claimants' legal analysis in their Memorial, absolutely no authority is provided to support how such a concoction is grounded in international law. No footnotes, no citations, mere supposition and creative writing. Alongside such deafening silence of authority, Claimants revert to pleading that "*sub-*

[679] Claimants' Memorial, ¶400.
[680] Claimants' Memorial, ¶403.

paragraph (4)(b) is not relevant to the Tribunal's work". [681] This strategy of forcing the Tribunal's head into the sand, resonates alongside the noticeable lack of attention afforded by Claimants to Article 10.11 ("Investment and Environment") – a provision which could not be more relevant to this case than any other in Chapter 10.

625. Subparagraph (4)(b) is an express exclusion which reflects the Parties agreement as to which State conduct should be excluded from the indirect expropriation standards and is *the* most highly relevant provision for the Tribunal's resolution of the indirect expropriation claim.

626. According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[682]

627. Clearly, nothing in the ordinary meaning of sub-paragraph (4)(b) suggests that what the parties meant was only to exclude cases of measures of general application and that it would not apply to a case of State action taken in relation to a single investment to enforce environmental laws, as Claimants' suggest. If that were to have been the intention, the Parties would have clearly stated so, as they have done with many interpretative provisions in the annexes of the Treaty.

628. On the contrary, as acknowledged by Claimants[683] the interpretative provision in of sub-paragraph (4)(b) reflects the customary international law standard as set out in arbitral case law[684] that the non-discriminatory bona fide exercise of State police powers does not constitute indirect expropriation.

629. Under customary international law the police power doctrine encompasses the right of a State to enforce existing regulation in relation to a particular investor:

> "According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation. Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts

681 Claimants' Memorial, ¶403.
682 **RLA-5**, Vienna Convention on the Law of Treaties, 1969.
683 Claimants' Memorial, ¶400.
684 **RLA-7**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, ¶176 (j) ("To distinguish between a compensable expropriation and a non-compensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure"); **RLA-4**, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005, Part IV – Chapter D, ¶15 ("For reasons elaborated here and earlier in this Award, the Tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex's central claim under Article 1110(1) of expropriation under one of the three forms of action in that provision fails. From the standpoint of international law, the California ban was a lawful regulation and not an expropriation.").

> such as (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defense against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war (Brownlie, 2008, p. 532; Wortley, 1959, p. 39). For example, if confiscation of property is effected as a sanction for a violation of domestic law by the property owner, this would not be an expropriation. The same would be the case if an establishment is shut down for violations of environmental or health regulations.
>
> In present times, the police powers must be understood as encompassing a State's full regulatory dimension. Modern States go well beyond the fundamental functions of custody, security and protection. They intervene in the economy through regulation in a variety of ways: preventing and prosecuting monopolistic and anticompetitive practices; protecting the rights of consumers; implementing control regimes through licenses, concessions, registers, permits and authorizations; protecting the environment and public health; regulating the conduct of corporations; and others. An exercise of police powers by a State may manifest itself in adopting new regulations or **enforcing existing regulations in relation to a particular investor**."[685] (emphasis added)

630. This is exactly the case at hand. Claimants' case on the alleged expropriation is based on the fact that Costa Rica enforced it environmental regulation in relation to Claimants' Project by ordering the suspension of works pursuant to the precautionary principle.

631. Furthermore, the context of the Treaty makes clear that for the Parties environmental concerns were paramount as they have expressly stated in Article 10.11 of the Treaty which provides for an interpretation rule:

> "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[686]

632. In that sense, sub-paragraph (4)(b) should be interpreted pursuant to Article 10.11 of the Treaty to mean that any action taken by the State to enforce its laws and regulations to ensure that investment in its territory is carried out in compliance with environmental concerns should not be considered as an indirect expropriation except when they are discriminatory.

633. The "non-discriminatory" aspect of the measure can be found in the fact that the suspension of works was not based on nationality, racial, religious, ethnic, but on other factors. This is clearly explained by UNCTAD's work on indirect expropriation:

> "The **non-discrimination requirement** implies the diffusiveness of the impact on different actors and constituencies and serves to prevent singling out or targeting

685 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012.

686 **RLA-6,** Article 11.10, DR-CAFTA.

> a foreign investor. It **primarily concerns nationality-based differentiation but it also seems to cover racial, religious, ethnic and other types of discrimination prohibited under customary international law**. It appears that a non-discriminatory regulation which is enforced in a discriminatory manner will also fit the description. Where a formally non-discriminatory regulation is designed in a way that it only covers certain foreign investor or investors, other indicators need to be examined to decide whether the measure is bona fide."[687] (emphasis added)

634. Costa Rica's actions were non-discriminatory as the enforcement of its environmental laws would have been applied in the exact same fashion to any other investor in like circumstances to Claimants, whose work could constitute a threat to the environment.

635. Therefore, since the actions of Costa Rica were a legitimate exercise of its police powers in a non-discriminatory manner, the exemption stated in sub-paragraph (4)(b) is completely applicable to the case at hand and no indirect expropriation can be found.

636. Once again, we consider that the Tribunal's analyses should stop here, but in any case, for the sake of argument we will continue in the next sections to demonstrate that none of the other requirements for an indirect expropriation are met in the instant case.

9. Costa Rica's actions have not permanently deprived Claimants' from the value or control of their investment

637. Under Annex 10-C.4(a)(i) we should consider the economic impact of the alleged expropriatory actions. The test for this issue has been developed by consistent arbitral case law to be one of permanent deprivation of the investment's value or control.[688]

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687 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012, p. 96.

688 **RLA-1**, *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuela,* ICISID Case No. ARB/07/27, Award, 9 October 2014, ¶286 ("The Tribunal considers that, under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature.").
RLA-12, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶193 ("The Arbitral Tribunal considers that the decisive elements in the evaluation of Respondent's conduct in this case are therefore the assessment of (i) substantially complete deprivation of the -economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (i.e., approaching total impairment); (ii) the irreversibility and permanence of the contested measures (i.e., not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor.").
RLA-21, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, ¶672 ("Tribunal is mindful in this regard of the point made in a number of awards that a distinction is to be drawn between a partial deprivation of value, which is not an expropriation, and a "complete or near complete deprivation of value", which can constitute an expropriation.") Thus, for example, in Tecmed v. Mexico, the tribunal adverted to measures that "radically deprived [the investor] of the economical use and enjoyment of its investments, as if the rights related thereto… had ceased to exist"

638. Costa Rica has not deprived Claimants of the value or control of the Project Sites which they still own. In fact, Claimants acknowledged that the Project Sites have the potential of considerable returns upon resale even if the Project was not developed.[689]

639. Furthermore, the alleged expropriatory actions do not constitute the necessary permanent character. They are temporary as they consist of a series of injunctions which ordered the suspension of work until the claims of environmental harm were resolved. The only reason they have been extended for so long is because Claimants chose to abscond in order to avoid facing their responsibilities. If they were to have participated in the administrative and criminal proceedings, they would have had the possibility of reaching an agreement with Costa Rican authorities to continue with the development of the Project provided they: (i) repair the environmental damage caused to the ecosystems; and (ii) commit to carry out the construction of the Project in compliance with the environmental laws.[690] This would mean that Claimants could have overturned the injunctions if they were committed to protect the forest and the wetlands which only represent a fraction of the land project.

