Freshfields Bruckhaus Deringer US LLP

NEW YORK
601 Lexington Avenue
31st Floor
New York NY 10022
T +1 212 277 4000
F +1 212 277 4001
W freshfields.com

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Memorandum

	NAME	ORGANIZATION
TO	Matthew Cox, Director Yasmin Mohammad, Senior Counsel	Vannin Capital
FROM	Noiana Marigo Leon C. Skornicki Sofia Klot	
DATE	17 December 2014	

Analysis of claims asserted by David R. Aven, *et al.* against the Republic of Costa Rica under CAFTA

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. You have asked us for advice in connection with the UNCITRAL arbitration claims brought by Mr. David R. Aven and his partners[1] (the ***Claimants***) against the Republic of Costa Rica (***Costa Rica***) under the Central American Free Trade Agreement-Dominican Republic (***Treaty*** or ***CAFTA***) in relation to a project to build and operate a hotel, beach club, and villas as well as sell lots in Costa Rica (the ***Project***). In particular, you have asked us to: (*a*) analyse the jurisdictional and merits arguments of the Claimants and assess their likelihood of success and identify any weaknesses, including in relation to the documentary evidence; (*b*) identify issues to be addressed by local counsel; and (*c*) opine on the damages methodology in light of existing case law.

2. After reviewing the documents you provided,[2] we conclude that:

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[1] Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso. *See* Claimants' Notice of Arbitration, 24 January 2014 (***Notice of Arbitration***), Section II.A.

[2] *See* Annex D.

Jurisdiction

(a) A tribunal is more likely than not to assert jurisdiction over the Claimant's claims under the Treaty, including:

(i) assert that Claimants are protected investors under the Treaty, pending questions of dual nationality of Mr. Aven, who appears to also be an Italian national. If this is the case, for the purposes of establishing jurisdiction, Mr. Aven will need to show that his U.S. nationality is "dominant and effective"; and

(ii) assert that Claimants have "covered investments" under the Treaty, provided they can supplement the evidence presented in their Notice of Arbitration with respect to their ownership of several local enterprises and their shares in La Canícula S.A. or, alternatively, obtain favourable opinion from local counsel that the evidence already submitted is adequate under Costa Rican law.

Merits

(b) Claimants are more likely than not to succeed in asserting a breach of FET on the basis of arbitrary treatment and violation of legitimate expectations. Arbitral tribunals have found that inconsistent behaviour between different organs or agencies of the state, in particular, revocation or non-renewal of permits, especially when politically motivated, constitute breach of the FET standard and violate legitimate expectations. There is evidence in the record that seems to show that Claimants followed the required administrative processes to obtain the necessary permits from the relevant authorities, but notwithstanding the courts ordered the Claimants to halt the Project. Claimants' case would be strengthened if they can provide evidence of bribery, unfair trial and threats to Mr. Aven, or other elements that would indicate political motivation behind the measures. We note, however, that the Claimants' claim may be affected if Costa Rica were to prove that the Claimants have violated the law by cutting down trees without authorization.

(c) The likelihood of success of the Claimants' claim for denial of justice is difficult to assess given the high standard required by arbitral tribunals, and the lack of evidence submitted with the Notice of Arbitration to prove this claim. In particular, a criminal law expert will need to opine on the eventual outrageousness of the order of re-trial of Mr. Aven. Claimants will also have to demonstrate that exhaustion of local remedies will not provide a reasonable possibility of effective remedy and would put Mr. Aven's life at risk.

(d) Claimants are less likely to prevail on their expropriation claim because, even though our assessment on the suitability of the facts to support an FET claim would also apply to a great extent to an indirect expropriation claim, in practice tribunals are more inclined to find breaches of FET than an indirect expropriation. In addition, the permanent effect of the measures is somewhat uncertain. Finally, we have not been able to assess the scope of the measures, including whether the Project has been totally or partially affected; some documents reviewed suggest that parts of the Project may be unaffected.

(e) We do not have sufficient evidence to properly assess the likelihood of success of Claimants' MFN and national treatment claims. In particular, Claimants have not identified investors that would qualify as "in like circumstances" under the Treaty. The success of the MFN and national treatment claims will depend on whether Claimants can prove that the environmental and topographic features of their land are sufficiently similar to those of other investors alleged to have received more favourable treatment from Costa Rica.

