BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

----------x In the Matter of Arbitration : Between: :

UNCITRAL Case No.

DAVID AVEN, et al., :

Claimants, : UNCT/15/3
:

and : THE REPUBLIC OF COSTA RICA, :

Respondent. : ----------x

12/836028_1

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Volume1 HEARING ON JURISDICTION AND MERITS

December 5, 2016
The World Bank
700 18th Street, N.W.
J Building
Conference Room JB 1-080

Washington, D.C.

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

MR. EDUARDO SIQUEIROS T., President
MR. C. MARK BAKER, Co-Arbitrator
PROF. PEDRO NIKKEN, Co-Arbitrator

ALSO PRESENT:

MR. FRANCISCO GROB D.
Secretary to the Tribunal
MS. SUSANNE SCHWALB
Assistant to the Tribunal

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MS. KARIN RUCKHAUS
MS. KELLEY REYNOLDS
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CONTENTS

PAGE

PROCEEDINGS PRESIDENT SIQUEIROS: Good morning. It

appears we all are now ready to commence.

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

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

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

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

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

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

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

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

Then we have from the Costa Rican law firm of

Batalla Salto Luna, Raul Guevara, Roger Guevara, Herman Duarte and Esteban De La Cruz; and then we have one of the witnesses, Manuel Ventura. And I can't see beyond.

From Vinson & Elkins, we have Jerome Hoyle.

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

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

On Respondent's side, Mr. Leathley?

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

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

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

And then if you'll excuse me, so, I'm going to read out the rest because I can't actually see in

which order appears.

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

PRESIDENT SIQUEIROS: Okay. Thank you, sir.

Anyone else in the room who has not been yet introduced?

Yes. Okay.

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

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

I think that's it, sir.

PRESIDENT SIQUEIROS: Thank you very much.

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

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

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

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

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

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

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

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

We have now got that document. There is a slight wrinkle, confusion, in this, in that the Respondent inserted a document which it chose to give

the "C" number to. I frankly have no objection to them introducing the document, but it's not a Claimants' exhibit, and it's not the exhibit that we anticipated receiving.

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

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

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

MR. BURN: Correct, sir. Correct.

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

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

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

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from their files.

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

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

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

And so, those three documents, a replacement of something that's unclear in its form before you already; one additional document that we say ought to have been disclosed in the first place and is a very

short document; and C-295.

PRESIDENT SIQUEIROS: Okay.

Mr. Leathley?

MR. LEATHLEY: Thank you, sir.

Of course, we are very happy to look at these

documents. We think it would have been appropriate to 12/836028_1 14

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

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

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

And so, sir, I would only ask that we have an opportunity to respond as much as we need to in the

post hearing briefs.

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

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

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

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

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

PRESIDENT SIQUEIROS: Right.

MR. BURN: But in terms of Mr. Leathley's observations, we have no objection to him having an opportunity to look at the--the three documents that--to which we

referred. I have no objection to him being given proper opportunity to--in this Hearing

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

PRESIDENT SIQUEIROS: That's fine.

Pedro, do you have any questions?

Mark?

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

MR. BURN: Thank you, sir.

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

PRESIDENT SIQUEIROS: Sure.

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

Just take a few minutes while the papers are

extracted.

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PRESIDENT SIQUEIROS: Sure. Take your time.
MR. BURN: Thank you.
(Off the record.)
MR. BURN: And just to be clear, so we will be

distributing soft copies as well, probably in USB--on USB drives for everybody's ease of use. There are a couple of animations in the presentation which are much easier to access, to understand, in the soft-copy form.

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

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

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

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

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

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

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

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

The Respondent would have us believe that if

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

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

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

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

It is also not about the various side shows 12/836028_1 20

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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correct, whether those assertions are fair or not.

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

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

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

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

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

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

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

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

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

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

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

Now, having drawn your attention to the numerous people from whom you will hear nothing, I now want to go and set out to you what this case is really about.

This is a--it's not a particularly complex case, to be honest. It's a permit cancellation case. It's a case in which a group of foreign investors, in compliance

with local law, developed a project from desktop concept to construction, carefully, thoroughly, properly. They applied for and obtained all of the permits, and we'll--I'll go to those permits shortly--that they needed to acquire. They were very careful about this. They took proper expert advice at every stage, and they did what they ought to have done.

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

The land had great potential for development because of its unique topography and its views of the Pacific Ocean and because it fronted a new main highway from San Jose to Manuel Antonio, a significant tourist attraction on the Pacific coast. This is a great position. This is a perfect position. And as I will show to you, there have been other developments around the area that have successfully been brought to fruition.

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You will hear from--before I do that, just a very quick video, just--that is--this is Exhibit C-60, but you can see some of the very advantageous beach position of the

sites. And this is an excellent beach, as you can see, in its own right. But behind this beach, you have the site, which we will see in plan form shortly.

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

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

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

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

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

As is set out in Exhibit C-4, which is captioned on the screen, the respective shares in the Enterprises are divided up as follows: Mr. David Aven holds 23 percent; Mr.

Samuel Aven, 44 percent;
Ms. Carolyn Park, 10 percent; Eric Park, another
10 percent; Jeffrey Shioleno, 2 percent; David Janney, 1 percent; and Mr. Roger Raguso, 5 percent.

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

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

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

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

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

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

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

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the pleadings.

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

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

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

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

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

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

And this is at Exhibit C-30.

Mr. Aven and Mr. Damjanac will be able to explain that the project was designed to take advantage of the multiple--of multiple revenue streams, including the sale

of lots, the construction of villas on the lots, mortgages, management fees, rental of commercial space, and so on. There were

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multiple ways of monetizing their investment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As the Tribunal will have seen from the 12/836028_1 40

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evidence in the record, Mr. Bucelato adopted a concerted and organized strategy directed at multiple State institutions. He took significant steps to undermine the

project, all facilitated by the continued failures of certain branches of the Costa Rican State to afford investors their rights.

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

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

What started as a simple complaint by Mr. Bucelato snowballed into a messy government shutdown, two criminal trials, and the ruination of a multimillion-dollar development project.

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Initially, Mr. Bucelato's complaints were rejected. He failed. He failed to show that there were forests and wetlands on site and through relevant competent agencies rejected those propositions. But in early

2011, there was a shift, and he had more success with his efforts of attacking the project.

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

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

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

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

But early in 2011, when Mr. Bucelato's complaints about alleged wetlands and forests had not had the desired effect, he renewed his campaign. This time, his allegations extended to include reference to an allegedly forged document that he

accused the Claimants of submitting to the record of SETENA in order to secure Environmental Viability for the condominium section.

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

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

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

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

And this is the document that gave rise to a campaign against Las Olas. This is the document that was used to prosecute Mr. Damjanac and Mr. Aven; and yet, in the Respondent's own files on the reverse side of the letter, there is this stamp

confirming who put the document on the file. Mr. Bucelato's campaign against Las Olas crystalized when, on the 7th of March 2011, he attended the Municipality's office with his lawyer, Mr. Jimenez; an environmental consultant, Mr. "Carmiol," whom he and other neighbors at
Las Olas--neighbors of Las Olas had hired to further their campaign against the project.

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

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Chinchilla.

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

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

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

The Respondent will no doubt attempt to

justify the Municipality's action by reference to SETENA's resolution of the 13th of April 2011, which temporarily suspended the EV for the condominium section and the criminal court's injunctions of the 30th of November 2011.

But the simple truth is this: At the time of 12/836028_1 45

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

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

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

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

The minutes of the municipal council meeting at which the decision was taken to suspend the

construction permits make no reference to the SINAC report, only to correspondence. The SINAC report of 3rd January 2011 was not addressed to the Municipality, and according to Ms. Vargas, had been presented by Mr. Bucelato at the 7 March 2011 meeting,

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only a day before the council's decision.

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

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

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

And it's not just the Claimants who say so. You will have seen the statement, although you will not hear from them at this hearing, of Mr. Jorge Antonia Briceño Vega, the internal auditor for the Municipality of Parrita at this time. Mr. Briceño

identified the unlawful nature of the Municipality's shutdown of the project and at the time brought it to the attention of the Municipal Council and the Mayor.

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

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

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

So, Mr. Briceño wrote to the Municipal Council and to the Mayor on the 29th of October 2012.
And this is Document C-283. And he warned the

Municipality that they would be--could be liable for damages to an affected third party caused by the

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

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

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

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

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

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

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

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

those recommendations had been adopted.

He said that the 7 March 2011 order to suspend

permits should be rescinded because it had no legal basis. He said that the Municipality should immediately take steps to implement SETENA resolution, the SETENA resolution of 15 November 2011.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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issued the EVs for those sections.
SETENA confirmed the condition of the site

both before and after it issued Environmental Viability by performing site inspections. It wasn't purely a desk exercise. They, being experts, went on the site and inspected it.

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

So, what you see on the screen now is the
September 1st, 2010, resolution. And you can see very
clear that they have indicated precisely that there
was no problem on the site.
ARBITRATOR BAKER: Mr. Burn, I--with greatest
respect, I hate to intervene on your flow, but it's
such a good time.
Could you also briefly address in your Opening
the Respondent's suggestion that somehow the

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applications being divided as they were presented to

the various agencies was incorrect. They make quite a deal out of that point. And I haven't heard you say anything about that yet. Thank you.

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

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

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

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

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Project.

In July 2010, Mr. Manfredi and Mr. Bogantes of

SINAC inspected the site and confirmed there were no wetlands to be found. SETENA received a report reaffirming no wetlands in August 2010, confirming its findings in 2008 when it visited the site in advance of issuing the EV for the Condominium.

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

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

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

On May the 15th, 2011, INTA received a report 12/836028_1 57

at the request of SINAC. SINAC contacted INTA in the hopes that INTA would confirm that wetland soils were on the property in order to substantiate or bear out its hasty and erroneous claim that there were wetlands on the property. INTA, however, concluded that the

soil data they collected did not support a finding of wetlands.

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

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

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

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

In contrast to the Respondent's complete lack of witness testimony regarding SETENA, SINAC and the other agencies to which I've referred, the Claimants'

expert, Mr. Gerardo Barboza Jimenez, a lifelong government employee and former official at SINAC, has explained that SINAC's determination of a wetland in 2011 was not based on the criteria prescribed in Costa Rican law.

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

Now, those are specific and those bear a specific technical meaning which the experts have explored and we say drive the conclusion that--that there was never any question of there being wetlands on-site.

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

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

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

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

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

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

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

The forestry expert hired by the Claimants, Mr. Minor Arce, has testified that the determination in 2011 that there were forests on the Claimants' site

was also not in accordance with Costa Rican law.

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

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

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

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

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

And Mr. Arce is very careful in his application of the relevant tests. He described in the 2010 report the Las Olas property as not

containing any forest that falls within that definition.

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

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

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

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

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

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

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

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was compliant with Costa Rican law.

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

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

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

Given the existence of reports and permits, all confirming at the time before the criminal

proceedings that everything was in order, on what basis can intent ever be found? It was hopeless.

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

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

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

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

Unfortunately, Mr. Aven was unable to appear at the second trial as he left Costa Rica after numerous threats and a shooting suffered by him and

Mr. Shioleno that left Mr. Aven's car riddled with bullet holes.

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

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

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

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

The regulatory and environmental issues relating to Las Olas were not the proper subject of a

criminal proceeding and should have been dealt with through the administrative process.

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

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

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

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

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

PRESIDENT SIQUEIROS: Thank you.

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

SECRETARY GROB: 7.

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

(Brief recess.)

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

DR. WEILER: Thank you, Mr. President. 12/836028_1 67

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

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

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

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

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

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

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

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

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

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

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

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

In this regard, I came across Campbell 12/836028_1 70

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McLachlan's warning about that. This is a--one of the legal authorities. Campbell wrote a chapter in a--I'm sorry, not a chapter--an article in a--a very famous article or increasingly famous article on

Article 31(3)(c) of the Vienna Convention. It's very thoughtful, and I thought that it was appropriate to include. It was almost opportunistic that I was able to find a quotation that I think suited.

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

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

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

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

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

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

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

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

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

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

A similar claim is that, more generally,

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

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

So, examples that demonstrate the relevance of NAFTA provisions for DR-CAFTA interpretation are actually fairly common. Some of them can be found, for example, in the Respondent's Reply Memorial--I'm sorry--the Respondent's Memorial on Jurisdiction and Counter-Memorial on the merits in the Spence v. Costa Rica case, for example, at Paragraph 198 where it actually relies on Article 1112 with respect to Article 10.2.

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

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

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

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

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

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

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

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

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

And I couldn't find the summary documents very easily. The links didn't work anymore. But I--I was

creative and diligent, and I was able to discover them. I found them online mostly using the--that Wayback Machine, the one that lets you go back and look at previous versions.

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

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

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

So, those are the--the legal authorities that I'm going to be referring to now for the next few

minutes. So, the reason that I think that's relevant is that it goes to the dispute that the parties have over these three particular issues, object, and purpose of the two chapters and the meaning of those two provisions.

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

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

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

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

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

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

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

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

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consistent underenforcement of any environmental regulation.

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

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

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

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

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

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

Article 17.3, I've highlighted the key points. 12/836028_1 82

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

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

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

And to be clear, the Claimants' position in 12/836028_1 83

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

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

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

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

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

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

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

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

Paragraph (1)(A) requires the Investor to state its case in this regard. When one provides

one's Notice of Arbitration, one needs to specify how the responding party has actually breached its obligations under Chapter 10, Part A.

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

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

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

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

The Claimants are responsible for defining the issues in dispute. And the Tribunal decides those issues in dispute in accordance with the agreement and applicable

rules of international law. It's not--in other words, it's not for the Respondent to define the issues in dispute. That's the Claimants' prerogative, and it's the Tribunal's responsibility to decide them.

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

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

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

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

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

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

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

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be useful here for a moment to remind yourselves of the subsidiary sources of international law. Obviously, you know, again, we can probably all say it in our sleep--the adjudicative decisions and also the most highly qualified publicist--the writing of those publicists.

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

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

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

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

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

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

We think the Respondent is doing this because 12/836028_1 90

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

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

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

I also note that at Paragraphs 975 and 976 of the Rejoinder, there seems to be a tentative reference to English law as well, suggesting that it may be

useful to--or applicable in some way with regard to the burden of proof for establishing allegations of bad faith or bribery; and needless to say, English law is, again, not relevant in this proceeding as a matter

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

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

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

So, where do we find evidence of these principles?

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

There's an argument that the preventative

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

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

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

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

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treaty's out. Well, what about custom?

Well, there you will find the attempt at

Paragraph 76 to 78 of the Rejoinder, and we'd first note that no effort is actually made to demonstrate that precaution--as some sort of principle forms part of the customary law of investment protection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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national of a Party.

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

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

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

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

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

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

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

But instead they cobbled together this

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idiosyncratic test in which they counted the occasions on which the Claimants, or rather since they were all minors at the time, somebody else had described them either as Egyptians or had used some sort of Egyptian identity document. That's

not the approach that is acceptable either under customary law or even arguably under ICSID law, and ICSID law itself is not relevant to this case.