10. Costa Rica's actions have not interfered with Claimants' reasonable expectations

640. We have already seen in the preceding section on fair and equitable treatment that the test of legitimate expectations under international law requires a specific commitment from the host

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or, to put it another way, "the assets involved have lost their value or economic use for their holder…". In CME v. Czech Republic, the tribunal noted that an indirect expropriation can arise where there are measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner…").
RLA-7, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, ¶ 176 ("(c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment). (d) The taking must be permanent, and not ephemeral or temporary. (e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights").
RLA-22, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶152-153 ("Given that the Claimant here has lost the effective ability to export cigarettes, and any profits derived therefrom, application of the Pope & Talbot standard might suggest the possibility of an expropriation. However, as with S.D. Myers, it may be questioned as to whether the Claimant ever possessed a "right" to export that has been "taken" by the Mexican government. Also, here, as in Pope & Talbot, the regulatory action (enforcement of longstanding provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products for which he can obtain from Mexico the invoices required under Article 4, although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no "taking" under this standard articulated in *Pope & Talbot*, in the present case. On the factual basis set out in the record, and this analysis, the Tribunal holds that the actions of Mexico with regard to the Claimant's investment do not constitute an expropriation under Article 1110 of NAFTA.").

689 Claimants' Memorial, ¶41: "In view of the booming real estate market and the Las Olas site's location and topography, the Claimants recognized it as a jewel of a property and considered that, even if they just held onto it for a few years before selling it, they would make a considerable return."

690 First Witness Statement, Luis Martínez Zúñiga, ¶101.

State to the investor that it would not act in the way it did. We have also shown that no such commitment is present in this case.

641. On the contrary, Claimants were on notice of the public policy decisions available and of Costa Rica's commitment to environmental protection and its strong policy of enforcement of environmental laws, which has been consistently publicized by Costa Rica. Indeed, Claimants had to be aware of the publicly available decisions from Costa Rican courts that applied the precautionary principle under Costa Rican and International environmental law to suspend works that *could* cause damage to the environment.[691] In addition, Claimants also admit they hired counsel and undertook extensive investigation.[692]

642. Therefore, Claimants could not have had a reasonable expectation that they could have developed their Project in breach of Costa Rican environmental law or that Costa Rican authorities would not have stopped them from continuing to harm the environment.

11. Costa Rica's actions are a bona fide exercise of police powers

643. To determine whether Costa Rica's actions contain the characteristics of a bona fide exercise of police powers, one needs to ask the following questions: Is it taken in pursuance of a genuine public purpose, in a non-discriminatory manner and in accordance with the due process of law? Was there a transfer of benefit of the investment of the State or any private party? Is there a manifest disproportionality between the aims pursued and the harm inflicted on the investor?[693] All of these can be answered in favor of the State.

644. Costa Rica's actions pursued the genuine public purpose of the protection of the environment. The aim of the suspension of works ordered by Costa Rican authorities was to prevent Claimants' for continuing damaging the environment in flagrant breach of Costa Rican laws. Furthermore, as has been extensively explained in this Counter Memorial, Costa Rica's actions were taken in accordance with the due process of law.[694] Moreover, there was no transfer of benefit of the investment of the State or any private party. Claimants continue to own whatever they have previously held title to.

645. Lastly, the suspension of works was completely proportionate to the aims pursued and the alleged harm inflicted on the investors. The actions simply put a hold on a situation which if it were to have continued would have caused greater and maybe irreparable harm to the

691 See, section III.B.6.
692 Claimants' Memorial, ¶¶26-27.
693 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012, p. 105.
694 See, section V.B.1.b.

environment. Such action was necessary and suitable for the aim of protecting the ecosystems in the area. Furthermore, it was totally balanced in relation to the alleged damage caused to Claimants, considering that if Claimants were to have complied with their obligations under Costa Rican law and participated in the administrative and other proceedings in Costa Rica, it would have been possible for them to reach an agreement to develop the Property providing they restored the damaged caused to the environment and adjusted their development plans in order to protect the ecosystems at the Project.[695]

646. Therefore, since the suspension of works ordered by Costa Rican authorities, Respondent (i) pursued the genuine public purpose of protecting the environment, (ii) which was executed in accordance with the due process of law, (iii) there was no transfer of benefit of the investment to the State or any private party, and (iv) there was no manifest disproportionality between the aims pursued and any harm inflicted on the investors. In such circumstances, Respondent's conduct qualifies as a bona fide exercise of police powers, which excludes the possibility of being considered as an indirect expropriation.

VI. RESPONDENT'S COUNTERCLAIM: RESTORATION OF LAND

647. Claimants undertook works that adversely impacted the Project Site. Annex C of the First KECE Report summarizes the manmade activities on the Project Site as follows:

> "[C]learing of forest, terracing hill slopes, constructing roads, excavating drainage ditches, installing culverts and inlet structures and the construction of one single-family residence in a filled wetland."[696]

648. Claimants' conduct has caused considerable environmental damage. Notably, as the First KECE Report establishes:[697]

- The construction of the roads, excavation of ditches, placement of culverts, and the removal of the vegetative strata of the forest have dramatically decreased the capacity of the forest to properly store and naturally convey water.

- These activities are significantly increasing soil sedimentation into the surrounding natural drainage features, and potentially the Aserradero River watershed and estuary.

- The claimant's filling and draining of wetlands has also directly destroyed habitat for fish and wildlife species thus reducing the biological diversity of the Las Olas Ecosystem

695 See, section V.B.1; First Witness Statement, Luis Martínez Zúñiga, ¶101.
696 First KECE Report, Annex C.
697 First KECE Report, ¶¶67, 68.

649. Claimants had information on the ecological conditions on the Project Site before they undertook to initiate the works. In particular, as early as July 2007, a study of the Project Site,[698] provided to Claimants by Mr Protti, a biologist hired by Claimants, identified wetland conditions on the Project Site.[699] Likewise, the First KECE Report describes the Project Site as a "forested area," [700] which Claimants cannot have missed.