Damages

(f) In light of prior decisions of arbitral tribunals, it is more likely than not that the tribunal may find that the discounted cash-flow (***DCF***) method is not appropriate to value damages in the present case given that the investment is not a going concern. When there is no track record of profitability, particularly in the hospitality sector, tribunals have generally allowed only the recovery of out-of-pocket expenses. In this case, we believe that there is a risk that the tribunal may consider that the DCF projections are too speculative (except with respect to the lots, where there is some evidence of their marketability and pricing). Therefore, we suggest that Claimants provide, together with the DCF, an alternative valuation method or enough information regarding sunk costs. In addition, Claimants may improve their chances of being awarded damages calculated under the DCF methodology if they can provide evidence of comparable projects.

(g) We are not able to assess the probability of success of Claimants' claim for contingent and moral damages in light of the information available and existing case law. We note that Claimants' burden is high in respect of both claims.

(h) Finally, we note that Costa Rica may assert counterclaims, possibly for environmental damage, which may substantially increase the costs of the proceedings irrespective of their chances of success (which we are not able to assess at this stage).

3. The rest of this Opinion is organized as follows: we briefly describe the Project in Section II, we then analyze Claimants' jurisdictional and merits arguments in Sections III and IV respectively, and assess Claimants' proposed methodology for the calculation of damages in Section V. Finally we comment on Costa Rica's potential counter-claim for environmental damage in Section VI. For your convenience, we also created a timeline of relevant events (Annex A) and listed the documents that would be needed to further assess the strength of Claimants' arguments (Annex B). Additionally, we briefly described the documents giving rise to Claimants' legitimate expectations (Annex C). Finally, and for ease of reference, Annex D contains a detail of the documents we reviewed to prepare this Opinion.

4. This Opinion has been prepared on the basis of, and with the limitations set out in our Engagement Letter dated November 26, 2014. We note that for the purpose of this Opinion we have analysed the most relevant decisions (based on sector, type of measures, and applicable Treaty) but our review of the case law is not to be considered exhaustive of all relevant cases.

II. THE PROJECT

5. We understand that the Project was located on beachfront property in Playa Esterillos Oeste, Costa Rica and was composed of several plots of land on which infrastructure would be built and commercialized as follows:

   (a) 71 titled lots with a minimum size of 500 square meters, each to be sold;[3]

   (b) A condominium, consisting of approximately 300 lots for individual home sites and four to nine larger parcels to build small condo buildings (the ***Villas***);[4]

   (c) A hotel (the ***Hotel***);[5] and

   (d) A Beach Club, which would include some commercial developments and condominium properties (the ***Beach Club***).[6]

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[3] Quantum-related document 7, Las Olas Luxury Beach Resort Project Investor Summary, 15 March 2008, p. 6.

[4] Quantum-related document 7, Las Olas Luxury Beach Resort Project Investor Summary, 15 March 2008, pp.6-7; Quantum-related document 16, Business Plan for Las Olas Beach Community, 10 December 2010), pp. 6-8.

[5] *Id*. Claimants planned to incorporate a company that would sell "time shares" in the Hotel and the Villas.

[6] *Id*.

6. The project structure consisted of several wholly-owned Costa Rican companies, where each corporation owned individual sections of the Project (the ***Enterprises***).[7] One of these Enteprises, Inversiones Cotsco C&T S.A. (***Inversiones Cotsco***), acquired by David Aven in April 2002,[8] was to develop the Villas under the name "Condominio Horizontal Residencial Las Olas".[9] Another entity, La Canícula S.A. (***La Canícula***), acquired in 2002 by Mr. Aven,[10] was to develop the Hotel under the name of "Hotel Colinas del Mar".[11]

7. To develop the Hotel,[12] La Canícula had a 20-year concession granted by the Municipality of Parrita over 2.2 hectares of coastal land on the Esterrilos Oeste beach (the ***Concession***).[13]

8. La Canícula and Inversiones Cotsco obtained environmental permits from SETENA ―the entity responsible for environmental clearances― for the Villas and the Hotel, respectively (the ***Environmental Permits***).[14]

9. We note that it is unclear to us what part of the Project was to be developed (if any) on the 71 lots, by Inversiones Cotsco, La Canícula or another Enterprise. It is also unclear whether the Beach Club was part of the Hotel or an independent development.