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

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

I mean, there is no indication that this 12/836028_1 101

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

If we were, though, however, to even indulge for a moment in the Champion Trading approach, we've got that covered too. There's lots of examples, as George has already shown you the slide. We've got lots of examples that cover that off too. Dave Aven

is an American, identifies as an American and uses American documents.

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

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

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

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

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

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

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

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

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

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

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that way and the jurisdictional objection was dismissed.

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

And that is what we talk about. And that's what our clients talk about when they say they lost their investment. When they say they "lost their investment," they don't say, well, I had cadastral

plain Lot Number X5000, and that was my investment.
And I also--I think I had some sort of IP rights,

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

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

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

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

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

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

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

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

Now, we submit in our Memorial that the 12/836028_1 107

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

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

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

you were actually in compliance.

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

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

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

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

work.

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

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

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

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

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

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

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

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

So, I should, though, mention Rejoinder

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

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

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

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

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

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

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

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

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

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

But there's an implicit and historically false assumption behind the Respondent's reasoning there, and that's that the Doctrine of Denials of Justice is actually

restricted to measures that involve the judicial branches of state. That's not what Jan Paulsson says. And I would submit that he is a learned publicist. That's not what Borchard or Eagleton said. Again, I think they were learned publicists. Unfortunately, to quickly give you their three opinions in a nice short note, I had to give you some pages of my book where I cited them.

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

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

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

So, the Respondent says that the bribery allegations lack any relevance with regard to the

development. So, they're saying that we haven't established some sort of causal relationship.

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

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

If the Treaty Provision 10.7(1) and 10.7(2) say one must provide compensation for expropriation and one does not do that, the act is illegal under international law. Thereof, there is no point in trying to reach back in time to a point when

expropriation itself was not so clearly defined in customary law and when the concept of legality versus illegality was used.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BURN: So, do you have any questions for 12/836028_1 120

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Dr. Weiler at this stage?

PRESIDENT SIQUEIROS: No.

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

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

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

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

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

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

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

Well, quite.

And I'm hoping this is going to work.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And the point at which the water table arises on that one is--if you look very carefully at the left-hand side of the image, there is a 1. That is 1

meter from the surface. That is where the water table is.

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

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

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

The second one, the water table 10 centimeters below the surface. Again, that's a hydric soil. Therefore, you're in the territory of thinking about wetlands.

Not hydric but still hydromorphic, he--he puts that at 20 centimeters, but it could be anything. And, again, you've got the--the green roots cross-section on the right-hand side.

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

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Wetlands are protected because they are special environments because of the hydrophytic vegetation, the type of plant life that--that appears there, the type of general conditions, the hydrophytic conditions that apply generally, is a lot of water around, and what is the nature of the soil. Otherwise, you can just go anywhere where there's a bit of standing water and say, that's been standing for a while, it must be a wetland. No. There is something specific and special and technical to--to deal with in that regard.

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

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

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

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

And this first slide--this is actually Mr. Erwin's second attempt at understanding wetlands on the site. There's another site that might be--have the opportunity to take you to that shows that he had virtually half the site covered with what he projected would be wetlands. But on rebuttal, he had to revisit his analysis and came up with a much more modest assessment of issues. We still say it's not correct, but it's a much, much more modest assessment. And--and so, you can see, that's what he thinks when--once he's at the second go, is the point.

Now, when Drs. Calvo and Langstroth look at it, you can see these green-shaded areas. They say, yes, that there are some potential areas of potential

sensitivity, and they identify those, much more

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

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

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

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

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

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

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

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

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

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

Just one second.

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

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

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

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

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with the environmental law as it stands.
We're--that's not a problem. We complied with it, as
it stood.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the Claimants filed that Protti report.

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

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

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

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

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

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

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

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

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It should also be borne in mind, looking at

what's on the screen, that this--I've already shown you this. This is SETENA's 2010--September 2010 resolution. And the--it's very important to bear in mind that SETENA clearly has already seen that this construction work, the easements, has taken place. They refer to the existence of roads 60 meters in length and 6 meters in width. They can see. They know that this work has been done. They have all of the documentation before them.

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

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fragmentation, no issue is raised.

If there had been an issue, whether that issue

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

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

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

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

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

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PRESIDENT SIQUEIROS: Thank you.

MR. BURN: All right.

The Claimants' contractors, people like

Mr. Mussio, are experts and professionals. And the Claimants took an enormous amount of care to make sure they had the right people and understood the procedures and laws at different times. They hired local lawyers, local architects, local building contractors, local environmental experts, local forestry engineers, all to get everything in order in this regard.

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

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

The allegations of unlawful construction prior 12/836028_1 141

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

As the Claimants have explained in submissions, they obtained construction permits and--for the paved roads or easements. Ms. Vargas actually saw those in

2007. And--however, those construction permits, went back to the Municipality to obtain copies from their records, the perfectly understandable explanation came back that the records were--a lot of records were lost during Hurricane Alma in 2008, and so, they did not have the relevant copies. But you will hear from the relevant people confirming that they filed the relevant applications, obtained the relevant paperwork.

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

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

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

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

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

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

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

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

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

Now, if we look at the slide here, we see another problem with the Respondent's position. The Respondent is simply not taking care to research some of its more

obtuse accusations. And sometimes, all it takes is a very brief review of the record to show

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

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

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

And another example is the--the point about Mr. Aven's nationality. The suggestion, slightly bizarre, made in the Rejoinder, that Mr. Aven was or

may not have been born in Italy. Well, the basis for

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that assertion is completely absent.

I mean, Mr. Aven is perfectly willing to

provide a copy of his birth certificate, establishing his place of birth. But it's points like this where it--material is being put before you that is perfectly--checking the record, it's perfectly straightforward and will show you the truth.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And as previously explained, in 2005, Mr. Aven 12/836028_1 149

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

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

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

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

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relevant permits at all times.

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

PRESIDENT SIQUEIROS: Thank you, Mr. Burn.

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

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

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rule.

Do you have any questions from Claimant?

Then if none are at this point--unless Respondent would like to make any suggestion otherwise, or comment, I proceed that we break for

lunch, as had been contemplated, and we return one hour from now, at quarter to 2:00.

Thank you.

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

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AFTERNOON SESSION

PRESIDENT SIQUEIROS: Good afternoon. Then if the parties are ready and our Interpreters and Court Reporters are ready, then I would ask Respondents to proceed with their presentation.

MR. LEATHLEY: Thank you very much, sir.

Members of the Tribunal, thank you very much for your time. And on behalf of Herbert Smith Freehills and COMEX, it's a pleasure to be here. And I'd like to thank also Mr. Grob and his colleagues and the court reporters and the interpreters.

And if you're like me, when you're listening to someone for more than an hour, you begin to fade. So, what I might suggest, as perhaps was indicated earlier, we maybe take a couple of breaks, but I do plan to speak to close to the three hours.

PRESIDENT SIQUEIROS: Okay. And feel free, if there are some breaks that you find it more appropriate at the point at which you would like to make a break. I think we're on schedule.

MR. LEATHLEY: Thank you, sir. And I should add that I will also be joined today by my colleague,

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

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

This case is an ongoing--and I repeat-- "ongoing" domestic dispute currently before the Costa Rican authorities. It has not finished. Therefore, why on earth are we here? The property the Claimants' owned from the start remains in their

possession, the disputes are ongoing, and domestic remedies have not been exhausted. And above all--and this is absolutely central to your deliberations and it's of relevance this week--there are protected wetlands on the property.

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

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

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

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

In short, the Claimants have asked of you the impossible. They're asking you to look at the case

today, a snapshot of a situation that is partially completed, and conclude that the Republic of Costa Rica has not violated international law. It has not. This is a contorted proposition that they are putting to you.

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

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

There can be no lack of due process and denial of justice if we are still in the midst of the process. There can be no lack of due process when the process upholds the very laws Claimants signed up to when they invested in Costa Rica. There can be no

arbitrary conduct when the conduct of the State justifiably seeks to protect wetlands that are now definitively proven to exist on the Las Olas Project

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site.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

conceding it.

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

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

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

And, eighth, I'll provide an overview of the 12/836028_1 165

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

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

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

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

In relation to Costa Rican law, Claimants have 12/836028_1 166

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

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

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

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

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

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

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

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time.

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

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

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

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I make a plea of central relevance to the legal tests in play in this case. Irrespective of our personal

views of how environmental protection should be framed, we ask the Tribunal to recall how important it is to Costa Rica.

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

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

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

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

I said a moment ago that we're here to reconcile the protection of the Costa Rican environment with the purported investments made by

Claimants. This is not rhetoric. It is indicative of the applicable law that guides this Tribunal.

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

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

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

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

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

And as the United States submitted, Article 10.2 subordinates the provisions of Chapter 10 to the provisions in all other

chapters of the DR-CAFTA in cases where there is an inconsistency with another chapter.

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

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

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

Chapter 17 is recognized by the United States as preserving the policy space for the environment. The US helpfully states--and I'm reading from their letter--"These provisions demonstrate the Parties' commitment to preserving policy discretion in

the adoption, application and enforcement of domestic laws aimed at achieving a high level of environmental protection."

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

common knowledge by now.

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

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

I'm going to put Article 17.1 on the screen. "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"--and here's the emphasis--"each party shall ensure that it's laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies."

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

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

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

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

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

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

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

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

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laws."

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

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

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

The third reason Claimants are mistaken is because of their reliance on NAFTA authorities. It's

totally misplaced. One need only consult the actual authorities they rely on to see how and why. NAFTA is not CAFTA. Of course, NAFTA occurred before CAFTA.

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

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

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

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

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It is entitled "Investment and Environment." This provides, "Nothing in this chapter, Chapter 10, shall be construed to prevent a party from adopting, maintaining or enforcing any measures 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."

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

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

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

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

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

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

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

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

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

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

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

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land.

Their testimony is utterly lacking in this

regard. While Costa Rica's experts seriously assess the impact, Mr. Burn this morning said they had to respond to that point. Well, yes, indeed they had to respond.

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

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

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

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

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

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

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

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

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

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

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In sum, if in doubt, defer to the environmentally sustainable option, something that Costa Rica is observing now and Claimants go to great lengths to ignore. The formulation of the principle relies on three key elements: first, a degree of

uncertainty of future harm where a threat remains unaddressed; second, the lack of scientific evidence at the time of the decision; and, third, making a decision before having scientific certainty.

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

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

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

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

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

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

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

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

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

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

Second, claimants have not proven their

investment. They have not proven the necessary chain of ownership in relation to certain elements of the Las Olas Project; and, therefore, they do not qualify under DR-CAFTA.

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

Article 10.28 of the CAFTA excludes claims by

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

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

In the context of this investment arbitration,

the nationality used to establish an investment must be considered as a relevant factor to decide on cases of dual nationality. That was found in Champion Trading v. Egypt.

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

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

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

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

the protection against treaty shopping.

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

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

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

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

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

So, this is for Claimants to prove. It is not for Costa Rica to prove. Claimants have not provided evidence of their ownership of the land such that, I suggest, to discharge the standard of proof. Specifically, I will walk you through the evidence on this.

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

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

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

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

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

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

And I would just like to say here that 12/836028_1 191

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

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

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

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

The land that forms part of the Concession

site is the land in the Maritime terrestrial zone of Puntarenas. This is where the Claimants planned to build their beach club. The main part of the site by Claimant to be--was planned by Claimant to be the

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

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

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

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

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

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

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

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

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

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

This assignment was made in violation of the Concession Agreement. Indeed, 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.

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

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

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

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

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

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

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

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

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

But this assignment, if it ever happened, is as opaque as the Claimants' alleged interest in

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Las Olas. Indeed, Claimants do not submit the required evidence of this alleged transfer of shares.

Under Costa Rican law, the transfer of shares in a Costa Rican corporation is evidenced by two things: physical delivery of the share certificate to the shareholder and registry in the books of the company.

In the present case, there is no proof of an actual assignment of shares. In addition, Claimants only disclosed this letter allegedly executed in 2005 when prompted by the Tribunal during document production.

In any event, the letter does not cure the two sources of illegality previously mentioned. One, between the extension of the trust agreement on April 30th, 2003, and Mrs. Murillo's alleged acquisition of her 51 percent share--stake in La Canícula on March 8th, 2005, Mr. Aven and Claimants owned the totality of the shares in La Canícula during the period--during that period.

And, two, under Clause 10 of the Concession agreement, the concession could not be assigned again

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or transferred to a third party without prior authorization. Just like it happened for the assignment to the bank that held the shares in trust back in 2002, no notification or authorization was obtained for the assignment to Mrs. Murillo.

Now, going back to our tracing of Claimants' interest in Las Olas, we see that throughout 2007 and 2009, Claimants acquired interest in a number of Costa Rican corporations, including Trio International. Claimants refer to these corporations as the Enterprises.

On September 29th, 2009, Trio International segregated that same property so that--the property on which--that was the object of the acquisition to create 288 lots.

Now, Claimants today have failed to indicate that not all of these lots are the property of Claimants. And they have wrongly included as part of their alleged investment these properties. On May 10th, 2010, Claimants allege that they sent a letter assigning for a second time 51 percent of the shares of La Canícula to the same Mrs. Paula Murillo.

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As before, Claimants submit no document proving when Mrs. Murillo allegedly purchased this 51 percent stake.

Now, if we look at--if we go to the map--so if we look at this map, this is--this map is a map of Las Olas properties where we have tried to identify the areas that are not owned by Claimants. They are colored in blue for the properties whose ownership changed since Claimants' memorial, green for properties that Claimants admitted to not owning, and purple for the beach concession. These properties, we allege, fall outside of the scope of your jurisdiction.

And we take issue with the characterization made this morning that the fact that these lots were sold was an issue that only went to--that was only a valuation issue. The absence of ownership on these lots creates an issue for the Project itself if the Project has to be taken into account as--as part of the definition of the investment, which, again, we contest.

If there are no plots--if there are no plots

of land, there is no project where this--that can be developed and, therefore, no investment. Accordingly, the Tribunal has no jurisdiction on the concession. It has no jurisdiction on the lots of land that we have identified, 78 of them. And we would like to note that Claimants, again, have been less than forthcoming in the information regarding this investment.

It was Respondent that uncovered the information regarding the sold lots, after much time and effort, and one has to wonder what other elements were concealed. This is fairly consistent with, unfortunately, Claimants' conduct before the Costa Rican authorities, which--to which you will be speaking.

Thank you.

PRESIDENT SIQUEIROS: Mr. Leathley, would now be a good moment to take a short break?

MR. LEATHLEY: Yes. Certainly.

PRESIDENT SIQUEIROS: Okay. Thank you. So, let's--5-minute--10-minute break. 10-minute break. Thank you.

(Brief recess.)

PRESIDENT SIQUEIROS: Thank you. If the

interpreters, court reporters, and counsel to Respondent are ready, then we can proceed.