650. These ecological conditions are crucial to the sustainability of the Las Olas Ecosystem and surrounding ecosystems. For example, the First KECE Report indicates that:

> "Filling of wetlands decreases the local area's water storage capacity and can cause improper drainage and potential flooding downstream. Degradation of regional water quality may also occur following the filling of wetlands. Wetlands not only store water, but they also trap sediments and filter pollutants that would otherwise flow downstream."[701]

651. Claimants were aware, upon deciding to acquire interests, and develop land in Esterillos Oeste,[702] that Costa Rica has, for decades, made significant efforts to develop mechanisms to protect, restore, and, as Costa Rica's former President and 1987 Nobel Peace Prize winner had put it, "make peace with the environment."[703] The legal protection of wetlands and forests was an important part of Costa Rica's environmental protection policy, as was the regulation of any development projects that might have an impact on wetlands and forest. Costa Rica set imperative norms intended to prevent, and control any possible damage to its environment. Any developer in Costa Rica, local or foreign, is bound by such imperative norms. As DR-CAFTA makes it very clear, the protections afforded to investors by Chapter 10 of the Treaty do not shield developers from DR-CAFTA signatory states of their obligation to comply with such norms.

652. Claimants' conduct in the development of their Project breached these imperative norms of environmental protection in several respects.

653. First, Claimants had the obligation, under Costa Rican law, to submit to SETENA a truthful application disclosing any ecological condition on the Project Site that could impact the biodiversity and the ecological conditions on the Project Site.[704] As previously explained, Costa Rica's entire mechanism of enforcement of its environmental protection norms is predicated upon the developers providing a good faith, truthful, account of the ecosystem on the land they

698 **R-11**, Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1), July, 2007.
699 See, section IV.B.1.a.
700 First KECE Report, ¶52.
701 First KECE Expert Report, ¶52.
702 **R-274**, CREST Study on the Impact of Tourism Related Development on the Pacific Coast of Costa Rica, 2010.
703 **R-213**, Costa Rica: The Country where life is greener, GEO, December 2015, p. 87.
704 C-208, Articles 36, 45.

intend to develop. The developers' own assessment of the land to be developed serves as a basis for SETENA to decide which other specialized agencies of the State should be involved, and the level of scrutiny that should be exercised, before declaring the development as environmentally viable.

654. Claimants failed to submit a truthful, good faith, assessment of the impact their project was going to have on the Las Olas Ecosystem. Indeed, Claimants even omitted to describe crucial elements of the ecosystems onsite, such as the presence of forest and at least eight wetlands.[705] Furthermore, as previously discussed,[706] Claimants fragmented their EV application to avoid communicating to SETENA an assessment of the full Project Site. Had Claimants been truthful in their Condominium EV Application in early 2008, it would be highly unlikely that they would have obtained an EV for the works as they had planned.

655. Second, once they obtained their work permit for the Condominium site, based on an illegally obtained EV, Claimants undertook to knowingly alter the existing ecological conditions of the Las Olas Ecosystem. Thus, without obtaining the required authorizations, Claimants cut numerous trees located in what fell within a forest. In addition, although it is strictly prohibited to dry wetlands in Costa Rica without proper mitigation measures approved by the Costa Rican authorities, Claimants undertook to terrace and drain the land on the Project Site. These violations by Claimants of their obligations under Costa Rica's law on forestry, wetlands, and biodiversity, have caused significant damage not only to the Las Olas Ecosystem itself, but also, to the surrounding ecosystems, which, as the First KECE Report explains, are connected to the Las Olas Ecosystem.

656. This is damage that Claimants caused, and that Claimants can, and ought to repair. Restoration, in this case, is feasible.

657. Annex C of the First KECE Report explains the steps that would normally be required for the Project Site to be restored. In order to restore the Las Olas Ecosystem, a detailed ecological restoration plan would have to be prepared by a qualified team, with the experience to monitor the restoration project. Restoring the Las Olas site to a sustainable, natural condition would involve several steps, including:[707]

- Removing all fill placed in wetland #1.
- Plugging and/or backfilling drainage ditches in wetland #1.

[705] First KECE Report, ¶[¶ 61 *et sec*.
[706] *Supra*, ¶[52.
[707] First KECE Report, Annex C.

- Re-grading terraced hills in those areas within the project site that were once forested and have been cleared.

- Removing unpermitted roads that have significantly affected the condition of the wetlands and forests on the Las Olas site.

- Planting and or direct seeding a ground-cover of native, herbaceous plant species would be required to accelerate vegetative cover in the restored wetlands and to stabilize the re-graded hill sides.

- The last phase of the restoration would involve planting a specified number and species of native forest trees as seedlings to accelerate the recovery of the forest, rehabilitate and stabilize the soils.

658. The cost of restoration can only be quantified upon review of an appropriate restoration plan to be prepared by Claimants and presented for approval to a competent authority in Costa Rica. Moreover, quantification of such restoration plan would require a dedicated site visit. That notwithstanding, Mr Erwin anticipates that the restoration required for the Las Olas Ecosystem would be unlikely to be quantified at less than USD 500,000 to USD 1,000,000.[708]

659. This Tribunal has jurisdiction to entertain Respondent's counterclaim. As has been rightly analyzed, "if a general principle can be discerned (…), it is that the jurisdiction *ratione materiae* of an international tribunal extends to counterclaims unless expressly excluded by the constitutive instrument."[709]

660. DR-CAFTA Article 10.20.7 excludes from the scope of any counterclaim, defense, or right to set-off based on the claimant's receiving "*indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or a guarantee contract*." It follows that, except for counterclaims based on the circumstances specified in Article 10.20.7, Respondent's right to counterclaim under the Treaty is contemplated and falls within the scope of the authority of a tribunal constituted under the Treaty.

661. Reparation is consistent with investment treaty tribunals' well-established approach[710] to legal remedies in the context of international disputes. DR-CAFTA Article 10.26(b) grants the

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708 First KECE Expert Report, Annex C.

709 **RLA-51**, Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009), pp. 255, 256.

710 **RLA-53**, *Case Concerning the Factory at Chorzów (Ger. v. Pol.)*, Claim for Indemnity, The Merits, Judgment No. 13, P.C.I.J., 13 September 1928), p. 21 ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."); **RLA-52**, *In Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 682, the tribunal cited the Chorzów case for the principle that "restitution is the primary remedy for international wrongs". The tribunal further stated, at ¶ 700,

authority to the Tribunal to award restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

662. Consequently, without prejudice to Respondent's jurisdictional objections, in light of the damage caused to the Las Olas Ecosystem, and the feasibility of restoration of the property, Respondent respectfully requests that the Tribunal order Claimants to submit an appropriate restoration plan for assessment by the competent authorities so they could quantify the monetary damages that Claimants should pay to the Respondent in order to restore "*the situation that existed prior to the occurrence of*"[711] Claimants' wrongful impact of the Project Site.

VII. CLAIMANTS ARE NOT ENTITLED TO COMPENSATION

663. In paragraphs 415 to 498 of their Memorial, Claimants set out their claim for damages. Since no breach of the Treaty could be found in Costa Rica's actions, there is simply no basis for Claimants' request for compensation. In any case and for the sake of completeness we will address each of Claimants' arguments in relation to the alleged damages for which they are seeking compensation.