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7 *Id*. *See* graphic representation of Claimants' investments on page 6.

8 Exhibit C-8.

9 Exhibit C-13.

10 *See* Exhibit C-8. Eventually, 49 percent of the shares in La Canícula were re-distributed among Claimants, and 51 percent was transferred to a Costa Rican national. *See* Exhibit C-7.

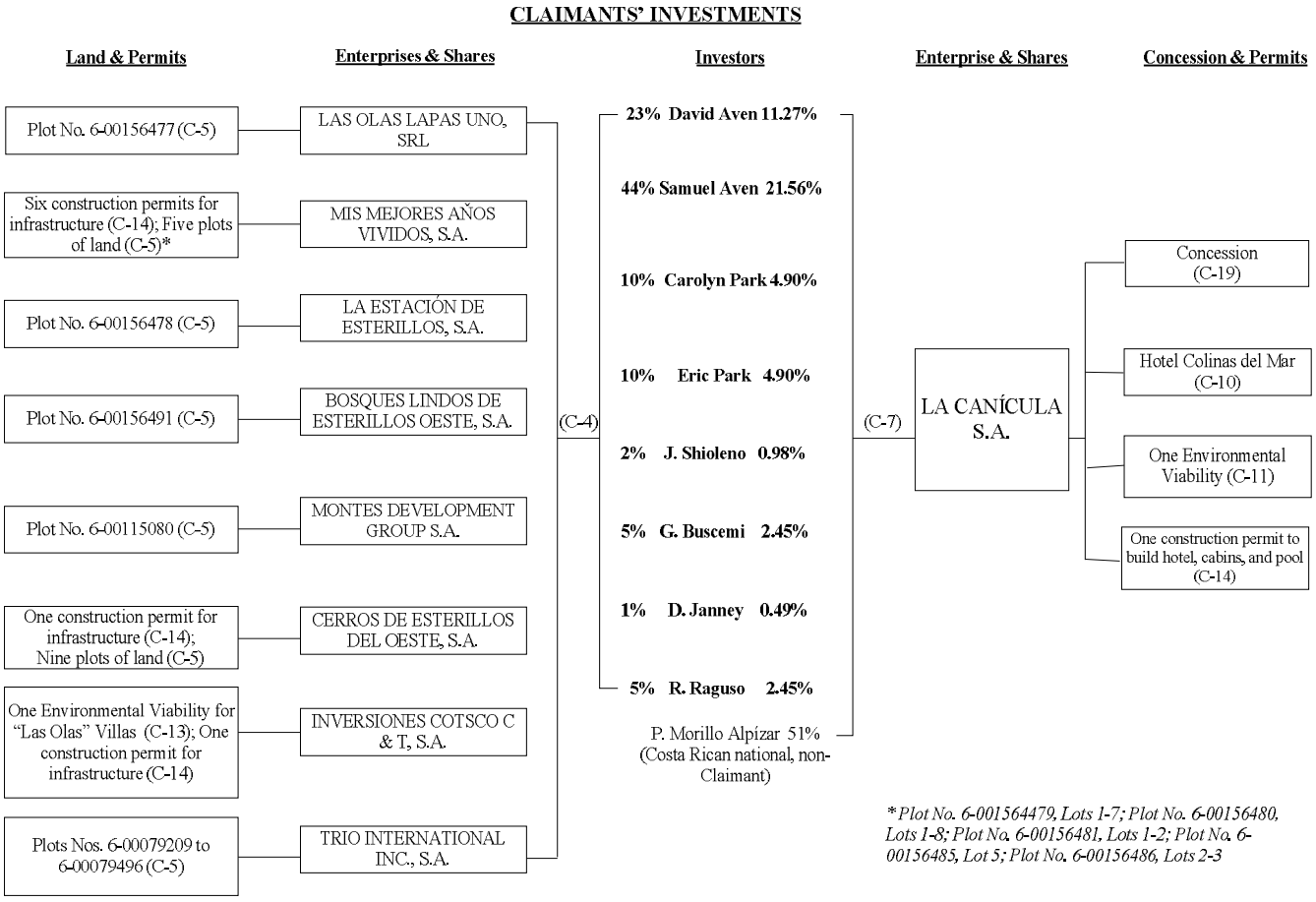
11 Exhibit C-11.