Thank you.

MR. LEATHLEY: Thank you very much, sir.

I'm going to--now moving to the merits, and if you're like me, members of the Tribunal, and you read a who-done-it novel, the temptation is often too great to turn to the last few pages and see who actually did commit the crime. And so, in a parallel sense, in anticipation of Mr. Burn's presentation, there are a few key questions that are probably floating around in your mind that you want to know immediately how Costa Rica responds.

I'll try to deal with some of these and see if we can resolve some of the uncertainties. I would call them red herrings. We're titling them here distractions and irrelevancies. And I can identify five immediate issues that are floating around this case in general which form the mainstay of Claimants' case, but which are nothing but pure distractions and

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irrelevancies.

They are, first, the early decisions regarding

the wetlands; second, the allegations of bribery; third, Mr. Bucelato; fourth, the forged document; and fifth, this grand conspiracy of the State against Mr. Aven.

First of all, the early decisions regarding the wetlands. And I'll deal with these in more substantive detail during my remarks, where we're going to have an extended chronology in a moment. The earlier statements from the public authorities regarding the existence or not of the wetlands.

Claimants' case is--when there was an earlier indication of no wetlands and Environmental Viabilities or construction permits were granted, this set in stone their progress to development. It did not. Costa Rican law, as we have already shown in our pleadings and evidence, permits at any time the revision of an earlier decision based on the need to protect the environment.

The Attorney General for Costa Rica endorses this view in his testimony, international law also

permits regulatory action to be adopted to respond to demands. And the legitimacy of this is compounded when the response is contemplated by domestic law.

Therefore, while there are earlier statements regarding the existence of wetlands, they're not immovable obstacles to the protection of the

environment. They did not petrify any measures. They did not stabilize the legal framework, and notably, Claimants do not even plead this. This is wise, as international law would reject such a proposition.

In addition, those earlier statements did not create any contractually binding effect. Something, again, Claimants do not plead.

In addition, as we've shown quite clearly, those earlier findings were premised on a series of flaws, most of which were created by the Claimants' own wrongdoing. These flaws are the illegalities that I consider a little later.

For example, the concealment of the Protti report. I need to correct the record here, members of the Tribunal. Mr. Burn said this morning that the Protti report had been delivered to SETENA. We assume

the implication was that that was part of the D1 Application, the principle application for the Environmental Viability. The Protti report did not form part of the D1 Application. It is not in any of the 120-odd pages which are before you on this record. It was not presented at all as part of their application.

This is a fundamental fact that was misrepresented by Claimants' counsel. The forged document, I will mention in a moment, and others. But many of the steps that have been taken we say are fruits of the poisoned tree. Bribery allegations.

This is the second distraction that is the cornerstone of Claimants' case, which is utterly unproven. And that is this allegation of bribery. No credible evidence whatsoever exists to suggest any bribery occurred. All we have is the testimony of Mr. Damjanac, who says he was approached by Mr. Cristian Bogantes. That's it. Nothing else. No witness; no corroboration. Halfheartedly, they refer to other alleged bribery attempts, but this would not qualify as evidence in any country. It certainly does

not under Costa Rican law.

Claimants revel in a peculiar way that Mr. Bogantes is not here this week or that we do not submit a witness statement on his behalf. They should not be so surprised. We reject the idea that this should be the forum for the Republic of Costa Rica to engage in a he-said/she-said battle with criminal repercussions.

If there is an allegation that rises to a level of a legitimate complaint of bribery, it can be

raised in Costa Rica, where any police power will effectively ensure testimony is properly heard and tested. The Costa Rican criminal courts can also enforce perjury laws which are not in play in these proceedings.

The Claimants had an opportunity to bring a timely formal complaint against Mr. Bogantes, but neither Mr. Damjanac nor Mr. Aven properly seized the moment. The lack of timeliness was fatal to the delayed complaint Mr. Aven ultimately commenced.

This is not an insignificant omission given how much they now want to rely on the allegation in

these proceedings.

Above all, the allegation of bribery is not relevant to the issues in dispute in this Arbitration. The bribery complaint raised by Mr. Aven was rejected in accordance with Costa Rican criminal law and procedure. It is not central in any way to this Tribunal's determination of the issues. It has no bearing on expropriation or FET claims.

But let's go a level deeper and really analyze what the Claimants are asking you to believe when they raise this bribery allegation.

The allegation of a disgruntled official not getting a purported bribe could be feasible if it were the case that there were no wetlands. For example, one could imagine, in theory at least, that an official might originally write up a report saying there was a wetland, even though there was not. At that point, an official could ask for a bribe in order to correct the record. And if he or she were rejected, they might then refuse to correct the record.

But here's the flaw. There are and always 12/836028_1 207

have been wetlands on the property. This is fundamentally important. Why? Because it means the most natural motivation for bribery that I just described does not function. What could Bogantes have threatened when he supposedly was refused payment? To reveal the truth, having previously fostered a lie? That doesn't make sense. The evidence is clear, there are wetlands in existence.

And this also means one of two things: First, in this case, it might be that a genuine error was committed in the earlier reviews of the land and the wetlands that we know exist were somehow overlooked. And just pausing here for a moment, even if that happened, it does not--it does not prevent the State or authorities from revisiting this finding if there were later investigations into the wetlands, which is exactly what happened in accordance with Costa Rican law.

Or, the second alternative is there were known to be wetlands from the start, and the blind eye was turned when it should not have been.

If this had been the case, the Tribunal should 12/836028_1 208

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ask which party would have been behind such a campaign of concealing wetlands? Which stakeholder would have had a commercial interest to encourage officials to ignore wetlands? The answer is quite obvious.

The third red herring, Mr. Bucelato. The Claimants persevere [with the campaign] of pointing fingers at Mr. Bucelato. Much like Mr. Bogantes, this is an irrelevance. We have no need or desire to enter into any appraisal of whether a neighbor with whom Claimants have clearly fallen out, is of any persuasion to the issues in dispute. Simply said, he is not.

Whether he's complained about the existence of wetlands is largely irrelevant. Public officials had to listen to his complaint and process it accordingly, in accordance with Costa Rican law. Whether he is a thorn in the side of Claimants or even whether he's defamed them in the past is all totaled irrelevant to these proceedings.

If these proceedings degenerate into a neighborly spat, then investment arbitration really is in desperately bad shape. The fourth issue, the

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forged document. The Claimants have made a big deal of the annotation on the back of the forged document purportedly deriving from Mr. Bucelato. Again, this is a total distraction. There's no dispute that the--that the document is forged, or at least we thought there wasn't. The Costa Rican authority have already ruled it is a forged--forged document, although Claimants this morning now question perhaps that it is forged.

And there is also, we thought, no dispute that the forged document is cited in numerous official determinations that earlier suggested that there were no wetlands. Those early determinations, that there were no wetlands, we say are fruit from the poisoned tree to the extent they clearly relied on the forged document; thereby setting in course a series of events--series of events which should not have occurred.

However, Claimants, reveling in identifying Mr. Bucelato as the deliverer of this letter, is as much bemusing as it is irrelevant. This--this Tribunal can legitimately ask, why would the most

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openly opposed man to the Las Olas Project prepare a document that supported the project? The forged document supported the project.

It's too twisted to take seriously and ultimately doesn't change the fact that this is a forged document that was relied upon to Foster the wrong findings.

Members of the Tribunal, there is no need whatsoever to get bogged down with these irrelevancies. There's no sufficient proof to ground them in any event; and as explained, even if you play out the logical and objective context to what Claimants are alleging, it doesn't reflect at all well on them.

Finally, conspiracy theories. There's been a colorful display, both in the witness testimony, we say, and Claimants' pleadings, and this morning that the Claimants and in particular, Mr. Aven, is an enemy of the State. Total fantasy. Clearly led by Mr. Aven. This is a clear example of someone who's seeing shadows.

Moreover, it seems to have affected the 12/836028_1 211

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objectivity of Claimants' counsel. Obsessive testimony illustrated well in Mr. Aven's second Witness Statement has permeated their pleadings and, we suspect, their ability to reason with Mr. Aven. Of course, we sympathize with any predicament that would compromise the safety of Mr. Aven. But the suggestion that Costa Rica is in any way responsible for to his well-being due to the Las Olas project and that he is somehow the target of a statewide campaign is utter nonsense. Of relevance to this Tribunal is the need to view matters dispassionately. Demonizing the State in the absence of evidence or in the absence of a denial of justice is not an option.

An adverse decision of an agency or a court against Claimants is not a breach of any law, let alone customary international law. And to construe incorrectly the procedures that criminal prosecutors are entitled to pursue does not mean that there is a personal vendetta held by that individual prosecutor in some personal capacity. We urge the Tribunal not to get sucked into the introspection that has been displayed.

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I'm going to touch briefly on the inadmissibility of claims before we move to the chronology.

The image I'm putting up on the screen is of the representatives that signed the State--heads of State that signed DR-CAFTA. Now, I want you to imagine walking into that group of celebrating officials and ask any one of them at the time whether they thought they had signed up to protect foreign investors from the other signatory States in circumstances where those foreign investors were consistently violating the applicable laws in their territory.

Like me, you can probably imagine the look that you'd have been given. No contracting party would have contemplated the protection of unlawful investments. And yet, this is precisely what the Claimants pretend.

Claimants say illegality only arises in the establishment phase. But as is clear from this case, illegality can pervade many years of investment activity. Under international law, Claimants cannot

avail themselves of CAFTA protections falling on--from their own illegal conduct. And in your slide pack, you have a summary chart of some of the illegalities that we raise.

Claimants have operated their investment illegally in breach of Costa Rican law. For your ease of reference, we include in this slide pack, and please read it later, these--and we'll touch on them during the chronology--those examples demonstrate an ongoing practice of misleading the Costa Rican authorities. The result was damage to the environment and a complete disregard for the environmental protections and regulation of Costa Rica.

That misconduct precludes the availability of international remedies to Claimants and the claim should be dismissed on the base of inadmissibility.

Illegality is not being advanced as a ground for lack of jurisdiction, as Claimants suggest in their Reply Memorial. Instead, Costa Rica asked the Tribunal to consider the claims inadmissible based on the seriousness of Claimants' misconduct in the operation of the investment.

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In exercising jurisdiction, investment tribunals have the power to dismiss claims as inadmissible when there is serious misconduct in the operation of the investment, and this is not new or uncharted territory in international law. For example, that

approach is endorsed in Plama against Bulgaria. Allowing Claimants the protections of CAFTA would be to assist investors who come with unclean hands.

In this case, this is a protracted pattern of misconduct across the operation of the project. That is not right. Customary international law does not protect such illegal conduct, and the equities of the situation certainly would not protect it.

Claimants claim comprises an alleged violation of fair and equitable treatment, and an inherent component of any FET claim must be that the equities cannot be one-sided. The equitable treatment can only be provided if the investment is equitably grounded.

Further, one of CAFTA's aims is to strengthen the rule of law among the State parties. CAFTA must, therefore, be interpreted in a manner that is in--that

is consistent with the role which, in turn, must mean that the substantive protections under CAFTA cannot apply to investments which are conducted contrary to the law.

The absence of any express provision requiring the investment to be in accordance with the host State

should not deter the Tribunal. The Tribunal in Plama and Bulgaria was ready to prevent protection--I'm sorry, was ready to prevent the same circumstances under the Energy Charter Treaty.

Briefly, the wetlands. We would not be here today if it weren't for the presence of the wetlands and forests in Las Olas' ecosystem and the consequent damage made by the Claimants to the project site.

Certainly, referring to Las Olas as an ecosystem is not a random remark. An ecosystem comprises of all living creatures of biotic organisms interacting with each other. It's a community where organisms each have their own role to play.

And we'll see how this exactly fits in. Costa Rica has made the protection of the environment a key priority. Its constitution in Article 50

provides the right for individuals to a healthy and ecologically balanced environment. Costa Rica's signature to the convention on wetlands, also known as the Ramsar Convention, and the Convention on Biological Diversity.

Costa Rica has balanced the aim of economic development on the one hand with the protection of biodiversity on the other.

Wetlands are areas that are inundated by water cyclically, intermittently, or permanently. Water is the primary factor, and plants and animal life have adapted to live in the environment.

It is important to bear in mind that an area does not need to be permanently wet to qualify as a wetland. Wetlands among--are among the most productive ecosystems in the world. They can be thought of as biological supermarkets. They provide great volumes of food, attract many species.

Legally speaking, I would like to turn to Ramsar Convention, which is defined wetlands in Article I.1 as, I quote, "Areas of marsh, fen, peatland or water with a natural or artificial,

permanent or temporary; with water that is static or flowing, fresh, brackish, or salt, including areas of marine water, the depth of which at low tide does not exceed 6 meters."

I emphasize marsh, natural and temporary because these were--these characteristics were what Mr. Aven and Mr. Janney had in front of them when they decided to buy the property.

Costa Rican law also provides for definition of a wetland. Article 40 of the environmental organic law, together with the regulations to the law on biodiversity,

define wetlands as ecosystems depending on water regimes, emphasizing that the water factor can be permanent or temporary.

There are many types of wetlands. Let's look at a few images.

Marine, estuarine, lacustrine, riverine, and palustrine. It's not possible to provide a complete set of characteristics that can be identically applied to all existing wetlands, and the existence has to be asserted case by case. Claimants' own experts acknowledge this challenge.

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Costa Rican Decree 35803, that's a number that you will become familiar with this week. 35803. It's a decree from MINAE. Sets forth a list of features that may be present in a wetland ecosystem. They serve as a basis for identification but must be entirely analyzed in the particular case.

Since a wetland is composed of a number of physical, chemical, or biological components giving rise to different conditions that might appear. What are the conditions?

The first is hydrophilic vegetation. This is in the first few images that we've provided, meaning

species of plants that are known to grow and develop in aquatic environments.

Second, hydric soils defined as those soils which develop under conditions with a high degree of humidity, up to reaching a degree of saturation.

This morning we heard from Mr. Burn, tried to draw a distinction between hydric soils and hydromorphic soils. And it may be that Mr. Baillie draws that distinction; but, unfortunately, Article 5 of that MINAE decree, which is Costa Rican law, to

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define wetlands does not. Article 5(b)--Article 5 is titled "Definitions," and Article 5(b) has the title "Hydric Soil," says, and I'm reading from it, "hydric soil or hydromorphic soil."

Third, hydric conditions. Characterized by climatic particular influence over determined territory in which other variables, such as geomorphic, topographic, soil makeup material and occasionally other processes or extreme events are involved. The frequency and duration of flooding and soil saturation varies widely from being permanently inundated or saturated to irregularly flooded.

Here, you have some images to give you some examples. It's important to note that the existence of a wetland per se does not preclude the possibility

to develop a real estate project. I really need to repeat that.

It's important to note that the existence of a wetland per se does not preclude the possibility to develop a real estate project. And that's still the position today.