664. Claimants set out three separate heads of damages: (i) those allegedly related to the "destruction" of their investment; (ii) Mr Aven's moral damages; and (iii) interest. As it will be further developed below, Claimants are not entitled to any such damage.

A. Claimants have failed to prove the damages they claim in relation with the investment

665. Claimants argue that they are entitled to the fair market value (FMV) of their investment both under Article 10.7 of the Treaty in case Costa Rica is found liable for expropriation, and under the standard set out by the International Court of Justice in the well-known *Chorzow Factory* case in the event of other breaches of the Treaty.[712]

666. As we will see below, Claimants' claim for damages suffers from the inappropriate and flawed methodology used to determine the FMV of their investment.

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that, "[I]t is beyond doubt that non-pecuniary remedies, including restitution, can be awarded in ICSID Convention arbitrations under investment treaties."

711 CLEX-273, Articles on State Responsibility, p. 213.

712 Claimants' Memorial, ¶¶416-420.

1. Claimants' valuation methodology based on a discounted cash flow is inappropriate for projects in pre-operational stage with no history of profits such as Las Olas Project

667. Claimants use an income approach method based on a Discounted Cash Flow ("DCF") to calculate the present value of the future cash flows that the Project would have generated but for Costa Rica's contested actions (i.e., the injunctions suspending the construction of the project). However, while the DCF methodology is widely accepted for valuations of going concerns it is inappropriate for projects that are at a pre-operational stage such as Claimants' Project.

668. Dr Timothy Hart clearly explains in his report that the Las Olas Project was not a going concern but a business at a pre-operational phase. Therefore, its future net cash flows cannot be estimated with reasonable certainty. Given the uncertainty of the future cash flows, forward looking methodologies that rely on future cash flows are speculative in the absence of definitive studies and plans with proven sales or any record of earnings.[713]

669. This is the reason why courts and arbitral tribunals do not allow for lost profit claims when there is no history of earning profits and have rejected going concern valuations for start-ups.[714] The amount invested is a better indication of value in this situation.

670. For example in *PSEG v. Turkey* where the tribunal had to consider the damages for an investment that was in a pre-operational stage, it rejected the valuation based on loss of profits as it was too speculative and only accepted the valuation based on out of pocket expenses actually incurred by the claimants. When reaching such decision the tribunal noted:

> "The Tribunal is mindful that, as the award in *Aucoven* noted, ICSID tribunals are "reluctant to award lost profits for a beginning industry and unperformed work." This measure is normally reserved for the compensation of investments that have been substantially made and have a record of profits, and refused when such profits offer no certainty.
>
> The Respondent convincingly invoked in support of its objections to this approach the awards in *AAPL* and *Metalclad*, which required a record of profits and a performance record, just as the awards in *Wena*, *Tecmed* and *Phelps Dodge* refused to consider profits that were too speculative or uncertain. The Respondent also convincingly noted

713 Timothy Hart Expert Report, Section 8.2.1, ¶¶105-106.
714 Timothy Hart Expert Report, ¶6, 163.

that in cases where lost profits have been awarded, such as *Aminoil*, this measure has been based on a long history of operations."[715]

671. Commentators referring to this decision have stated that:

> "This case highlights the fact that potential claimants should proceed with caution when considering whether to bring a claim under an investment treaty if they are seeking damages for breach at the pre-construction phase of a project."[716]

672. *Biloune v. Ghana* involved a claim of expropriation brought by Mr Biloune, a Syrian national who held a 60 per cent interest in a Ghanaian company that had been engaged in the construction of a hotel resort complex. After substantial works had been performed, the construction was stopped, Mr Biloune was expelled from the country and the project effectively expropriated. The tribunal rejected the claim for compensation based on "lost profits" (essentially the market value established through the DCF method), in the absence of sufficient evidence of the likelihood of future profits, as at the time of expropriation the project remained incomplete and inoperative. Instead, the tribunal awarded the amount of the actual investment.[717]

673. Similarly, in *Wena Hotels v. Egypt*, the Tribunal rejected Wena's DCF calculation as too speculative, and instead calculated the market value by reference to Wena's actual investment in the hotels.[718]

674. These cases are just examples of the general trend in investment treaty arbitrations not to award loss of profits in respect of projects which do not yet have a substantial history of operations and a record of profits, on the basis that to do so would involve an estimate of future profits that is too speculative. Therefore, Claimants' claim based on loss of profit calculated by a DCF method should be rejected.

2. Claimants inappropriate alternative valuation date

675. Claimants argue that even if the Treaty is explicit in fixing the valuation date for legal expropriation as the date just prior to the moment of the expropriation, in case the expropriation is considered illegal the proper valuation date should be the date of the award.[719]

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715 CLA-77, ¶¶310-311.

716 **RLA-24**, Richard Bamforth and Katerina Maidment, Olswang, "Investment treaty arbitrations: the significance of PSEG Global v. Republic of Turkey", *PLC Cross-border*, November 28, 2007.

717 **RLA-25**, S Ripinsky with K Williams*, Damages in International Investment Law (BIICL, 2008),* Case Summary Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana, 2008.

718 **RLA-26**, S Ripinsky with K Williams, *Damages in International Investment Law (BIICL, 2008)* Case summary Wena Hotels Ltd v. Arab Republic of Egypt, 2008.

676. Therefore, Claimants provide two alternative valuation dates: (i) May 2011, the date on which Claimants considered the suspension of works in the Las Olas Project took effect; and (ii) November 2015, which they use as an approximation to a current date of valuation.[720]

677. Dr Hart explains that in damages calculations the valuation date to determine what the investment was worth is the day of the "alleged bad act." In this situation, Claimants claim that Costa Rica caused them to halt all further works on the Las Olas Project as of May 2011. Thus, May 2011 should be the valuation date used in any related damages analysis and any proper way to update damages would be to add pre-judgment interest until the day of the award.[721]

3. Claimants have not proven their alleged damage to the valuation of their investment under the correct cost approach

678. As explained by Dr Hart, the proper methodology to calculate damages for a project at a pre-operational phase would be an accounting or historical approach such as the book value or the cost approach. The cost approach, which is a derivation of the asset approach, measures the actual amount spent on the project to date and evaluates the contribution to value made by these funds. In the real estate industry, the cost approach is best suited for new properties, where the future cash flows are unknown or uncertain.[722]

679. As the Las Olas Project was pre-operational, with no historical performance upon which to base any projections and thus uncertain future cash streams, the cost approach to valuation is the least speculative measure of value and therefore Claimants should have presented a valuation based on their costs. Yet, Claimants have not put forward a cost claim or the necessary supporting details that would support such a claim which would include all historic costs by month and type with evidence of payment and accounting documents.[723] Therefore, Claimants' have not proven their damages.