12 The concession agreement allows La Canícula to build, in Spanish, "*Hotel Cabinas*" which can be loosely translated as a "hotel with rooms". *See* Exhibit C-10, fourth clause. However the exact meaning of "*Hotel Cabinas*" in this context is unclear.

13 Exhibit C-10; Quantum-related document 7, Las Olas Luxury Beach Resort Project Investor Summary, 15 March 2008, p. 3.

14 La Canícula obtained its Environmental Permit ("*Viabilidad Ambiental*") for the Hotel on 17 March 2006, while Inversiones Cotsco received the respective permit for the Villas on 2 June 2008. *See* Exhibits C-11 and C-13.

10. Below we provide a graphic representation of the Project's structure as we understand it and on the basis of the documents provided:



III. JURISDICTIONAL ARGUMENTS

A. Consent by the Parties

11. In the Treaty, Costa Rica granted its consent to submit any dispute under the Treaty to arbitration. The Claimants in turn provided their consent in the Notice of Arbitration.[15] In order to validly submit the dispute to arbitration, however, the Claimants must comply with some additional requirements.[16] From our review of the documents provided, and subject to our limited comments below, we believe the Claimants will more likely than not be able to establish that they have complied with those requirements:

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15 CAFTA, Art. 10.17.1.

16 *See* CAFTA Arts. 10.16, 10.18.

(a) *At least six-months must have elapsed between the events giving rise to the dispute and the Notice of Arbitration*:[17] the first main event giving rise to the dispute is the Environmental Administrative Tribunal's injunction of April 13, 2011 (the ***Administrative Injunction***),[18] which occurred more than six months before the Claimants submitted their Notice of Arbitration on January 24, 2014. We note, however, that under the Treaty and the UNCITRAL 2010 Rules,[19] a dispute is deemed to have been submitted to arbitration on the date the respondent receives the notice of arbitration. We do not have evidence of the exact date on which Costa Rica received Claimants' Notice of Arbitration. Therefore, for the purpose of this Opinion, we assume that it was received shortly after January 24, 2014.

(b) *No more than three years must have passed between the date on which the investors first acquired knowledge of the breach and the Notice of Arbitration*:[20] even the earliest possible measure in alleged breach of the Treaty, the Administrative Injunction,[21] is well within the 3-year period before the submission of the Notice of Arbitration.

(c) *The Notice of Arbitration must be accompanied by a waiver of Claimants and the Enterprises' right to pursue domestic remedies*:[22] Claimants state that they have attached as Annexes A and B to their Notice of Arbitration the required waivers.[23] We have not, however, been provided with a copy of these Annexes.

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17 CAFTA Art. 10.16.3: "Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1: […] (c) under the UNCITRAL Arbitration Rules."

18 Notice of Arbitration, ¶¶ 36; Exhibit C-21.

19 CAFTA, Art. 10.16.4(c); 2010 UNCITRAL Arbitration Rules, Art. 3.

20 CAFTA Art. 10.18.1: "No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage."

21 Exhibit C-21.

22 CAFTA Art. 10.18.2(b)(ii): "No claim may be submitted to arbitration under this Section unless […] (b) the notice of arbitration is accompanied […] (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."

23 Notice of Arbitration, ¶ 3(d).

(d) *More than 90 days must have elapsed between the Notice of Intent to submit a dispute to arbitration and the commencement of the arbitration:*[24] Costa Rica received Claimants' Notice of Intent to bring their dispute to arbitration on September 19, 2013,[25] and the arbitration formally commenced when Costa Rica received Claimants' Notice of Arbitration, on or shortly after January 24, 2014.[26] Between these two dates, 127 days elapsed. We understand that all efforts by Claimants to negotiate the dispute have been ignored by Costa Rica.

(e) *The Notice of Intent must clearly identify the parties, the Treaty breaches, the factual basis of the claim and the relief sought and the approximate amount of damages*:[27] Claimants' Notice of Intent identifies the parties to the dispute, the Treaty breaches and their factual underpinning. We note, however, that while the Notice of Intent identifies the type of damage sought, it does not identify the approximate amount claimed as required by the Treaty. Arbitral tribunals interpreting analogous provisions of the NAFTA have, however, considered that non-compliance with some requirements of the notice of intent does not bar the jurisdiction of the tribunals.[28]

B. Jurisdiction *Ratione Materiae*

12. Under the Treaty, a tribunal has jurisdiction only with respect to protected "investors" and "covered investments." We provide below our analysis of the Claimants' arguments and evidence with respect to their standing as protected investors and their covered investments.