The consequence for the developer is that it 12/836028_1 220

would have to preserve these natural water features to build its project and adapt accordingly. That's still the decision today. This is imminently possible. And it's something that SETENA, the institution that you heard mentioned already, tries to accommodate through harmonization. Dr. Jurado, Attorney General, will testify to this fact.

Importantly, and this is central to understanding how absurd this entire claim is, it's something that the Claimants can still try to do today with Las Olas. They can still try to realize an environmentally friendly development. At the risk of repetition, members of the Tribunal, why are we here?

So, why are the wetlands so important? Wetlands store water and improve its quality. They filter pollutants that would otherwise flow downstream, such as soil sediment. Wetlands work like sponges to avoid flooding. Wetlands are home to a variety of species. And due to their importance, their protection is a concern of the international community as a whole.

Costa Rica has demonstrated that wetlands 12/836028_1 221

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exist in Las Olas' ecosystem; and, tellingly, Claimants admit the same as of the status quo of the land, today.

KECE, or the acronym is K-E-C-E, but I will refer to it as "KECE," is Mr. Kevin Erwin, who you will hear from either likely at the end of this week or Monday. He identified not one but a total of eight wetlands located in the east, northwest, and western portions of Las Olas' ecosystem.

Please have a look at the pictures that were taken by each of the wetlands by the Respondent's experts--here's an example. And as it was stated a couple of minutes ago, there are many types of wetlands. KECE has confirmed the findings that the Costa Rican authorities had already made. The existence of wetlands which are palustrine. "Palustrine" means inland; inland wetlands which lack flowing water. These wetland areas are hydrated by rainfall. They're seasonally inundated, which means that depending on the time of the year, water can be found.

The conditions provided in Decree 35803 to 12/836028_1 222

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determine the existence of a wetland in Costa Rica were found in each of them by Costa Rican experts.

They concluded that the soils were hydric and that there were hydrophilic plants; and, in addition, that there were hydric conditions.

Because of Claimants' illegal works to wipe out existing wetlands, the experts had to look for evidence of preexisting conditions. It is for this reason that the soil experts had to dig deep to find, after the filling, decomposed organic matter in its early stages, in, for example, Wetland 1.

Members of the Tribunal, Claimants' own experts support the position of existing wetlands in Las Olas's ecosystem. Dr. Calvo and Dr. Langstroth expressly affirmed in their report that there are three potential wetlands which corresponds to Wetlands 2, 3, and 5 found by KECE. Because of the limitations of their study Drs. Calvo and Langstroth condition their findings on hydric soil conditions to Dr. Baillie. Dr. Baillie endorsed KECE's findings, identifying hydric soils in the three Calvo and Longstroff's potential wetlands.

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Because Dr. Baillie did not want to put in evidence Claimants' illegal works on wetland Number 1, he referred to the soils as marginally hydric, trying to minimize the obvious. They're either hydric or they're not.

In relation to the forests, not only do wetlands exist on the property but also the Claimants' property harvests a forest. Costa Rican environmental policies comprise the protection of forests and
Costa Rican forestry law defines what is understood as a forest.

Here is the full test. It's a doozy.
A native ecosystem intervened or not regenerated by natural succession of the forestry techniques occupies an area of two or more hectares characterized by the presence of mature trees of different ages, species and varied size with one or more canopies covering more than 70 percent of the surface where there are more than 60 trees per hectare of 15 or more centimeters in diameter measured at the height of an adult's breast.

As in the case of wetlands, Costa Rica courts 12/836028_1 224

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have understood a forest as an integral ecosystem.
Even if forests are located in a private property,
they enjoy the protection of Costa Rican law. And
that's why those who desire to use forestry resources
or to engage in tree-cutting must apply for a permit.

There are certain prohibitions in Costa Rica regarding these activities. The prohibition in the charge of the use of land on land covered by a forest--sorry, in the change. The prohibition on the cutting of trees can only be carried out on land for agricultural use and without the forest with prior permission from the regional environmental counsel.

The presence of forests in the ecosystem is so crucial that Costa Rica raises infringements against the forestry law to the category of criminal offenses. That's what Costa Rican statute books say, and that's what they said when investors invested in Costa Rica.

Despite this protection, the Claimants totally ignored this framework and decided to cut down the trees. This wasn't a simple management of vegetation. Instead, the Claimants were again impacting a protected ecosystem with the aim of developing the

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project at any cost.

Costa Rica based its claim of forest impact on tree-clearing as occurred in 2010 and 2011, and to review the damage that was done to the environment, it's necessary to go back to those critical dates. In effect, the review of the forest conditions at Las Olas' ecosystem during the period of the project through the aerial photography.

The second KECE report shows a significant increase in tree canopy cover within the Las Olas ecosystem. There were multiple areas with tree canopy greater than two hectares in size as required by the forestry law. You can see that the areas with canopy cover are typically concentrated around the wetlands.

The--yes, sir.

PRESIDENT SIQUEIROS: Mr. Leathley, what date is this photograph? This photograph is of what date? Do you have that date?

MR. LEATHLEY: 2010. I think in the very small text on the corner, sir.

PRESIDENT SIQUEIROS: Okay.

MR. LEATHLEY: In the little black-and-white

text.

PRESIDENT SIQUEIROS: Is this June 5, 2010?

MR. LEATHLEY: Yes, sir.

PRESIDENT SIQUEIROS: Okay. Thank you.

MR. LEATHLEY: At the end of 2010, SINAC estimated 400 trees having been felled within a 7.6-hectare area without any permits. It then recommended cessation of site work until the site could be properly evaluated.

However, the second KECE report shows that instead of suspending the works, in 2011--again, the little date in the bottom left, 2011--Claimants developed interior roads reducing significantly the tree canopy cover. SINAC conducted a quantitative analysis confirming the existence of a forest.

Again, Claimants' own consultant considered that there were--there were mature trees and that the area had over 60 trees with a diameter of more than 15 centimeters, measured at the height of an adult's breast.

So, the ecosystem has been altered by the Claimants, first by filling and draining the wetlands

in the southwest portion of the property; and the photos taken by KECE in the first report are telling.

The damage was made by the excavation of drainage ditches and installing culvert pipes and innate structures by terracing the hillsides to drain the water and to flatten the land.

And I'd encourage you to look at the images that we have on file here and in the record.

There's also construction of the house--just go back one--the construction of the house there in the bottom image, over a wetland.

Secondly, by cutting town the trees and existing forest on-site have been significantly reduced. You can see the clearing of the land here on these images.

As you can see from these images taken by SINAC in March 2011, significant filling and earth movement was taking place. I think it was described this morning as preparing for construction. But whatever the description is, it was unlawful construction work. The removal of the vegetation considered as forest has dramatically decreased the

capacity of the forest to properly store and naturally convey water, direct loss of animals and a substantial knock-on effect.

Members of the Tribunal, this case must fail because of the simple fact that wetlands exist. Both the Claimants' and the Respondent's experts have confirmed the evidence of at least three wetlands on the project site. Mr. Burn refers to the status quo today cannot condemn them for what happened in the past. But it is our testimony, sir--it is our evidence that there is ample evidence on the record to show that there were in existence wetlands at the time that the development started and that this is a mere continuation of the natural ecosystems that are in existence.

You can see here the seven wetlands identified by Mr. Erwin on the project site. Claimants' expert Dr. Baillie found hydric soils in KECE's Wetlands 2, 3, and 5. You see how we've interposed them on this image.

And Drs. Calvo and Langstroth found hydric vegetation and hydric condition on KECE's Wetlands 2,

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3, and 5 as well.
These wetlands exist, and have always existed, on the Las Olas Project.
And our final slide shows how that--Claimants

planned an aggressive and fully invasive development that did not consider any of the wetlands on the property or respect their protection under Costa Rican law. And these last four images have been provided in a small clip of documents in hard copy for you.

And if the Tribunal would like, I'll take you through a chronology.
PRESIDENT SIQUEIROS: If you may, Mr. Leathley--
MR. LEATHLEY: Yes, please, sir.
PRESIDENT SIQUEIROS: --perhaps I--this is an issue for both Respondents and Claimants.

When we address with the experts this topic, I think it would be interesting to make sure that when photographs are being shown, we compare equivalents, not only on years but also on the season in which they're taken, because a photograph taken especially from above--above, may be misleading if it's during a

wet season or if it's in a dry season. So, hopefully we can address with the experts--and compare photography on equal terms.

MR. LEATHLEY: We'll absolutely do our best, sir, yeah.

PRESIDENT SIQUEIROS: Thank you.

MR. LEATHLEY: And so, we're going to go through a chronology. And this is going to take me a little while. So, I would beg your patience.

This is also going to be provided in a soft copy. Obviously, we'll be providing it to the Claimants' counsel. And you can manipulate this image on the screen with just the drag of a mouse, so you can see a lot of what is there in the chronology, and we think it would be useful for you to see the whole thing set out.

I will be referring to certain parts of the chronology, not every single block that you'll see. And so, if in doubt, gentlemen, I would ask that you defer to listening to me instead of trying to getting too lost in the actual document. I hope I don't compromise my own objective.

And we believe that this chronology is the complete chronology. It was notable that the parties could not agree a chronology for your consideration,

and that is because we believe the devil is in the detail. And to understand what happened and when and by whom is critical to understanding really and truly how Costa Rica has sought to enforce its laws in a legitimate way at all times.

First, we'll revisit the Claimants' story as explained today in very brief terms. The Claimants' view of the world is, understandably, exclusively focused on the Environmental Viabilities and the construction permits that they obtained.

We'll take you to the EVs that they did not obtain. We will dispute the legality, and even in some instances, the existence of the construction permits. We'll dispute the legality of both the EVs and the construction permits which we will show were premised on the withholding and perhaps even the concealment of critical information.

After their remarks, we thought we would have been given a very clear chronology during the

Claimants' opening, which we were not. So, you're still, I suspect, a little confused as to what happened and when. We'll try to assist you in this regard.

Let's look at the basics, this table. The site is divided into different portions. It's notable this morning that the images that were put up on your screen often had a red border. That red border was seemingly represented as the Las Olas Project. It was not. It was the Condominium Section.

And as you'll have seen from the presentation by Ms. Bouchenaki, there is more to the Las Olas Project than the Condominium Section. There is a concession site, a little part down by the beach in the south corner, a teardrop off the main piece; and then the other easements that run up the west-hand--west side.

This is what we believe is the position. For the concession site, we have no complaint, although we will raise this issue in relation to the ownership, that we believe they do not have any standing. For the Condominium Section, the EV was unlawfully

obtained and, therefore, the construction permits were unlawfully obtained.

For the easements and the other lots, no EV was obtained whatsoever. And only seven of nine easements had construction permits but we say were also unlawfully obtained.

In addition, we challenge the way that Claimants approached the EV and construction applications by fragmenting the Las Olas Project site into different portions as part of a concerted effort to avoid the proper processes.

The advantage of this was that Claimants minimized their reporting and environmental obligations. This effectively saw them circumvent Costa Rican law and the highly sensitive awareness that they had to show to the wetlands.

Why did they do this? We assume money. They wanted their project to be as profitable as possible. We do not begrudge pioneering entrepreneurship, but we do when it damages the environment in ways to contravene Costa Rican law.

What else will we show you today? We will

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show you by reference to the documentary evidence what Claimants knew regarding the existence of the wetlands. We will also show that these are the very same wetlands that our experts and theirs identifies existing on the land today. They knew the wetlands existed. At the very minimum, they should have known, based on the series of red flags that were raised for them by technical experts who were more than capable than the Claimants to identify the wetlands.

The story gets bleaker. After having duped the authorities by withholding or concealing critical information that they then presented in an unlawful way, they

undertook works in order to conceal the wetlands. This was done by filling them. This was done by burning the vegetation. The expert reports of Dr. Perret and Dr. Singh, who will be here this week, clearly show man-made sways of earth that cover the wetland soil. Literally, they were trying to bury the evidence. And notably, they were undertaking this work on the easements, remember that western strip, where they had not properly obtained any Environmental Viability permits or construction permits, EVs or

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construction permits.

Having obtained some EVs and construction

permits on the unlawful basis, they were then approached by certain authorities who began to question the environmental integrity of the project. If Claimants had genuinely overlooked the wetlands, this was their moment to work with the authorities and resolve how to integrate and accommodate the sensitive ecosystems. They could have done that. They did not. They doubled down.

Instead, Claimants ignored the authorities. They ignored and rejected the complaints; and in doing so, began their own campaign of demonizing the very officials whose job it was to make these inquiries.

You have already heard the reputations of our witnesses Mónica Vargas, Luis Martinez and Hazel Díaz being slammed in this Arbitration. It's baseless. They were doing their job.

They have absolutely no personal vendetta against any of the Claimants. And you'll hear from this--hear from them this week, and you can judge for yourselves.

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Injunctions were issued to protect the land. Why? Precaution. If nothing else was done, the eventual relief might have come too late. The wetlands needed to be protected. The precautionary principle not only permitted but obliged officials to act reasonably--sorry, responsibly.

You have the testimony of Costa Rica's Attorney General, Dr. Julio Jurado, who used to be the SINAC director. He testifies as to what Costa Rican law says in this regard. These injunctions were entirely permissible. They were necessary to protect the wetlands.

At around the same time, complaints were raised by individuals and investigations began. Any ordinary person would stop in their tracks, fearful of having violated environmental laws and potentially being guilty of crimes. But, no, Claimants doubled down yet again and protested throughout the proceedings exclaiming that

there were wetlands. Criminal investigations began against Mr. Aven and Mr. Damjanac.

Now things were getting serious. And guess

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what? Claimants doubled down again. Mr. Aven does not stay in the country to defend himself and contest any allegations; he absconds, violating Costa Rican laws and triggering an automatic process that results in Interpol notices being put in place.

I'll go into a little detail now about each of these stages. But as you can see, the issues the Claimants complain of are all of their own making.

The timeline begins in 2002. This is when the first EV application was made in relation to what was known as the first condominium site. We call it the first because the site changed over time. It was originally a development of 48 units. However, once Mr. Mussio, the architect, became involved, that mushroomed to 288.

Claimants filed for the EV on the 30th of September 2002. Although even though it would have been necessary in the circumstances, no biological study addressing the presence of any wetlands or forests was submitted.

Not only was this a violation of Costa Rican law, it was the first known occasion of when the

Claimants failed to comply with the burden of proof on them as developers.

Article 109--you would have heard me mention it before in the earlier submissions. Article 109 of the biodiversity law of 1998 says, 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.

This, gentlemen, really is a provision we would ask you to tab, to note, to have on your short list of issues to consider.

On the 23rd of November 2004, SETENA granted the first EV for the first condominium site. Claimants used this and the other subsequent occasions of an EV being granted as evidence of their right to develop the property. They say it was for the State to police their application. They say it was for the State to visit the property and double-check what had been disclosed in their application.

This is not what Costa Rican law provides for. The burden was on them and them alone. They had to

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disclose sensitivities, wetlands, forests; and if they did not, then their applications would be granted on a flawed basis.