4. Even if DCF were applicable Claimants' projected cash flows are obviously inflated and baseless

a. *Unrealistic drivers of the valuations as a going concern*

680. Claimants' expert, Dr Abdala uses the following key drivers to evaluate the Las Olas project: (i) Las Olas and Los Sueños are comparable business; (ii) las Olas Business Plan of December

719 Claimants' Memorial, ¶422.
720 Claimants Memorial, ¶450; Abdala Report, ¶5.
721 Timothy Hart Expert Report, ¶¶99-103.
722 Timothy Hart Expert Report, ¶¶72-74, 106.
723 Timothy Hart Expert Report, ¶12.

2010;[724] (ii) the development and sale of lots; (iii) the construction and management of houses; (iv) the construction and management of condominiums; (v) sales and administration of time shares; and (vi) the construction and sale of a 114 room hotel.[725] Dr Abdala applies a discount rate arrived at by calculating the Weighted Average Cost of Capital (WACC) for the particular investment, accounting for sector risk, country risk and the balance between debt and equity.[726] The DCF analysis performed by Dr Abdala is completely flawed as explained below.

i. *Las Olas is not comparable with Los Sueños*

681. Claimants consider Los Sueños a comparable development to Las Olas. However, Dr Hart shows that Los Sueños is a superior resort than what was planned for Las Olas, since: (i) it is the closest beach resort to San José; (ii) it has closer medical facilities; (iii) its location has access to a much bigger beachfront property; (iv) it has golf course; and (v) it has a Marinat.[727] Therefore, Claimants attempt to compare both properties for valuation purposes is flawed.

ii. *Incorrect reliance on the 2010 Business Plan*

682. Claimants state that for calculating the project value as a going concern, their expert Dr Abdala relies on the latest business plan dated December 20, 2010.[728]

683. Such business plan has been the subject of substantial changes since 2004. Claimants completely altered the business plan at least four times. The first was a marketing and land planning study assembled by EDSA, a planning and landscape architectural firm, and Norton Consulting, a resort and leisure consulting firm.[729] The second plan came in 2007 in the form of an analysis report prepared by the Las Olas development team.[730] Three years later, in September 2010, Mr Aven prepared his own project overview and proposed business model.[731] Finally, in December 2010, Mr Damjanac created the "*Business Plan for Las Olas Beach Community*"[732] that is the one relied upon by Dr Abdala to create the assumptions used in the DCF.

724 Claimants' Memorial, ¶458.
725 Claimants' Memorial, ¶460.
726 Claimants' Memorial, ¶460.
727 Timothy Hart Expert Report, ¶¶86-93.
728 Claimants' Memorial, ¶458.
729 C-30.
730 C-39.
731 CLEX-013.
732 CLEX-016.

684. Every version of the business plan contains significant project changes and inconsistencies in many aspects of the development strategy including, but not limited to, the number of units, the prices per unit, and the total expected revenues.[733]

685. Dr Hart explains that "given that previous plans had been altered multiple times and there are no historical operations upon which to compare any future projections, it is difficult to believe that the inputs used by Dr Abdala for his valuation are anything but poor random guesses with no basis in reality and are in no way reasonably certain. This renders his valuation an inappropriate basis for a damages claim."[734]

iii. *Defective estimates of cash flows from the sales of the lots*

686. Dr Abdala estimates the cash flows using data from 2015 and adjusted to 2011 to account for inflation and exchange rate fluctuations. However, he did not perform adjustments to account for changes in the real estate market conditions between 2011 and 2015.[735]

687. As analyzed by Dr Hart, Dr Abdala assumed prices of the lots is: (i) 35% higher than the price of actual Las Olas lot sales and reservations which had already taken place between January 2008 and May 2011[2736][736]; (ii) 77% higher than the average pre-sale price closest to his May 2011 valuation date;[737] and (iii) 62% higher than management hoped for just five months before the alleged Measures.[738]

688. Additionally, Dr Abdala did not properly account for infrastructure costs, since in the December 2010 business plan, management estimated they were going to have to spend an additional $4.2 million to complete the lots;[739] yet it does not appear Dr Abdala accounted for any of these infrastructure costs in his model.[740]

iv. *Unsupported assumptions relating to the houses and condominiums*

689. Dr Hart shows how Dr Adbala's calculations relating to the houses are riddled with unsupported assumptions, including the following: (i) 90% of the lot owners would have paid to have Las Olas coordinate their house construction, (ii) sales and rental prices of the houses would have been 10% lower than listed prices, (iii) half of the houses would have been put up

733 Timothy Hart Expert Report, ¶¶77-85.
734 Timothy Hart Expert Report, ¶182.
735 Timothy Hart Expert Report, ¶¶110-113.
736 Timothy Hart Expert Report, ¶13.
737 It is interesting to note that the highest lot sale price in the post-financial crisis period was to one of the claimants in this matter, Mr Samuel Aven, in September 2009. Timothy Hart Expert Report, ¶113.
738 Timothy Hart Expert Report, ¶114.
739 CLEX-016, p. 33.
740 Timothy Hart Expert Report, ¶114.

for rental, and (iv) buyers would have held the properties for ten years and at that point 90% of the properties would be re-sold. He provided no supporting details for any of these assumptions.[741] There are also a number of instances where he misquoted his own source.[742] These misrepresentations include construction lag time, construction costs, gross margin, and occupancy rates. Additionally, he ignored costs associated with renting the properties.[743]

690. Furthermore, most of the defective assumptions used in the calculations for the cash flows relating to the houses were also applied to the calculations relating to condos.[744]

v. *Incorrect sources for the timeshares*

691. Dr Hart also explains that the real estate market in Costa Rica is vastly different than that of the U.S. However, the majority of Dr Abdala's assumptions related to timeshare cash flows are based on data from U.S. sources without providing any adjustments to account for the fact that Las Olas is located in Costa Rica. Furthermore, Dr Abdala did not properly account for marketing expenses. Therefore his calculations result in an inflated profit margin.[745]

vi. *Misrepresentation of cost and unjustified project margins in relation to hotel cash flows*

692. With respect to hotel cash flows, Dr Hart's report shows how Dr Abdala: (i) misrepresented construction costs; (ii) did not add additional costs for common areas of the hotel; (iii) did not provide any justification for the profit margin; and (iv) only compared his total estimated sales price to a proposed hotel in Panama (which currently does not exist), which completely disqualifies the conclusions.[746]

vii. *Errors in the calculation of the WACC*

693. Lastly, Dr Abdala uses a discount rate calculation of an industry WACC of 7.6%. However, this calculation does not properly account for the risks faced by the Las Olas Project as it (i) does not use the correct risk free rate based on 20-year Treasury bonds; (ii) the estimation of the project's beta does not account for the specific risk for a project like Las Olas; (iii) miscalculates the country risk premium and omits a size premium; (iv) calculates a synthetic

741 Timothy Hart Expert Report, ¶118.
742 Timothy Hart Expert Report, ¶119.
743 Timothy Hart Expert Report, ¶¶118-124.
744 Timothy Hart Expert Report, ¶¶125-127.
745 Timothy Hart Expert Report, ¶¶128-134.
746 Timothy Hart Expert Report, ¶¶135-136.