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24 CAFTA Article 10.16.2: "At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent')."

25 Notice of Intent, ¶ 3(c).

26 There is no evidence of the exact date when Costa Rica received Claimants' Notice of Arbitration. *See* paragraph 11(i) above.

27 CAFTA Article 10.16.2: "[T]he notice [of intent] shall specify: (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise; (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions; (c) the legal and factual basis for each claim; and (d) the relief sought and the approximate amount of damages claimed."

28 *See, e.g., Ethyl Corporation v. the Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998, ¶ 95 (holding that a change in the description of measures between the notice and the statement of claim is not significant); *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003, ¶¶ 134-139 (the claimant's addition of a substantive breach that had not been identified in its notice of intent did not deprive the tribunal of jurisdiction); *Chemtura v. Canada* (UNCITRAL) Award, 2 August 2010, ¶¶ 101-102 (following *ADF v. United States*).

1. Claimants' standing as protected Investors

13. As is relevant here, the Treaty defines the term "investor" as being a citizen of the United States (***U.S.***) that "attempts to make, is making, or has made an investment in the territory of another Party; *provided*, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."[29]

14. Claimants have provided proof of their U.S. nationality and therefore qualify as protected "investors" under the Treaty.[30] However, we have found that at least three documents in the record refer to Mr. Aven's Italian passport number.[31] If, in addition to being a U.S. national, Mr. Aven is a national of Italy, he must prove that his U.S. nationality is the "dominant and effective" nationality in order to qualify as a protected investor under the Treaty.

15. The Treaty does not define the terms "dominant and effective nationality" and there are no known cases interpreting their meaning in the context of the Treaty. The tribunal may thus refer to the decisions of other tribunals that have examined this issue under other treaties or customary international law.

16. In one of the most prominent cases defining "dominant and effective" nationality, *The Nottebohm Case*, the International Court of Justice found the claimant's Guatemalan nationality to be dominant and effective because Mr. Nottebohm had a long-standing and close connection with Guatemala, where he had lived for most of the preceding thirty years, but only a minor connection with Liechtenstein, the state of his other nationality.[32] Other tribunals called to decide on this same issue have considered "all relevant factors, including habitual residence, centre of interests, family ties, participation in public life and other evidence of attachment" to determine which nationality is dominant and effective.[33] We found no evidence in the record that would allow us to conclude

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29 CAFTA, Art. 10.28 and Annex 2.1. Claimants bring claims on their behalf and on behalf of eight Costa Rican enterprises of their direct ownership. The relevant analysis relating to the ownership of the Enterprises is provided in Section 2, below.

30 Exhibit C-3 (copies of Claimants' U.S. passports).

31 Exhibit C-18, p. 3; Exhibit C-20, p. 2; and Exhibit C-21, p.1, first whereas clause.

32 *The Nottebohm Case* (Liechtenstein v. Guatemala), 4 ICJ Rep. [1955].

33 Iran and United States, Case No. A/18, Decision No. DEC 32-A18-FT, 6 April 1984, reprinted at 5 Iran– U.S.C.T.R. 251, ¶¶ 263-265. *See* also *Eudoro Armando Olguín v. Republic of Paraguay* (ICSID Case No. ARB/98/5) Award, 26 July 2001, ¶ 61 (holding that domestic provisions on the exercise of rights attached to nationality are irrelevant for the purpose of determining whether such nationality is effective); *Nasser Esphahanian v. Bank Tejarat*, Case No. 157, Decision, Iran– U.S.C.T.R. 29 de March 1983, p. 168.

that Mr. Aven's dominant and effective nationality is the American one. Assuming that such evidence is available, we believe that Claimants are more likely than not to succeed in establishing that they are protected investors.

2. Claimants' protected Investment

17. The Treaty contains a broad definition of "covered investments," which includes "every asset" owned or controlled, directly or indirectly, by the investor. As is relevant for the present analysis, the definition of investment includes: (*i*) enterprises; (*ii*) shares, stock, and other forms of equity participation; (*iii*) concessions and other similar contracts; (*iv*) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (*v*) other tangible or intangible, movable or immovable property, and related property rights.[34]

18. Claimants contend that they have five types of protected investments under the Treaty:

(a) Direct investments:

(i) their joint 100% interest in each of the Enterprises (on behalf of which they also bring claims); and

(ii) their ownership of 49% of La Canícula.[35]

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[34] CAFTA Art. 2.1: "Covered investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter."