Yes, they secured the EVs. But they were unlawfully obtained. And as a result, Claimants always ran the risk that their efforts to develop the property would be unwound when the truth was outed.

This EV for the first condo site would lapse on the 27th of February 2007, meaning a new application had to be made.

The next key date is now the 26th of January 2005. On this day, La Canícula--that's the entity that they--that you see in the corporate description. La Canícula applied for an EV for the concession. The concession is that little red part of the territory.

DEPPAT was hired as an environment regent. That's Mr. Bermudez. You'll hear from him this week. Now we move into to 2006. On the 20th of January 2006, SINAC issued confirmation--excuse me--that the concession is not within a Wildlife-protected Area, or WPA.

A Wildlife-protected Area is a national 12/836028_1 240

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categorization of land. However--and this is important--because Claimants tried to confuse you a little in this--in this regard, just because the concession or indeed, any other part of Las Olas, was not in a WPA does not mean that Claimants could ignore the potential existence of wetlands. They were still bound by Costa Rica's strict environmental protection laws. If wetlands existed, as they did on Las Olas, the same protection applied. The protection of wetlands is completely independent of the characterization that can be given by the State to a certain area as a WPA.

More than a year after the application for the EV, for the concession, the little piece of land at the bottom by the coast, SETENA issued the EV on the 17th of March 2006. Like I said, we don't have any complaint in relation to the information provided in order to obtain the EV in relation to that concession.

2007. In April 2007, the architect firm of Mussio Madrigal was hired and undertook surveys in preparation of the EV application for the Condominium Section. Now, this is where it starts getting

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important.

Here it's worth noting that the Condominium Section had evolved into larger, as I said, 288 units. This is the red section now on the map.

Mauricio Mussio, the architect, prepared the master site plan and devised the plan to fragment. It is Costa Rica's position that fragmentation undertaken in the way they did is unlawful. You'll hear from Mr. Mussio tomorrow.

By this point in 2007, plans are moving to develop the site in a major way. However, let's not forget what the site comprises. As I mentioned, there's a condo site and the concession. However, there is a critical third portion of the land, which is called "easements." I'll come to these in a--in a moment. Let me just touch on the condo EV application process, the main part of the land.

In June 2008, the EV was granted by SETENA for the Condo Section. But let's return to the start of that EV process since it was obtained unlawfully. And this is a very important part of Costa Rica's case.

And you'll have heard and read about the D1 12/836028_1 242

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Application. This is a paper-intensive exercise, the D1 Application, which requires the developers, that is to say the Claimants, and them only, to disclose all the necessary physical conditions of the site where the activity is to be developed. As I said, the burden was on them.

We set out in our counter Memorial in Paragraph 158 onwards the requirements of the D1 Application process.

Claimants failed to properly complete this application. They did not identify the wetlands and forests on the property. They did not submit a biological study that could identify the number of species in those ecosystems. There were multiple areas, all of which are identified in Priscilla Vargas's report, which is appended to the KECE 2 study. Priscilla Vargas is from a consultancy called Siel Siel. She's one of the experts appearing on behalf of Costa Rica this week.

But here, it gets worse. Not only does the D1 Application fail on its face, during the course of this arbitration, we have uncovered a document that

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existed from June 2007. As I said before, to correct the record, this--the Protti report was never included as part of the D1 Application. And that omission was not insignificant. You've heard Mr. Burn try to downplay the significance of the Protti report, but I'd like us to have a look at it.

Roberto Protti, a hydrogeologist--and that's, again, not an insignificant qualification in these circumstances--was hired by Techno Control. Techno Control had been contracted by Mussio Madrigal, the architect for the Claimants. Mussio Madrigal answers to the Claimants.

Mr. Protti prepared and delivered a report to Mussio Madrigal's contractor clearly stating that possible evidence of wetlands existed on the site. This is R-11.

We would invite you, please, to put a big red tab or Post-It note in R-11. This is a document that we will talk you through in numerous stages. Expressly Protti identified wetlands using terminology that Costa Rican law accepts as do Claimants' own experts. Terminologies--terminology that would

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identify a potential wetland.

He wrote there--and I think we have to zoom in

now--this is Protti's map. The (in Spanish ["áreas anegadas de tipo pantanoso"]). This is--I'm sorry. I'm quoting from the report, but if you see "Zona anegada." This is specifically an area that had been identified which notes in the report, as he says in his report, and we'll find you the citations during the course of this week, (in Spanish ["áreas anegadas de tipo pantanoso"]). This means in English, a swamp-type flooded area. Swamps are a type of wetland, as are flooded areas, according to Costa Rican law.

Areas of poor drainage were noted on more than

one occasion. And as you can see from the screen, the broader areas approximately identified, and he says approximately, is in precisely the areas where we have found wetlands. Soil types indicated claying, a red flag for hydric soils, one of the possible indicators of wetlands.

And Mr. Protti also found poor soil permeability, having tested the soil to a significant

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depth of 6 meters. This tells anyone with any degree of environmental awareness that wetlands possibly existed. Based on these findings, any developer working in

good faith would have not only disclosed it but they would have investigated it further, precisely dealing with the wetlands identified. They were also under an obligation to disclose these findings, even if they had preferred, as they did for the D1 Application, a report by a company called Geoambiente.

Instead, the Protti report was filed away. The only way we got sight of this Protti document was Mr. Aven, and we assume accidentally, disclosed it to SINAC in February 2011, not November 2007 when it had been produced and when the application was made to SETENA.

Claimants, instead, filed the Geoambiente report with that D1 Application. If the D1 Application had been properly completed, it would have triggered a quite different process.

The entire process directs SETENA to assign scores to the results. It's almost an empirical exercise that SETENA undertakes. Based on that

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scoring system, which is an exercise of assigning a beta risk value, the level of environmental clearance changes. Priscilla Vargas testifies in this respect.

Because Claimants fail to identify wetlands

and forests, they avoided the EIS, the Environmental Impact Assessment process. They instead ended up being processed through an easier environmental management plan process. We set this out in out counter Memorial.

This process becomes self-fulfilling. You identify sensitive environmental areas; the bar is raised. If you do not, it is lowered. And as I mentioned before, it is not for SETENA to then get in the car and visit the property and every other property, presumably, in Costa Rica, and audit the submissions made by the developers. Claimants say it was SETENA's obligation. That is wrong as a matter of Costa Rican law.

We do not rely only on the Protti report to identify wetlands and to identify the failings of the Claimants. In the course of this arbitration, the Claimants disclosed notably during the document

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disclosure phase, a Castro de la Torre report of 8th of July 2002. The report shows extremely shallow water tables according to Priscilla Vargas in the area we know as Wetland Number 1.

The second report--or rather, the third if

you're counting Protti, is the Techno Control report which is submitted by Claimants as part of their D1 submission in 2002, and R-13 would offer you a better image than this; I apologize. That's the best we could do for this presentation.

This is still in relation to the condo site, the condo EV application. This report identified two brooks, or "quebradas," which showed the tendency for the existence of wetlands. That's page 14 of the report that shows this graphic. And, again, I would guide you gentlemen to the report by Priscilla Vargas.

So, as to orientate ourselves again, we're in 2007, and the Claimants submit their D1 Application relying on the Geoambiente report which does not identify potential wetlands, and that's submitted in November 2007 to SETENA. This is unlawful. It cannot be said any clearer. Claimants failed to disclose

what they knew. This is a breach of Costa Rican law.

Claimants EV application with SETENA omitted crucial terms. It failed to identify the ecosystems on the land--I'm reading from the screen here. It did not propose measures to protect species from impacts of the development, and no proper biological survey was contained. And yet it was their legitimate expectation that if wetlands were uncovered, they

would be held accountable for them. Knowing this, they still continued with their preferred D1 form.

Now, we've been talking up until now about the EV application by completing the D1 form for the condo section. What about the easements? The third part of the project? Well, we'll come to this in a moment, but the D1 Application made in 2008 was only in relation to the condo section. Mr. Aven describes the easement section as--and I'm quoting from his first statement--72 lots coming off the easements going into Las Olas.

Mr. Aven testifies that Claimants established nine easements along the main road going into Las Olas project and carved out areas for a long--for others

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along two roads.

This is the green section in the map on the left. Their intention, Claimants' intention, was to create lots for individual homes that fronted directly onto the easements.

But we repeat: No EV exists for these easements. And these are important areas for the Tribunal's consideration. Because Wetlands 1, 2, and 3 identified by KECE are all in the easements.

And so, let me describe what we know and what

the evidence tells us about the easements. First, as stated by Mr. Aven, there are nine easements within the section that we're referring to as the easement section. So, I apologize there's a little ambiguity in the large. We are saying easement section, but divided into nine pieces.

Easements 8 and 9 are at the bottom southwest corner of the Las Olas site, and the remaining Easements 1 to 7 run up the west road as the map indicates.

The second thing we know, Claimants say they have construction permits for Easements 1 to 7.

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That's the top sections. However, while they have documentation showing construction permits were issued by the Municipality, these were obtained without an EV. This makes them unlawful. Articles 2 and 3 of the general regulations on the procedures for environmental impact assessment--that's 2004--and Ms. Vargas sets this out in her report--the work that is segregating urban projects must still seek EV approval. Claimants say they did not need an EV. This is simply wrong as a matter of Costa Rican law.

So, you'd be justified in asking, and why would the Municipality issue construction permits in the absence of an EV from SETENA if it was a necessary requirement?

The answer is in the documents. Claimants told the Municipality that the proposed works to be undertaken on the easements could be considered as work on the overall site. That was characterized as the Condo Section. This is grossly misleading.

There are two separate sections. This appears in DEPPAT's Document R-42. This is a document we found at the Municipality, was not shared to us by the

Claimants, that Mr. Bermudez prepared, indicating, on page 1, that he represented to the Municipality that the whole Project benefits from the EV and that the work to be carried out on the easements was covered by the same EV.

This is a clear misrepresentation. On the back of this, the construction permits were granted. To this day, no evidence exists showing an EV for the easements.

Now, that was Easements 1 to 7 that I've just been describing. What about Easements 8 and 9? The documentary evidence tells us that there is no construction permit for Easements 8 and 9. None exist. The Municipality's records tell us this for 2008 and 2009.

This is C-295. Now, you might be a little bit amused this morning by a qualification as to what C-295 comprises.

There's a very clear reason. C-295 is a document that clarifies, and we would invite you to look at it, that there are no construction permits at all for Easements 8 and 9 in 2008 and 2009.

PRESIDENT SIQUEIROS: If I may, Mr. Leathley.

MR. LEATHLEY: Yes, sir.

PRESIDENT SIQUEIROS: I think it is clear that Claimants were going to produce C-295. The one that you have offered might not be the same one they have stated they will submit to the Tribunal.

Am I correct on that, Mr. Burn?

MR. BURN: That's absolutely correct, sir. And--and you will recall that I indicated at the beginning of the proceedings today that if the Respondent wishes to submit the document they currently call C-295 as an R exhibit, they're perfectly welcome to do that. We have no objection to that. But we do object to this continued conflation of one with another.

This is not C-295. They knew it, frankly.

We've held back from criticizing what they did a few weeks ago, but they knew what they were doing at the time. They were playing games. They should just file it as an R exhibit and be done with it. We filed the proper exhibit. We put it to them.

It will be before you by the end of today or

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tomorrow morning once the Respondent's had a chance to consider it. But really they're just playing games on this point.

PRESIDENT SIQUEIROS: So--

MR. LEATHLEY: We will very kindly--thank you, sir. And we're very happy to submit it as an R document. The proprietorship of this document is irrelevant.

PRESIDENT SIQUEIROS: Okay.

MR. LEATHLEY: But it is an important document, sir.

PRESIDENT SIQUEIROS: Yes. Proceed.

MR. LEATHLEY: It shows that there were no construction permits in 2008 and 2009. From the other side of things--still, for example, Easements 8 and 9, there is not a single document in the record that shows any permit for any year regarding these two

easements. This is despite the fact that Mr. Aven testifies that in the final quarter of 2007, construction permits had, he says, been obtained to build the first two easements.

What we also know is that the work on the 12/836028_1 254

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Easements 8 and 9 were undertaken and completed by March 2009. Aerial photography shows us that by March 2009, two roads in Easements 8 and 9 were built and completed. A little hard to see. There are two roads that come perpendicular to the main road. But we would also invite you to look at the images from the Claimants' submission this morning as they indicate them even clearer.

Photographs from Mónica Vargas' report of April 2009 also show the land at those points having been substantially flattened. And SINAC also reported in 2008 that they identified the two little easement roads during their September 2008 visit. That's R-20.

Third, what do our recent studies tell us? KECE and the report of Drs. Singh and Perret clearly indicate that the wetlands we have found are located right in the area of Easements 8 and 9.

Is this a coincidence? Is it a coincidence that the very first work undertaken on the entire Las Olas Project Site were undertaken in this corner of Easements 8 and 9 where the wetlands are? Is it a coincidence that the flattening and the major movement

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of earth occurred where the wetlands are? Is it a coincidence that the first lots sold by Claimants were those in the easements on precisely the locations where Wetlands 1, 2, and 3 have been found?

Finally, Claimants argue in their Reply Memorial that they had construction permits for the easements. They do not say which ones. Their evidence for this is Exhibit C-40, which is a construction permit for the Concession only. There is no construction permit for the easements in this exhibit.

In this case, we would have expected from Claimants a forensic analysis of the EVs, the construction permits, and taking each plot in turn, setting out very clearly what they have. They don't. They confuse, generalize, and try and hide the ball.

They do so because they've constructed roads and undertaken work in contravention of Costa Rican law, another evidence--further evidence of their unlawful activity.

Let us return to the chronology. And we're now in 2008. And there's the Claimants' note that

SETENA visited the property in January 2008 in the midst of the dry season.

In February 2008, SETENA requested certain additional information regarding the Condo Section EV. One of the requests was a vegetation coverage map. The verifications were framed by the information provided by Claimants as Dr. Jurado confirms. And when Claimants submitted their response in March 2008, what was presented to SETENA was the forged document.

Now, Claimants have got excited about Mr. Bucelato's apparent delivery and this being recorded on the back. I've already commented on that.

In June 2008, the EV was issued for the Condo Section. I mentioned that a moment before. And as I've explained, this was off the back of this misleading information. The EV was issued subject to certain qualifications. If the cutting of any trees was required, Claimants needed a permit, and they would need to notify at least a month in advance the commencement of any works.

As you will remember, by September 2008, the global financial crisis hit. Claimants testified that

the Project was suspended weeks after construction had started at the Concession Site in August 2008.

On the 30th of September, 2008, due to a complaint that there were irregularities on the property, SINAC inspected the property. Mr. Mussio was present. Even though Claimants' submission in this arbitration is that they knew nothing of the visit, Claimants knew the complaints had been raised. And on the 1st of October of this same year, 2008, SINAC issued a report identifying two wetlands. SINAC reported two possible wetlands. Although SINAC notes that, Mr. Mussio preferred to describe them as stagnant water due to drain blockage.