cost of debt using incorrect inputs; and (v) applies an optimal capital structure even though it is clear that this project was funded by 100% equity.[747]

b. *Incorrect calculation of the land value*

694. Claimants explain that the Land Value seeks to ascertain the value of the land and assets if the project failed to become a going concern.[748] They calculation made by Dr Abdala for the Land Value consisted basically of taking an appraisal made in October 2009 and adjust it to account for inflation, foreign exchange rates, and the fact that only partial urbanization was complete as of the valuation date.[749]

695. As Dr Harts' Expert Reports show Dr Abdala's resulting land value of $35.5 million, is far in excess of the cost of the land. This is because Dr Abdala did not adjust for changes in the real estate market between the valuation date and the date of the pre-existing appraisal (2009), and he ignored the fact that the permits would be worthless if construction is not continued. Further, the partial construction on the land can potentially reduce the value to third-party buyers, as it may need to be removed and cause the buyer to incur additional costs.[750]

c. *Flawed calculation of the residual value*

696. Claimants have also taken into account in the valuation of their alleged losses any residual value attached to the land in its current state.[751]

697. To determine the value of the property considering it has wetlands Dr Abdala used a comparable approach and pulled data from Remax as of November 2015, ignoring changes in the real estate market conditions. Further, he did not make any adjustments to the comparable data, given that the details were not provided. Therefore, it is impossible to assess whether the so-called comparables are in fact comparable.[752]

d. *Inflated probability of success*

698. Claimants' expert states that Claimants are entitled to 68% of the value of the project as a going concern plus 32% of the value of the land, permits, and existing construction.

747 Timothy Hart Expert Report, ¶¶137-148.
748 Claimants' Memorial, ¶463.
749 Claimants' Memorial, ¶464-465.
750 Timothy Hart Expert Report, ¶¶153-160.
751 Claimants' Memorial, ¶472.
752 Timothy Hart Expert Report, ¶¶164-166.

699. Claimants argue that Dr Abdala relied on a paper by Prof. Damodaran.[753] However, Dr Hart explains that "Prof. Damodaran cautions that using sector data averages from a study as the probability of survival for an individual firm or project is “painting with a broad brush” and generalizing findings from a specific time frame to the firm or project in question. It would also generalize as to the location of the firm or project, as Dr Abdala did in this case by using U.S. company data for a project in Costa Rica."[754]

700. As explained by Dr Hart, the formula applied by Dr Abdala does not make logical sense. The supposed 68% probability of success is completely speculative and has no relationship to a resort construction real estate project in Costa Rica. The “distress” value (the value of the project as a failure) is also inflated, as the permits add no value if construction cannot be completed as planned, and the existing construction would be worthless to a potential third-party. Existing construction could in fact reduce the value to a third-party.[755]

B. Mr Aven is not entitled to moral damages

a. *Under international law there is no room for moral damages based on the alleged facts*

701. Mr Aven claims $5 million in moral damages.[756] Claimants argue that international law allows for moral damages as per Article 31 of the ILC Articles on State Responsibility and the full reparation principle as held by the International Court of Justice in the *Chorzow Factory* case.[757] They further argue that the obligation to pay moral damages dates back to the *Lusitania* cases decided by the United State-Germany mixed Claims Commission in 1923.[758] Lastly, Claimants rely on a few exceptional of cases where arbitral tribunals have granted moral damages such as *Desert Line Projects LLC v. The Republic of Yemen* ("*Dessert Line*").[759]

702. None of those cases are applicable to this case, since they are based on completely different set of facts. As explained by the tribunal in *Lemire v. Ukraine*, in the *Lusitania Cases* "the mental suffering or shock caused by the violent severing of family ties by reason of the deaths."[760] and in *Desert Lines* "the award acknowledged that claimant was subject to what is describes as a siege with heavy artillery, an armed assault, an act of terror in its worst image,

753 Claimants' Memorial, ¶468.
754 Timothy Hart Expert Report, ¶151.
755 Timothy Hart Expert Report, ¶¶149-152.
756 Claimants' Memorial, ¶495.
757 Claimants' Memorial, ¶¶476-478.
758 Claimants' Memorial, ¶479.
759 Claimants' Memorial, ¶¶480-484.
760 CLA-102, ¶330.

that claimant suffered threats and attacks on the physical integrity of its investment and that the settlement agreement was imposed onto claimant under physical and financial duress."[761]

703. Claimants argue that even when Dessert Line expressly refers to the possibility of recovering moral damages in exceptional circumstances, "such “exceptional circumstances” have no impact on the principle of compensation of moral damage, but only on the forms or degrees of reparation due. That is to say, the question of gravity does not operate as a pre-condition for the award of moral damages."[762]

704. Such proposition is completely inconsistent with the holdings of a vast quantity of investment treaty tribunals which have consistently considered that for an award on moral damages they should be both (i) exceptional circumstances; and (ii) of substantive gravity.

705. In *Lemire v. Ukraine*[763] the tribunal drew the following conclusion from the case law:

> "[A]s a **general rule, moral damages are not available** to a party inured by the wrongful acts of a State, but that moral damages can be awarded in **exceptional** cases, provided that
>
> - The State's actions imply **physical threat, illegal detention or other analogous situations** in which the ill treatment contravenes the norms according to which civilized nations are expected to act;
> - The State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
> - Both **cause and effect are grave or substantial**."[764] (emphasis added)

706. As regards the negative impact on claimant's reputation, the tribunal found that the gravity required under the standard was not present:

> "The Tribunal sympathizes with Mr Lemire's predicament, but feels that the injury suffered **cannot be compared** to that caused by **armed threats,** by the **witnessing of deaths** or by other similar situations in which Tribunals in the past have awarded moral damages."[765] (emphasis added)

707. Similarly, in *Europe Cement Investment & Trade S.A. v. Republic of Turkey*[766] the Tribunal found that while the illegal conduct involved fraud and abuse of process the claim for moral

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761 CLA-102, ¶328.
762 Claimants' Memorial, ¶486.
763 CLA-102.
764 CLA-102, ¶333.
765 CLA-102, ¶339.
766 **RLA-27**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009.

damages should be rejected as there were no "*exceptional circumstances such as physical duress are present in this case to justify moral damages*".[767]

708. Furthermore, in *Franck Charles Arif v. Republic of Moldova*[768] the tribunal concluded that:

> "After having carefully considered all the circumstances, the Tribunal is convinced that the conduct of the Moldovan authorities provoked stress and anxiety to Claimant. However, the different actions **did not reach a level of gravity and intensity** which would allow it to conclude that there were **exceptional circumstances which would entail the need for a pecuniary compensation for moral damages**."[769] (emphasis added)

709. Claimants submit that Mr Aven has suffered emotional and financial distress by having been subject to criminal charges and an INTERPOL Red Notice.[770]

710. First, the reason why Mr Aven was subject to criminal charges is because there was sufficient evidence to justify an investigation as to his alleged violations of environmental laws. This is completely reasonable in any civilized nation with a strong judiciary that enforces the rule of law. If Mr Aven considers that he was innocent he should have proved that at his trial instead of fleeing the country. The INTERPOL Red Notice was merely the consequence of his conduct arising from his abandonment of the criminal proceedings.