By 2009, the interest in the environmental integrity of the Las Olas Site continues to grow. In March of 2009, the neighbors filed a complaint against the Las Olas Project with the Municipality. In response, as was their obligation, Mónica Vargas visited the property for her first time. This is April 2009.

You will hear from Ms. Vargas this week. She has testified that at the time she noted and recorded

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in writing two paved roads, the same two and only two roads in Easements 8 and 9, and she also noted cutting and burning of trees.

The images on the screen show the photos that were take--that were given to her, taken from 2007, as contrasted with photos taken in March 2009. She included these in her report.

They indicate some telling sites. For example, Figure 3. This is R-26. It shows the road built across the easement and the notable flattening of the land by manmade measures. This is, what we submit, the refilling of the wetlands. Claimants understandably have and this week will be very nervous about the content of this report.

We're now in 2010. Claimants allege that the Project was reactivated. However, documentary evidence shows that illegal works had already been undertaken on the easements during '08 and '09.

Mónica Vargas returns to the Project twice, in January and May of 2010. A summary of her reports is summarized in the green boxes on the screen. Ms. Vargas requested the Permits Department in the

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Municipality for any permits for the works they were undertaking. The Permits Department confirmed they did not and notified Claimants on the 14th of June 2010, as you can see in Exhibit R-35.

Now, we focused a lot in the last few minutes on the Easements Section. But what about the Condo Section? Let's go back to the main piece.

By June 2010, the EV was about to expire. Two years was nearly up and no works had been undertaken. Claimants say they notified SETENA at the start of works on the Condo Section on the 1st of June, 2010. The EV was to lapse the next day.

However, again, the documents tell another story. SETENA is only officially informed when it receives the--and stamps the relevant documentation. The way one delivers any submission to SETENA is through delivery to the office in order to obtain the stamp, and mailing the document to SETENA is not an option.

Exhibit R-31 shows the date stamp of 14th of June. They were out of time. Now, is it a coincidence that the same day Claimants' letter to

SETENA informing them that the works had been undertaken was taken in on the same day the Municipality informed them to stop their illegal works?

On 8th of July, 2010, Mr. Bogantes and Mr. Manfredi visited the site, informing Mr. Damjanac of the reason; namely, the investigation of the wetlands.

On the 16th of July, 2010, SINAC issued a report mentioning that the area was not located on wetlands and announcing the cutting and burning of trees that had been observed.

You may react, why couldn't SINAC spot the wetlands? Well, let's not forget, two years of moving earth and filling wetlands has already passed as well as the building of the road and the house that Mr. Damjanac was now living in.

In addition, the conclusion that there were no wetlands was founded in part on the findings contained in the forged 2008 document.

Around this time--so this is around--also, sorry, 16th of July, 2010, Claimants obtained seven

construction permits for Easements 1 to 7. To remind the Tribunal, this was obtained without an EV, rendering it unlawful.

On the 22nd of July, 2010, DEPPAT submitted a Land Movement Contingency Plan to the Municipality. And as I mentioned before, the plan showed the intended works on the Easement Section, Easements 1 to 7.

This is the document I mentioned where Mr. Bermudez indicated on page 1 that he represented to the Municipality the whole Project benefits from an EV and that the work was to be carried out on the easements was covered by the same EV. That was wrong.

By August 2010, we come to the point that Mr. Bogantes is accused of soliciting a bribe. No credible evidence exists to support this. Certainly, under Costa Rican law, no criminality could be established.

Claimants allege that they had a tape recording of the solicitation of this alleged bribe. They make that in page 7 of their Notice of Intent to Submit a Claim to Arbitration on the CAFTA back in

2013.

I'm sorry.

PRESIDENT SIQUEIROS: Please go ahead. When we conclude this section and you go into--when we conclude this section and go into, what, the Defensoria, could we take a break--small break?

MR. LEATHLEY: Absolutely, sir.

PRESIDENT SIQUEIROS: Thank you.

MR. LEATHLEY: Let me just take one step back.

PRESIDENT SIQUEIROS: Sorry for my interruption.

MR. LEATHLEY: No. Of course, sir.

Claimants say they had a tape recording of this alleged bribery incident. They said this in 2013 at the time King & Spalding were representing them. As of today there is no recording. Such a cornerstone of their entire case is inexplicably missing.

Sir, if you wish to stop now for a short break, I would be very happy to. I'm about to move into the Defensoria part of these.

PRESIDENT SIQUEIROS: Thank you. So, let's take a 10-minute break.

MR. LEATHLEY: Thank you.
PRESIDENT SIQUEIROS: Thank you.
(Brief recess.)
PRESIDENT SIQUEIROS: Are we able to proceed? Interpreters, court reporters. If we may proceed.
MR. LEATHLEY: Thank you, sir.
PRESIDENT SIQUEIROS: Thank you, Mr. Leathley.
MR. LEATHLEY: No, thank you, sir.
And so, we're close to the end of the chronology, and then I'll move into the applicable law section. And I do hope to be on schedule to finish on the three-hour mark.
PRESIDENT SIQUEIROS: We have, if you wish--what is the--I think we have two hours and nine minutes. So, it would be roughly 50 minutes left.
MR. LEATHLEY: Yes. Thank you, sir. I think that's what we have as well.
So, let's reorientate ourselves. Where are we in the timeline? Mid-2010. There's been a finding of no wetlands by SINAC while simultaneously there are complaints being raised about the existence of wetlands.

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And this is the moment when matters are referred for the first time to the Defensoria de los Habitantes. This is an Ombudsman office in Costa Rica responsible for the enforcement of human rights. You'll hear from Hazel Diaz this week, who will explain how the investigations proceeded.

A complaint was filed on the 20th of July, 2010, due to damages caused to a wetland. The following month, on the 7th of August, 2010, the Defensoria requested information from SETENA, SINAC, the Environmental Administrative Tribunal, known as the TAA, and the Municipality.

And these agencies responded during August 2010. And I'll leave you to read the slides. I was about to read them. I'm afraid my eyesight doesn't permit me. But there you go, 18th of August and the 27th of August are the responses.

In August 2010, SETENA visited the site and found no wetlands. So, recently, after the refilling of the wetland, it perhaps comes as no surprise that they were not immediately observed. Only after a prolonged period of abandonment has nature allowed the

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natural restoration permitting our experts to definitively identify and delimit the wetlands that always existed on-site.

On the 1st of September, 2010, SETENA dismissed the complaint regarding the existence of wetlands on the Project Site. And it's worth pausing here for a moment.

First, this finding was founded on the March 2008 forged document. Second, we've heard a lot from the Claimants about the broad campaign against them, starting with the supposed animosity shown by the entire apparatus of the State instigated by Mr. Bogantes whose bribe was refused. But yet here in September, the first official act after the moment Mr. Bogantes' bribe was apparently rejected, we find a decision favorable to the Claimants.

If Claimants' theory held water, this would have been the perfect opportunity for Mr. Bogantes to have his revenge.

In addition, a week later, on the 7th of September, 2010, a construction permit is issued by the Municipality for the Condo Section. On the 13th

of September, 2010, the Municipality noted there were missing documents in the Claimants' file that were required to obtain the Condo Section construction permit.

Now, what knowledge do Claimants have of this Defensoria investigation? Well, the Claimants have gone to great lengths to show as part of their international law claim that they were never informed of these "secret investigations" conducted by the Defensoria, SINAC, and the Municipality. However, the record shows that Claimants knew, since January--sorry--the 29th of September, 2010, so very contemporaneous--they knew of the investigations conducted by those Costa Rican agencies.

In the defamation suit against Mr. Bucelato, information was requested by the Claimants of the investigations initiated by various institutions; namely SINAC, TAA, the Environmental Department of the Municipality, which is known as DeGA, and the Defensoria.

So, still in the context of the Defensoria proceedings, in November 2010 the neighbors filed a copy of the complaint requesting SINAC to confirm if

the forged document was an official and valid document. On the 25th of November, SINAC confirmed that the forged document was indeed forged.

For now, we leave the Defensoria proceedings as events took precedence elsewhere.

On the 25th of November, 2010, the director of SINAC requested Mr. Luis Picado to undertake an inspection of the Project Site. This letter represents the culmination of the various inquiries and inconsistencies that have been observed by the various institutions.

Please recall that SINAC is the only institution that can determine the existence of wetlands or not. If you think wetlands, you think SINAC.

And please also remember that notwithstanding the previous findings of no wetlands by SINAC, it had absolutely--absolute authority to find contrary to that in order to protect the environment were it found to be necessary.

Now, this letter--this is the 25th of 12/836028_1 268

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November, 2010, letter--says, "In this respect, I should highlight the Municipality of Parrita as well as the Defensoria are monitoring the alleged illegalities."

This is the conclusion at this point. And here SINAC is advancing the investigation, bearing in mind that the forged document and other illegalities were being investigated by others.

On the 30th of November, SINAC requested SETENA to suspend the EV for the Condo Section because of a complaint relating to the existence of the forged document.

Here is that hair trigger. Here is the precautionary principle in action, the practical effect. Here you begin to see the institutions noting how their previous findings will have been partly tainted by the forged document. On December 2010, SINAC officers carried out several Project Site visits.

We're now moving into 2011. And on the 3rd of January, 2011, SINAC issued a report with the results of their site visits, observing and recommending

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various things.

They recommended issuance of an injunction, precautionary principle in real life, the INTA soil Study, the Study of Wetlands by the National Wetlands Authority, a SINAC wetlands study, a criminal complaint.

As you can see, by now things are getting really serious for the claimants. Specifically, in making those recommendations on the 3rd of January, 2011, a number of important points are mentioned by SINAC in their conclusions. These include reporting the illegal felling of approximately 400 trees, describing 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 removed and burned.

Neighbors also reported animals, amphibians, reptiles. The letter also described the construction of a drainage channel within the property that would connect with the public sewer system constructed by a municipality apparently dividing a wetland. It reported the existence of forged documents, and it

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also included a video where you could easily see a drainage of the wetland and damage made by the Claimants.

Now, the conclusions of the letter speak for themselves that are contained in your file, which I would really encourage you to read in your spare time. We summarize, I think, the conclusions in the next image.

The body of evidence was growing and the legitimacy behind the complaints that there potentially existed wetlands becomes clearer, so much so that by the end of January, beginning of February, a multiple stream of activity was occurring among the respected institutions, each with their own jurisdictional right to pursue the relief that the law permitted.

Namely, A criminal complaint was launched by SINAC on the 28th of January, 2011, having visited the site and undertaken their reviews. This focused on the refill of the wetland, the illegal felling of trees, and the forgery of a public document. Also, there was an injunction that was issued by SINAC in

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February 2011 suspending all works at the Las Olas Project Site.

Information was requested by the National Wetlands authorities by SINAC and a soil study from INTA was requested by SINAC on the 4th of February. SINAC noted that it would be convenient rather than necessary.

At the same time, other steps were also being taken. A criminal complaint was commenced by Mr. Bucelato on the 2nd of February 2011. The prosecutor, Mr. Martínez, who you will hear from this week, requested a study of the wetlands from the National

Wetlands organization. Mr. Martínez also requested a soil study from INTA. And Mr. Bucelato filed a complaint for the refilling of the wetland with the TAA. Mr. Burgos also filed a complaint in relation to the illegal cutting of trees in the same month.

Not feeling threatened by the evidence growing against them, the Claimants challenged the SINAC injunction, something that was dismissed because Mr. Aven never responded to requests from the Court.

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In any event, Claimants ignored the injunction, stating clearly on the record, even in this arbitration, that they were advised that they did not have to adhere to it. What is more, they continued working on Las Olas, irrespective of that injunction.

This is despite the clear concerns expressed regarding the health and integrity of the environment. Claimants were notified of the SINAC injunction the same day, which stated in relevant part, "In order to prevent any greater assault to the ecosystem affected by the property, this precautionary measure has been issued for the immediate cessation of the land clearings, tree cutting, and constructions, as well as any other actions which may be harmful against the environment until it is duly determined that the appropriate legal permits have been appropriately granted

and whether there is a wetland area at the site, in addition to the legitimacy of the signatures."

In March 2011, Mr. Gamboa, of the National Wetlands Program, along with Mr. Cubero, of INTA,

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visited the site to inspect conditions, the result of which was a report from Mr. Gamboa on the 18th of March 2011. This concluded that there were wetlands.

He identified that the wetland had been filled and was being impacted by the Project works. This report included findings of INTA on hydric soils. And here it's worth looking at the photographs taken from that visit where INTA found hydric soils. In this photo--this is the grey soil known as "gleying." Mr. Gamboa notes this in his report. Remember these are INTA's field study findings. That's hydric soil.

Claimants put a lot of emphasis on the fact that in May of 2011--so this is a couple of months later after that visit with SINAC and with INTA--in May INTA writes up its report. And Mr. Cubero concluded, notwithstanding those hydric soils you literally saw in that photo, that, in his view, there were no wetlands. Claimants rely on this. How should you reconcile this contradiction?

It's simple. SINAC, not INTA, determines the

existence or not of a wetland. SINAC concluded that there were wetlands based on Mr. Gamboa's visit and

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based on the hydric soil findings contemporaneously by Mr. Cubero at the time. This is to say SINAC incorporated INTA's expertise from the field reports.

Now, I cannot begin to answer how INTA's final May 2010 report would pretend that there were no wetlands when they found hydric soil and photographed it.

Mr. Cubero said in his May 2011 report that there were soils there are "not typical of wetland systems." But he also says there were "gleyed soils" and "anaerobic conditions," both red flag indicators of hydric soils; i.e., wetlands.

The samples taken by Mr. Cubero which form the only basis of his scientific analysis in his May 2011 report are dated and came from the only two bore holes dug in March 2011 with Mr. Gamboa.

And we can see the results in the photo that we had up a moment ago. Mr. Cubero's conclusion, referring to the agricultural classification--this might be a term you've been seeing in the papers on the soils--we know this is a guide and not a definitive basis on which to conclude that there are

wetlands.

Drs. Perret and Singh visited the site, dug holes deeper than the 120 centimeters that Mr. Cubero dug, thereby allowing them to inquire below the manmade strata of soil that Claimants had shifted and moved over the wetlands. You will hear from Drs. Perret and Singh this week. In April of 2011--this is a slight step back from that May 2011 INTA report--further injunctions were issued.

First, SETENA issues an injunction on the 13th of April based on the forged document. Second, the administrative tribunal issues an injunction the same day on the basis of the wetlands being discovered.

Now, Claimants kept performing illegal works on the project in spite of the SINAC injunction, which was followed by an injunction from SETENA issued on that 13th of April 2011, which is on your screen, which incidentally Mr. Damjanac refused to receive. And an injunction from the TAA also was issued on that same day, 13th of April.

Now, how do we know that the Claimants kept performing works? From agency reports. For example,

on the 12th of May, 2011, one day after the notification of the SETENA injunction, the municipality reported works being conducted on the project site. Claimants have contested the authenticity of these reports. This is Exhibit R-270.

But their own construction logs show Claimants engaged in substantial construction in May, 2011.

These photos you're looking at now indicate the works that were being undertaken at the time. They come from the 2nd of May, 2011, which is the Claimants' construction log, R-512.

Other dates when work was being undertaken were the 9th of June, 22nd, 23rd of June, and 27th of June. By mid May, inspections are ongoing. And on the 18th of May, 2011, SINAC issued a report delimiting the wetlands and remarking on the forests being cut. This is R-265.

It appears it was a failure on the GPS settings since the plotting is outside the boundary of the site which clearly would not have been there where--clearly would not have been where they were undertaking the survey. A GPS glitch.

Any ordinary law-abiding investor would have been frozen in their tracks literally by the injunction but also by the specter of criminal proceedings. But not the Claimants. They pushed on, conducting ongoing illegal works on the site, as I mentioned, in June 2011. And on the 7th of July, 2011, SINAC submitted another report to Mr. Martínez, the prosecutor, confirming the existence of a forest and damage being caused.

And here it's worth us mentioning the forests since so much of our time is dedicated to the wetlands. In exactly the same way the Claimants were under the burden to disclose the wetlands, they were under the obligation to disclose forests and determine whether they existed on the site. They failed. Let's remember that the EV for the Condo Section was expressly conditioned on the terms that if the claimants were to cut any trees, they required a permit from SINAC.

And in September of 2010, Minor Arce, who is a witness here this week for the Claimants, on the advice of Mr. Bermúdez, was commissioned to prepare a

study regarding whether permits were required to cut trees on the land.

Arce advised seeking a permit if more than 10 trees per year were to be cut. Claimants never applied for or obtained any such permits, despite reports of tree cutting from third parties.

For example, the report issued by Mr. Cubillo on the 11th of January, 2011--sorry. That's Mr.--yes, Mr.--yeah, Mr. Cubillo from SINAC noted the cutting of trees, as I mentioned a moment ago, of close to 400 trees. Now, this prompted the prosecutor, Mr. Martínez, to request SINAC to undertake a technical study.

SINAC's response was given in July 2011, determining that there were forests and damage had been caused to the ecosystem.

This is a major environmental violation by the Claimants. In actual fact, probably frowned upon more than wetland violations. Contrition and concern from the Claimants, mitigation and sensitivity towards the environment? No way. Claimants hire INGEOFOR in December 2011 to analyze the findings of SINAC's

July 2011 report.

INGEOFOR concludes there are no forests on the site. You'll hear this week from KECE, or Mr. Kevin Erwin, in this regard which he confirms the SINAC findings of a forest.

This is a point not rebutted by Claimants' witnesses or experts. In October 2011, Claimants continue to ignore the injunctions, the criminal proceedings, and push ahead with tree cutting on the site. SINAC visited the site and reported on the 3rd of October there had been men cutting the trees.

Let's not forget, SINAC had already determined within its legal competence that the site contained a forest. Criminal investigations were ongoing. Any cutting of any kind required permits. But with the injunctions in place, no thought should have been given to cutting and burning trees.

On the 21st of October, 2011, based on the SINAC findings, Mr. Martínez, the prosecutor, takes the next step and criminally charges Mr. Aven and Mr. Damjanac.

He charges them for illegal tree cutting and

for the refilling of the wetlands. The Claimants

allege he's on a personal vendetta and had no evidence to bring charges.

And I would simply refer you to Paragraph 247 of our Counter-Memorial to see the long list of reports, studies, and evidence that justified Mr. Martínez' processing of this file.

On the 30th of November, 2011, the Criminal Court of Quepos issued a judicial injunction against the continuance of the works at the project site. And you heard me mention a number of injunctions up to this point. SINAC, TAA both had issued injunctions.

But this is one that should really resonate. The judicial injunction has the effect up to and including today of suspending the Project in its entirety.

Members of the Tribunal, with the judicial injunction in place and a number of institutions clearly concerned about harm being caused to the environment, Claimants resist. We're meant to believe from Mr. Burn's comments this morning that his colleagues--sorry, that Mr. Aven and his colleagues

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are victims subject to the State's intent on persecuting unsuspecting foreign investors.

Our evidence and the testimony you will hear this week, we believe, will debunk that myth. Claimants have made much of the criminal proceedings, treating them as an example of this victimization. We believe this is nonsense.

Mr. Martínez took steps that were lawful and permissible for any prosecutor to adopt. No arbitrary steps were taken. You'll hear this week from Judge Chinchilla, an experienced and decorated judge from Costa Rica, who confirms that Mr. Martínez acted properly.

In relation to the criminal proceedings, also we have a separate line--we've branched it off for the Defensoria and the TAA in the criminal proceedings--and, again, you can manipulate this in your free time. On the 6th of May, Mr. Aven voluntarily testified in the criminal investigation. He makes a big deal of this day because he says he informed Mr. Martínez of the alleged bribe from Mr. Bogantes. The fact Mr. Martínez did not commence

an investigation into Mr. Bogantes is, according to Mr. Aven, evidence of arbitrariness.

Mr. Martínez and Judge Chinchilla roundly reject this. A prosecutor would, of course, be greeted by counter-accusations when a subject of investigation is being questioned. Mr. Martínez has the right but not the obligation to follow up on any counter-accusation.

He also has the right to ignore such evidence if his belief is this is nothing more than an attempt to avert criminal proceedings.

In fact, on the 16th of September, 2011, Mr. Aven filed the criminal complaint against Mr. Bogantes. The record shows Mr. Aven was contacted on multiple occasions by the ethics prosecutor--this is someone else, not Mr. Martínez--to investigate this complaint. And our submissions rely on the documentary record of that prosecutor's approaches.

Mr. Aven says he never received such approaches. No credible evidence has been offered by Mr. Aven in this regard. The fact that Mr. Martínez' conduct as a prosecutor in this setting becomes the

subject of criticism when it is Mr. Aven that is the subject of the criminal investigation beggars belief.

The criminal proceedings show balance and objectivity. For example, on the 21st of October 2011, the same Mr. Martínez dismissed further investigation for forgery and disobedience to authority. Notably, Judge Chinchilla actually thinks that Mr. Martínez erred on this occasion and would have had a basis to pursue the

investigation. In June 2011, a preliminary hearing is--against Mr. Aven and Mr. Damjanac was held. The judge, not Mr. Martínez, ordered the case to go to trial.

At this preliminary hearing, Mr. Aven testified voluntarily. On the 5th of December, 2012, the criminal trial commenced. Due process up to this point has been observed. No arbitrary conduct has occurred. Costa Rican criminal law and procedure has been complied with. It is not now available to Mr. Aven to criticize the decision of the judge simply because he disagrees with the outcome.

And as I'll explain later, the role of international law is not to second-guess questions of

criminal culpability. Claimants complain about the application of Costa Rican criminal procedural law. But I won't entertain it further here for the interest of time. But there is plenty on the record of this. And you will have an opportunity to hear from Judge Chinchilla, who is more than capable of answering any questions you have in this regard.

In May 2013--we're now in 2013--the ethics prosecutor is trying to reach Mr. Aven to inquire into his complaint about Mr. Bogantes. We're trying to

respond to his complaint about this bribery.

But by May 2013, Mr. Aven has fled from Costa Rica. Again, throughout 2013 and 2014, as the illustration on the screen shows, we see a number of developments in the criminal proceedings. And finally, I'd like to mention INTERPOL. Again, the idea of the state conspiracy is a fantasy. Mr. Aven's inclusion in the INTERPOL notice was appropriate. You'll hear from Judge Chinchilla that this was a natural consequence and is a legal consequence of the issuance of an international arrest warrant.

I'd now like to move to the law, gentlemen,

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and I apologize. I went a little longer than I anticipated, so I'll try to be brief on our legal submissions.

First of all, you'll see in our pleadings the issue of state responsibility and whether it should be triggered in these circumstances. I'll be very brief. We think our pleadings set this out quite clearly.

It is not the role of an International Tribunal to sit on appeal against the correctness of individual administrative acts. The Tribunal is not a super-national appellate body to review local administrative decisions.

The State is judged not on every step in its administrative process; rather, it is judged on its final product. And it's liability is engaged only if the overall process of its decision-making is flawed. When the process of decision-making is still ongoing, as in this case, the State's liability is not engaged.

This is for good reason. International law developed principles to regulate international state liability for multi-level decision-making in administrative affairs. It's a fundamental principle

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of international law that are not, in and of themselves, internationally wrongful acts. These shouldn't be brought before an International Tribunal.

A low-level administrative or judicial decision can constitute an international delict only if one of two things is true. Either, number one, there is no effective remedy available, meaning appeals process is such that it does not afford the investor a meaningful prospect of correcting the deficiencies it challenges; or, number two, the applications for remedy the investor made do not lead to redress.

This necessarily means that the investor sought to challenge the decision locally, but after it was allowed to go to the length, the system of appeals

did not correct the deficiencies of the lower official's decision.

Members of the Tribunal, we are not in either of those circumstances. Claimants must therefore show much more than an individual erroneous decision. In fact, Mr. Burn's words were, I think, a couple of agencies bringing the State into disrepute. That is

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not a test under international law, and it is certainly not a basis to find Costa Rica liable under the DR-CAFTA. They must demonstrate that Costa Rica's administrative and legal system is fundamentally flawed. They have not.

Claimants' case on the alleged breach of FET also lacks any basis in international law. We submit that in order to find a breach--I'm sorry, sir.

PRESIDENT SIQUEIROS: Could we take a 5-minute break?

MR. LEATHLEY: Absolutely. Absolutely.

(Brief recess.)

MR. LEATHLEY: I'd just like to move briefly on to FET. I feel like the sand is slipping through my fingers and have many points I wish to make. But let me deal with FET. I'd like to deal with due

process. We may have to truncate our remarks on arbitrariness and abuse of rights. I would like to touch on expropriation and then briefly conclude.

Notably, very few pages was dedicated to the legal analysis of what appears in their pleadings in what we would actually described as law-light

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regarding FET. It's not enough to repeat general principles of good faith or the rules of law without really looking at what they mean and how they sit within what the Claimants argue is the legitimate expectations test. The sprinkling of some sort of international law spirituality that are called with the subjective views of the Claimants is not enough.

Claimants' case is that there was a violation of the legitimate expectations. Costa Rica, much like the position that it's consistently adopted in many of the cases, such as Spence, a case where Mr. Weiler remarked he had been working a late night, although he was counsel to Claimants in that case, does not--Costa Rica does not accept that the legitimate expectations test can be derived from customary international law. The intervention from the United States makes this point in its submission from Spence. Therefore, the starting point for this Tribunal is to determine whether legitimate expectations is an applicable test in the first place. If it finds that customary international law does not ground such a standard, then the entire claim for breach of legitimate

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expectations must be disregarded.

However, we don't wish to shadow-box in this regard, so let's assume the legitimate expectations test applies. It's an objective test, not a subjective test; and let us break that down for one moment. We've raised the question of who the investors are because of their lack of ownership. But notwithstanding that, let's assume, for the ease of reference, that Mr. Aven and the other Claimants are all to be treated as having invested roughly around the same time.

By the time they invested, was the date they first made their investment in Costa Rica. For Mr. Aven, this was 2002, when he made his first investment into Pacific Condo Park and La Canicula. For the other Claimants, this was around 2004. Again, this is only an assumption that some of our submissions on jurisdiction are disregarded.

They all invested with the sole objective of developing the property at Las Olas, and those initial investments with a starting point in that development.

The time when you make your investment is not

an iterative process. Claimants have once--have one investment, and there is one moment when it was made. It's not something that repeats itself, whether you get to reset the clock on, when you go back through different phases of a project. International law is very clear on this. Therefore, we look at the objective expectations an investor could have at 2002 and 2004.

The law in place at the time remains the law in place throughout all relevant phases in this Arbitration. It's been clear, it's been stable, it's been predictable.

Excuse me, sir. One minute may save ten.

So, we would remark, in brevity, that the submissions from the Claimants have been confused regarding the objective test. It appears from their submissions there have been a number of references to the conversion of a subjective analysis into an objective test.

We believe, sir, that that is the incorrect approach to determining what the objective--the legitimate expectation of the investors would be at

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the time. It is not to start with their subjective analysis and then see if there was a reasonable and legitimate expectation that could be construed. That is to take things the wrong way around.

The objective expectation was the existence and the clear language of Costa Rican environmental law. This is what they were on notice of, and we've heard on numerous occasions that they apparently received advice on this issue. That would have put them on constructive notice of all of the enforcement mechanisms that were available to the--to Costa Rican authorities.

There is no attempt to credibly argue inducements or incentives occurred here in order to build their case of legitimate expectations and that, gentlemen, we would say is wise.

No acquired rights are alleged to have formed. No guarantee that deviated from the enforcement rights of the State is pleaded. Every investor that invests in Costa Rica is aware of their laws. Ignorance of the law is not a defense, and international law upholds that principle.

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The Claimants' due process claim, we believe, is confused and misplaced. In Paragraph 317 of their Memorial, Claimants profile a shopping list of what due process purportedly comprises. They cite an array of investment arbitration cases in support of what they notably overlook that is the actual text of CAFTA. This is contained in Article 10.5.

In addition to concocting a standalone standard by reference to international jurisprudence, none of which is DR-CAFTA authority, they also try desperately to isolate a standard of due process by sourcing it from Chapter 17 of the CAFTA.

While we would embrace Claimants' late conversion to the fact that Chapter 17 is capable of offering more than mere hortatory statements, even the recourse to Chapter 17 is flawed, specifically Claimants rely on Article 17.3. What Claimants forget is that their claim is brought under Article 10.5, not 17.3.

As the U.S. intervention notes, in effect as well, this Tribunal does not have jurisdiction to decide violations of standards essentially imported

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from Chapter 17.

The only reference in Chapter 10 to due process is quite clearly linked to the denial of justice, and this is the core of the Parties' disagreement. We want to break down Claimants' case on due process and reveal precisely how it is either misstated or flawed by its own measure.

First, while the Claimants in their Reply Memorial avoid the precise text of Article 10.5, 10.5 is both the starting and finishing point for this question. It's on your screen.

10.5, the minimum standard of treatment, customary international law standard. We would urge the Tribunal never loses site of this restrictive standard, which is expressly linked to the standard of customary international law.

In pertinent part, Article 10.5(2)(a) provides fair and equitable treatment, includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principle legal systems of the world.

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As an aside, we find it very telling that neither in Claimants' Memorial nor in their Reply

Memorial do they ever quote Article 10.5(2)(b) of the CAFTA.

This is the provision that is meant to be the backbone of their case. While the Claimants can hope the Tribunal may or may not apply the cases they cite, what the Claimants unquestionably cannot ask of you is to ignore the clear and unambiguous wording of 10.5(2)(b). The obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process. It should not trouble any members of the Tribunal for too long to immediately discern that the drafters of DR-CAFTA had a very specific objective when considering the scope and application of FET. Consistent with the restrictive interpretation of FET is the minimum standard of treatment, FET is focused on the denial the justice.