711. In any case, in view of the above quoted decision, such circumstances could never qualify as exceptional circumstances of substantial gravity such as physical duress or the witnessing of deaths of close family members. Therefore, Mr Aven's claim for moral damages should be rejected.

b. *Mr Aven has failed to prove suffering of any moral damages*

712. Furthermore, even if the Tribunal were to consider that Mr Aven is entitled to moral damages, Claimants have not proven that Mr Aven actually suffered any damage.

713. Claimants rely on a commentary that states that "given the subjective nature of valuation of most types of moral injury, arbitrators seem to enjoy almost an absolute discretion in the matter of determining the amount of moral damages."[771]

714. However, *The Rompetrol Group N.V. v. Romania* tribunal[772] when interpreting that very same commentary held that such discretion should be exercised with considerable caution and that

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767 **RLA-27**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶181.
768 **RLA-28**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.
769 **RLA-28**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶615.
770 Claimants' Memorial, ¶489-491.
771 Claimants' Memorial, ¶ 487.

is it subject to the usual rules of proof. Since the claimant was unable to produce any reliably concrete evidence of actual losses incurred under the head of moral damages and the tribunal declined to make an award[773] noting that:

> "A leading commentary draws as its conclusion from the cases that tribunals seem to enjoy "an almost absolute discretion in the matter of determining the amount of moral damages." The very fact, however that **this alternative claim for damages is both notional and widely discretionary prompts a considerable degree of caution** on the part of the present Tribunal in facing the proposition that compensable "moral" damage can be suffered by a corporate investor. The case law in the investment field, as indicated, is very thin: two tribunals have accepted claims for moral damage and two have declined to award it… The Tribunal has already indicated that reputational damage to a protected foreign investor is a perfectly conceivable consequence of unlawful conduct by the State of the investment, and if so is likely to show itself, for example, in increased financing costs, and possibly other transactional costs as well. But the Tribunal regards that as **just another example of actual economic loss or damage, which is subject to the usual rules of proof.** To resort instead to a purely discretionary award of moral solace would be to subvert the burden of proof and the rules of evidence, and that the Tribunal is not prepared to do." (emphasis added)

715. Similarly, in *Tecmed v. Mexico*[774] the tribunal found that there was an absence of evidence proving that the illegal actions affected the claimant's reputation and therefore caused the loss of business opportunities for him. The claimant also complained of damage due to adverse press coverage but again the tribunal dismissed this, finding that the adverse press coverage was neither fostered by the respondent or a result of actions attributable to it.[775]

716. Mr Aven alleges that due to Costa Rica's actions he has lost the opportunity to partner with Google and Facebook in relation to an iPhone and Android application[776] and that he is suffering from post-traumatic stress disorder and severe migraines.[777] However, Mr Aven has presented absolutely no independent proof of suffering such alleged damage and/or harm.

C. Claimants proposed interest rate is inflated and inappropriate

717. Claimants request interest from the date of the alleged illegal act until the date of full payment of the award based on the project WACC.[778] Such approach falls away from the standard

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772 **RLA-31**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013.
773 **RLA-31**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 293.
774 **CLA-54,** *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.
775 CLA-54, ¶198.
776 Claimants Memorial, ¶493.
777 Claimants' Memorial, ¶494.
778 Claimants' Memorial, ¶¶ 496-499.

practice and there are no precedents of any award having granted interest based on the WACC.[779]

718. Dr Hart explains that historically, the predominant basis for interest awarded has been either the U.S. Treasury Bill or LIBOR which he further corroborated with a study of over 60 ICSID awards he published in 2014. Therefore, he recommends using as an interest rate the 10-year U.S. Treasury Rate or the 6-month LIBOR+2%.[780]

719. In the *Tenaris v. Venezuela* case where Compass Lexecon served as claimants' damages experts, Claimants asked for interest based on WACC and that request was rejected,[781] which further support that using a WACC as an interest rate is incorrect from a financial theory basis.

VIII. PRAYER FOR RELIEF

720. Based on the above, Respondent respectfully requests that the Tribunal:

1. Declare that Mr Aven's lacks of standing on the grounds of nationality precludes the Tribunal from seizing jurisdiction of this arbitration and thereby prevents Claimants from seeking redress under the Treaty;

2. Declare that Claimants' Claims are inadmissible on the basis of the illegality enunciated herein and thereby prevents Claimants from seeking redress under the Treaty;

In the alternative:

3. Dismiss all of Claimants' Claims in their entirety and declare that there is no basis of liability accruing to Respondent as a result of:

    1.1 Any claim of violation by Respondent of DR-CAFTA Articles 10.5 and 10.7;

    2.1 Any claim that Claimants suffered losses for which Respondent could be liable;

    3.1 Any claim for the Tribunal's interference with Mr Aven's ongoing Criminal trial before the courts in Costa Rica;

4. Furthermore declare that Claimants have caused environmental harm to Respondent;

779 Timothy Hart Expert Report, ¶174.
780 Timothy Hart Expert Report, ¶¶174-176.
781 **RLA-35**, *Tenaris & Talta v. the Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016.

5. Order Claimants to pay Respondent damages in lieu of the reparation of the environmental damage Claimants caused to the Las Olas Ecosystem, to be quantified based on a the restoration plan that Claimants must submit to the competent authority Respondent shall designate;

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

In the alternative,

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

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

721. Respondent reserves its right to amend or otherwise supplement or modify its defense, counterclaim, and arguments as necessary, until the written phase of the proceedings is declared closed.