But more than this, the denial of justice and the principle of due process are explicitly and inextricably connected. Therefore, the standard of

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due process is a reference point when determining a denial of justice. It is not an independent standard.

Put in other terms, it is the lens through which you should scrutinize whether there has been a denial of justice.

As the U.S. submitted, denial of justice arises, for example, when a State's judiciary administers justice to aliens in a notoriously unjust or egregious manner which offends a sense of judicial propriety. The CAFTA drafters clearly went to specific lengths to connect due process only to denial of justice.

Claimants protest that their claim is not a denial of justice claim. In Paragraph 316 of their Memorial, they state that claims which pertain to the conduct of host state officials rather than court judgments are to be considered under a different application of the due process principle than the doctrine on denial of justice.

Well, their subsequent pleadings belies that desire. Claimants summarize their due process claim in Paragraph 367 of their Memorial by stating in this

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penultimate paragraph to an extended review of the alleged due process violations that in this case, there is, and I quote, "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."

This is still an adjudicatory process. What could better encapsulate a denial of justice claim than the Claimants' own summary characterization?

The acts the Claimants criticize as part of their claim are adjudicatory acts, and they are subject to the denial of justice regime. In their Reply Memorial, Claimants make numerous assertions regarding the history of this matter, talking in generalities and opining that steps were taken lacking in due process. However, what is quite remarkable is that there is no evidence cited or legal basis established under Costa Rican law for these apparent due process violations. Instead, it is a long rant of what they characterize as objectionable events but, when scrutinized are, instead, adverse decisions.

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Claimants' invention of a self-standing due process claim is flawed even by its own measure. For example, Claimants dedicate time and attention in their Memorial to the import of human rights law by virtue of Article 10.22, reference to applicable rules of international law. This is a flawed approach to constructing a standard under DR-CAFTA.

As this Tribunal is well aware, and in particular, Professor Nikken, the import of human rights is not only a substantive consideration but a procedural one. The infrastructure of human rights institutions is as much a part of human rights law.

For example--and knowing this myself as having previously worked at the Inter-American Commission on Human Rights, the first assessment in determining whether there has been a violation of any human right is the assessment of the exhaustion of domestic remedies. Petitions can and will be summarily dismissed where domestic recourse has not been exhausted.

Consequently, if Claimants wish to benefit from the fruits of human rights law, they cannot do so

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without also bearing the burden of the procedural requirements and constraints that come with it.

And that is entirely appropriate here, where Article 10.5 2(b) expressly links due process with the denial of justice. And in this regard, a claim for denial of justice cannot be made while proceedings are ongoing.

Therefore, Members of the Tribunal, this is where I would like to conclude my remarks on due process, and--but for the avoidance of doubt, Costa Rica does not pretend that domestic remedies must be exhausted before this Arbitration can be commenced. To suggest this is to conflate two quite different concepts. But what do we maintain--sorry, what we do maintain is that as our--as set out in our

pleadings, no denial of justice claim can survive while the processes in question are still in process. For what other reason does the term "due process" exist but to emphasize the need for a process?

Mr. Burn described "This is a permit cancellation case." Well, let it conclude. And if Costa Rican law upholds precisely that, a process,

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then importantly, that process must be permitted to proceed.

Claimants have prevented that. Mr. Aven absconded, violating Costa Rica's criminal laws; and meanwhile, the very processes of appeals or challenges and checks and balances that Costa Rican law readily embrace have been denied application because of the Claimants' own abandonment. As part of the Claimants' due process claim, they refer to two other elements: The failure to notify and the lack of transparency. I'd refer you to our pleadings in regard of both of those.

Finally, we come to the Claimants' argument on expropriation. And I've left this to last for a specific reason. This claim does not warrant any serious consideration by this Tribunal. We suppose, as is the way with inflated damages claims, that a baseless argument might be thrown in as the pawn in order to allow some ground to be given on the others. We're confident this Tribunal won't be so easily misled. This claim has absolutely no legitimacy.

The starting point is agreed to be

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Article 10.7. We refer the Tribunal to the language in your slide packs, which recites that Article; and regard must also be paid to Annex 10-C. But also, please refer to Article 10.28, which is the definition of "investment."

As appears on your screen, Footnote 10 to Article 10.28 is very important to qualification. It's part of the definition of investment, which has a direct bearing on their claim. We've heard already--I'll come to that Footnote 10 in a moment.

We've heard already from the Claimants, and even today, the nature of their investment is very confusingly described. Is it the land? Is it the construction permits? Now we're told today that it's--the investment is, quote, in a project or, as was concluded, the maintenance of the Las Olas project? Is this an amalgamation? Are we meant to consider them all?

There is no juridical precision whatsoever. And, frankly, gentlemen, we are none the wiser today as to what their investment is. But what we are sure is they have not properly made out their claim under

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international law. Claimants in their Memorial describe the investments as "a combination of property rights in land and licenses, authorizations, and permits." That's Paragraph 409.

Perhaps in their own realization that this peculiar amalgamation has no real clarity, they attack things from the other side. In the same paragraph, they say, and I quote, "The Tribunal simply needs to decide whether the conduct outlined above prevented the Claimants from realizing their plans for developing Las Olas."

Gentlemen, this is perverse. It bears no relation to the test of expropriation whatsoever. In a last-ditch attempt to plead their case, they continue in the next paragraph, "Either the Respondent's unlawful conduct prevented the Claimants from utilizing the construction permits granted to them or it did not." Paragraph 410.

What was the Claimants' investment? It was the acquisition of the land, plain and simple. In their Reply Memorial, Claimants provide an ambiguous response: "Obviously, it is not the Claimants'

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position that their investment constituted solely of construction permits. Rather, they possessed property rights in land, the use of which was enhanced by the grant of various certifications and permissions."

This does not advance things. And the amalgamation of rights seems to be Claimants' preferred characterization. Unfortunately, this is not satisfactory. It is Costa Rica's position that Claimants can only cite their acquisition of the land as their investment. And that, quite clearly, remains in their possession, or whoever's possession it is in.

If the Claimants insist on looking to the construction permits as their investment--and I'm not clear today if that is their case--then they're in serious trouble as a matter of international law.

First within the context of their FET claim, if the date of their investment is now meant to be the date when they obtained any construction permits, this changes the landscape significantly and puts them in an even more precarious position, because by 2010, for example, they would have already known about the various reports such as SINAC and the Protti report

such that these red flags on wetlands were well and truly raised. Their legitimate expectation would have been framed even more on the enforcement rights of the State.

Second, the definition of "investment" contained in Article 10.28 becomes critically important if their claim is that their investment is the construction permit.

And let's look at Footnote 10. This provides, quote, whether a particular type of license, authorization, permit, or similar instrument, including a concession, to the extent 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. That's Costa Rica.

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.

That footnote critically embodies the international law principle that the existence of

property and vested rights is a matter to be determined by the host state, Costa Rica.

Put simply, international law, the test under international law, to determine if there exists an acquired or a vested right looks to how domestic law treats that. This principle is well established and endorsed by numerous tribunals, such as Nations Energy against Panama and the recent Charanne against the Kingdom of Spain.

Claimants flirted with the idea of pleading the construction permits as vested rights; but in their Memorial, very notably in Paragraph 396, they called back before making this an explicit claim, knowing it was going to lose.

Costa Rican law would have confirmed this for them. As we argue in our submission, Costa Rican law does not treat the construction permits as a vested or acquired right. In order to be considered as an investment, the permit must create rights under Costa Rican law. No construction permits waive the continuing obligation not to impact the environment under Costa Rican law.

As a result, the construction permits simply do not give the Claimants the right to breach Costa Rica's environmental laws. In addition, if they are breached, the permits must be stopped immediately in accordance with the precautionary principle, and this was always known to the Claimants.

Claimants' permits do not grant them a right to be immune from the application of environmental law.

PRESIDENT SIQUEIROS: Perhaps, Mr. Leathley, you might--I see that you're very close to conclusions, and you might want to proceed with that, because just as we were a few--tolerant a few minutes with Claimants' statement--opening statement, we will with Respondent. But that means only a few minutes--

MR. LEATHLEY: Thank you. I can--if it's amenable to Mr. Burn, I can promise four minutes, and I'm sitting down again.

PRESIDENT SIQUEIROS: Thank you.

MR. LEATHLEY: Let me conclude, sir.

Why are we here? This is a tremendously misplaced claim. Were it not for the complex

chronology, this would have been a prime example of a case that could and should have been dismissed summarily under the CAFTA rules for a frivolous and vexatious claim.

There are ten points I would like to conclude as to how Costa Rica can summarize its position. First, Claimants do not own all the plots. They have not proven their investment and cannot bring a claim in the absence of definitive proof. It is their claim to bring, and they have failed since 2013. Accordingly, this Tribunal does not have jurisdiction over large sways of the property investment alleged to exist.

Second, Chapter 17 does apply to uphold Costa Rican environmental laws that permit the marginalization of Chapter 10 protection, or at least that this Tribunal should show deference to the enforcement rights of Costa Rica in the context of an investment.

This seismically changes the prism through which you should view the claims, and the entitlements Claimants pretend to have. Irrespective of

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Chapter 10--sorry, Chapter 17's application, Costa Rican and international law maintain the precautionary and other established principles entitled the State to regulate its environment even where a permit may have been granted. That right of

the State exists at all times, and Claimants knew this the day they set foot in Costa Rica.

Third, customary international law truly limits the standards of protection to the absolute minimum standards of protection. This means in the absence of egregious and shocking conduct, the ELSI test, with which we would ask the Tribunal to adhere, without that egregious and shocking conduct, the Claimants' case must fail.

Fourth, State responsibility is not triggered by any of the alleged conduct of Costa Rica. It is not the role of an international tribunal to sit on appeal against the correctness of individual administrative acts. The Tribunal is not a super national appellate body to review local administrative decisions; and we believe, sir, that a finding in favor of Claimants would be the opening of a

horrendous set of flood gates.

Fifth, Claimants' claims are inadmissible under international law because CAFTA never contemplated protecting illegal conduct. Claimants' conduct is a litany of failures, many of which are committed in highly suspicious circumstances. It increasingly appears as if Claimants set out to

bury the wetlands as soon as possible in order to leapfrog what they thought were burdensome and costly environmental considerations.

Whether this is by virtue of the Claimants' advisors or Mr. Aven himself is not the issue. The issue is Claimants' clear and repeated violation of Costa Rican environmental, administrative, and criminal laws.

Sixth, no violation of FET exists. FET, in the context of DR-CAFTA, requires a finding of a denial of justice, and no justice has been denied. We are still administering justice in accordance with Costa Rican law; and for Claimants to pull the ripcord, ignore those proceedings, and yet, launch a gargantuan claim at great expense to Costa Rica is an abuse of process. The processes are still ongoing in Costa Rica, and this claim, even if it had a legitimate basis, is far from ripe.

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Seventh, no arbitrary conduct has arisen. All public officials have acted within the constraints of local law and in no way exceeded their mandates. The personalization of Claimants' case against public officials is premised upon a complete misunderstanding of how Costa Rican law operates. The same can be said of their allegations of abuse of rights.

Eighth, no expropriation has occurred. Their investment is in the land, and they still own that land, to the extent that they ever did. No other investment exists based on any alleged permits, as I've explained, at least not to the extent that they accrue to become an acquired or vested right under international law.

Ninth, there is nothing stopping the Claimants from trying to develop the land. Being sympathetic to the wetlands and the forests that exist, Costa Rican law to this day still embraces development, provided it is harmonious with the ecosystems that exist.

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Careful planning could deal with this. Therefore, it beggars belief why Claimants have so belligerently ignored the pleas of the State to recognize the existence of wetlands and forests on the site. Claimants have caused the delays, and Claimants have caused the problems.

Tenth, finally, and most importantly, there are, and always have been, wetlands and forests on the site. Both sides' experts agree on the findings of wetlands. This is utterly fatal to the claims, because it means one simple thing: No matter how elegant or inelegant the process was in establishing the necessary protection over the ecosystems, the Tribunal can conclude that Costa Rica reached the right result.

In reaching that result, the Tribunal can also conclude that, for many years, Claimants inadvertently, or perhaps intentionally, ignored the wetlands and the forests that always attracted the utmost protection from domestic laws.

Gentlemen, we respectfully request that all the claims be dismissed with the full costs to be awarded to Costa Rica. Thank you.

PRESIDENT SIQUEIROS: Mr. Nikken, any questions? Mr. Baker, any questions?

Any comment from Claimant at this point?

MR. BURN: No, sir. I mean obviously, in terms of time allocation, you will already have in mind that Mr. Leathley ran significantly longer than we did, and that will come out of the arithmetic.

But no, no other comments at this stage.

PRESIDENT SIQUEIROS: Before we conclude, we will ask Mr. Grob to make an update on the time which each Party has taken.

There is a question, and taking advantage that our guests from the United States of America are here, we would ask--and given the significance of the submission that has been made, the Tribunal would like to ask the representatives from the United States of America to identify what other submissions they have

made with respect to the two provisions on 10.5 and 10.7 of CAFTA in other--in other proceedings that have been initiated under Chapter 10 of CAFTA.

Because we would like to know the consistency of those statements; and although the Tribunal could naturally investigate those and identify them, it would probably take more time than if we ask you, if you have those readily available, if you could share those with the Tribunal, and the Parties, of course.

MR. PEARSALL: Thank you, Mr. President, and Members of the Tribunal, for the question.

We'd be happy to do so. With the Tribunal's indulgence, if we could ask for a day or two to get that together so that we can take a sounding within government and make sure that we have all the appropriate sources for you.

PRESIDENT SIQUEIROS: Absolutely. Thank you.

And also remind the Parties that the representatives from the United States of America have reserved the right to make oral argument during this Hearing. But at this time, they have not identified whether they will. But they will retain that right to intervene during the Hearing, if they wish to do so.

Okay? Well, if there is no further comment

from any of the Parties, I would ask Claimants whether Claimants has any further issue for the rest of the day?

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MR. BURN: Well, just to say that we will complete our discussions with respect to the few additional documents. So, we will report back to you at the beginning of proceedings tomorrow.

PRESIDENT SIQUEIROS: Okay. Thank you very much.

Francisco, would you mind sharing what the time of which each Party has spent from their--

SECRETARY GROB: Yeah. The Claimants, three hours and four minutes; and the Respondent, three hours and eight minutes.

PRESIDENT SIQUEIROS: Thank you very much. And see you tomorrow at 9 o'clock in the morning.

Thank you. And naturally, appreciate the court reporters and the interpreters for their hard work today.

(Whereupon, at 5:53 p.m., the Hearing was adjourned until 9:00 a.m., the following day.)

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CERTIFICATE OF REPORTER

I, Michelle Kirkpatrick, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

_____

Michelle Kirkpatrick

CERTIFICATE OF REPORTER

I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

_____

MARGIE R. DAUSTER

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