Herbert Smith Freehills New York LLP

Herbert Smith Freehills

MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA

ANNEX I: INDEX OF DEFINITIONS AND ABBREVIATIONS

- "Abdala **Report**" means the Damages Valuation of David Aven et al.'s Investments in Costa Rica; submitted by Dr Manuel Abdala of 26 November 2015
- "**ACOPAC**" means the Central Pacific Conservation Area (ACOPAC), which covers the area of Esterillos Oeste
- "**Biodiversity Convention**" means the Convention on Biological Diversity entered into the Earth Summit in 1992
- "**Biodiversity Law**" means Claimants' Exhibit C-207, Biodiversity Act, N. 7788
- "**Concession**" means the concession for the development of the beach in the Maritime Terrestrial Zone of Puntarenas over the parcel of land No. 6-001004-Z-000 owned by La Canícula
- "**Concession site**" means the area under SETENA record No. 110-2005
- "**Concession Agreement**" means the Concession Agreement for the development of land in the beach of Puntarenas entered by La Canícula and the Municipality
- "**Claimants**" means David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, David A. Janney, and Roger Raguso
- "**Claimant's Memorial**" means UNCITRAL Case No. UNCT/15/3 David R. Aven et. al. v. the Republic of Croatia, Claimants' Memorial, submitted by Vinson & Elkins RLLP on 27 November 2015
- "**Condominium**" or "**Condominium site**" means the condominium part of the Las Olas Project (SETENA Record No. 1362-2007)
- **"Construction Act"** means Costa Rica's Construction Act, Law No. 833
- "**Credibility Consulting**" means Credibility Consulting LLC, the Respondent's Damages Expert
- "**Credibility Report**" means the Respondent's Damages Expert's report on the valuation of David Aven et al.'s investment in Costa Rica dated April 8, 2016
- "**D1 Form**" means the Environmental Assessment Document D1
- "**Defensoría de los Habitantes**" or "**Defensoría**" means the Ombudsman of Costa Rica
- "**DeGA**" means the *Departamento de Gestión Ambiental*, or the Environmental Management Office of the Municipality of Parrita
- **"Delimitation of Wetland SINAC Report"** means Respondents' Exhibit R-265, SINAC Report (GASP-143-11), May 18, 2011

- “**DEPPAT**” is a Costa Rican environmental consultancy company hired by Claimants to act as Environmental Regent for the Concession and the Condominium at different times

- "**DIM**" means *the Departamento de Ingeniería Municipal*, or the Department of Municipal Engineering of the Municipality of Parrita

- “**DR-CAFTA**” (or "**Treaty**") means the Dominican Republic Central America Free Trade Agreement

- "**Easement and other lots site**" means what Claimants refer as "Easements and related lots"

- “**EIA**” means Environmental Impact Assessment

- "**EIS**" means Environmental Impact Study

- **"Enterprises"** means the following corporations: Las Olas Lapas Uno, S.R.L., Mis Mejores Años Vividos, S.A. (formerly Caminos de Esterillos, S.A., Amaneceres de Esterillos, S.A., Noches de Esterillos, S.A., Lomas de Esterillos, S.A., Atardeceres Cálidos de Esterillos Oeste, S.A., Jardines de Esterillos, S.A., Paisajes de Esterillos, S.A. and Altos de Esterillos, S.A.), La Estación de Esterillos, S.A. (formerly Iguanas de Esterillos, S.A.), Bosques Lindos de Esterillos Oeste, S.A., Montes Development Group, S.A., Cerros de Esterillos del Oeste, S.A., Inversiones Cotsco C & T, S.A.; and Trio International Inc.

- "**Environmental Organic Act**" means Claimants' Exhibit C-184, Environmental Organic Act

- "**Environmental Regent**" means the person appointed, under Costa Rica law, to serve as environmental supervisor of a project.

- "**EV**" means the Environmental Viability, an authorization to start the development of a project that may affect in any way the environment

- “**FET**” means fair and equitable treatment

- "**First Concession site**" means the area of the second project called "Hotel La Canícula" (SETENA record No. 552-2002)

- "**First Condominium site**" means the area of the first project called "Villas La Canícula" (SETENA record No. 551-2002)

- "**Fiscalía Agrario Ambiental**" or "**FAA**" means the specialized Environmental Prosecutor's Office, an Environmental Department within the General Attorney's Office and the TAA

- "**Forged Document**" means Claimants' Exhibit C-47, Allegedly forged SINAC Report (67389RNVS-2008), March 27, 2008

- “**INTA**” means the National Institute for Agricultural Innovation and Technology Transfer of Costa Rica

- "**Inversiones Cotsco**" means Inversiones Cotsco C&T, S.A.

- **"January 2011 SINAC Report"** means Respondents' Exhibit R-262, SINAC Inspection Report, January 3, 2011

- **"July 2010 SINAC Report"** means Claimant's Exhibit C-72, Inspection Report ACOPAC-OGRAP-371-2010 dated July 16, 2010

- "**KECE**" means Kevin Erwin Consulting Ecologist, Inc., the Respondent's environmental expert.

- "**First KECE Report**" means the expert report submitted by KECE on April 8, 2016

- "**La Canícula**" means La Canícula S.A.

- "**Las Olas Ecosystem**" means all of the parcel of lands owned by Claimants that form the Project Site

- "**MINAE**" or "**MINAET**" means the Ministry of the Environment, Costa Rica; also referred to as MINAET

- "**Municipality**" means the Municipality of Parrita

- "**MTZ Act**" means the Maritime Terrestrial Zone Act

- "**NAFTA**" means the North American Free Trade Agreement

- **"October 2011 SINAC Report"** means Respondents' Exhibit R-264, October 3, 2011

- "**Option Agreement**" means the Option Agreement for the Sale and Purchase of Properties entered into by David Aven with La Canícula and Pacific Condo Park S.A. for the acquisition of three properties in Esterillos Oeste

- "**Other Lots site**" means what Claimants refer to as "commercial and condominium areas"

- "**PA**" means the Project Area

- "**Pacific Condo Park**" means Pacific Condo Park S.A.

- "**PNH**" means the National Wetlands Program

- **"PNH Report on Wetlands"** refers to Respondents' Exhibit R-76, dated March 18, 2011 the SINAC Report No. SINAC-GASP 093-11 dated March 18, 2011.

- "**Project Site**" means Claimants' properties

- **Protti Report** means the Geological Hidrogeological Survey prepared by Roberto Protti, Geotest (Estudio Geológico Hidrogeológico Formulario D-1) on July, 2007 (R-11)

- "**Ramsar Convention**" means the Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar 2 February 1971 as amended by the Protocol of 3 December 1982 and de Amendments of 28 may 1987

- "**Respondent**" means the Republic of Costa Rica

- **"SINAC Injunction"** means Claimants Exhibit C-112 issued by SINAC against Claimants on February 14, 2011.

- "**SETENA**" means the *Secretaría Técnica Nacional Ambiental*, or the National Technical Environmental Secretariat, a specialist branch of the Ministry of the Environment of Costa Rica

- "**Share Purchase Agreement**" or "**SPA"** means the Agreement for the Purchase-Sale, Endorsement and Transfer of Shares entered into by David Aven with Carlos Alberto Monge Rojas and Pacific Condo Park on April 2002

- "**SINAC**" means the National System of Conservation Areas of Costa Rica, a branch of the Ministry of the Environment of Costa Rica

- "**TAA**" means the *Tribunal Ambiental Administrativo,* a branch of the Ministry of the Environment, Costa Rica

- **"TAA Injunction"** means Claimants' Exhibit C-121 issued by the TAA on April 13, 2011

- "**Trio International**" means Trio International Inc.

- "**WPA**" means a Wildlife Protected Area

- "**Wetlands Decree**" means Claimant's Exhibit C-218, Technical Criteria for Identification of Wetlands, Decree N. 35803