CAFTA Art. 10.28: "Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."

[35] Notice of Arbitration, Sections II.B, II.C; Exhibit C-7, C-4.

(b) Indirect investments (through the Enterprises and La Canícula):[36]

(i) several plots of land;

(ii) the Concession over the coastal strip granted by the Municipality; and

(iii) nine construction permits and two Environmental Permits.[37]

19. All of the direct and indirect investments identified above are expressly listed under Treaty's definition of investment. However, to qualify as protected investments, Claimants must provide sufficient evidence of their ownership.[38] We provide below our assessment of the evidence submitted by Claimants to prove their ownership of the investment.

Direct ownership of the Enterprises and La Canícula

20. The Treaty does not provide any guidance as to the type of evidence that is required to establish ownership of shares or an enterprise. In general, tribunals have accepted as evidence of ownership copies of share registers, official registry certificates or other corporate documents reflecting ownership.[39] Any of these corporate documents must be authentic.[40]

21. In this case, Claimants have provided, both for the Enterprises and La Canícula, "Certifications of Current Ownership". These are notarized affidavits prepared by a corporate officer who states to have accessed the companies' records as of March 1, 2013 and presents a breakdown of Claimants' shareholding in the Enterprises (the ***Affidavits***).[41]

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36 Given this structure, if the Tribunal decided that it had no jurisdiction with respect to the Enterprises or La Canícula, this would mean that it does not have jurisdiction with respect to the investments made through these vehicles.

37 Notice of Arbitration, Sections II.B, II.C, V; Exhibits C-5, C-11, C-13, C-14, C-19.

38 *Cf*. CAFTA Art. 10.28.

39 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Jurisdiction and Merits, 13 September 2013, ¶ 139 n.101, ¶ 276 n.294 (accepting as proof of ownership a board resolution and a mercantile registry certificate, both listing ownership interests).

40 *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2 141) Award, 13 August 2009, ¶¶ 143-144 (dismissing jurisdiction on the grounds that the claimant failed to produce original share certificates as requested by the tribunal, after respondent challenged the authenticity of the copies it had submitted initially).

41 Exhibit C-4.

22. We have identified the following issues with respect to the Affidavits that will need to be analysed further: (*i*) with the Claimants, to understand whether additional evidence of ownership is available;[42] and (*ii*) with local counsel, to understand whether this evidence constitutes valid proof of ownership under Costa Rican law.[43]

23. *First*, the Affidavits state that the officer accessed the company records and those records reveal the corporations' ownership structure. Thus, it appears that the corporation records do exist. If Costa Rica where to object to this evidence, the tribunal may require copies of the records either at the jurisdictional or merits stages.[44] We note that tribunals have drawn negative inferences from claimants' failure to provide "even basic corporate and legal documents (many of which would be likely to exist if the facts alleged by the Claimants are true) […]."[45] These types of sworn statements have also been challenged in the past by respondents.[46] That said, we note that some tribunals have accepted (at least for the purposes of jurisdiction) the evidentiary value of sworn witness statements showing the ownership structure of the company.[47]

24. *Second*, the Affidavits also disclose that the officer consulted the records on March 1, 2013 – almost a year prior to the submission of the Notice of Arbitration. This evidence might be insufficient to prove ownership at all relevant times.

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42 For example, copies of share certificates, share registries or corporate ledgers, meeting minutes, bylaws, or official information available in public registries.

43 Even though the Treaty and the UNCITRAL Rules are silent with respect to whether international or domestic law should be applied to the assessment of evidence, in practice, tribunals have considered domestic evidentiary requirements to assess whether a party owns or controls an investment, especially when the respondent challenges the evidence presented by the claimant. *See Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Award, 2 September 2011 (***Libananco v. Turkey***), ¶¶ 112-113, 531, 536 (assessing backdated shares and other forged documents under Turkish law to determine whether a legal transfer of ownership had taken place).

44 *AES Corporation v. The Argentine Republic* (ICSID Case No. ARB/02/17) Decision on Jurisdiction, 26 April 2005 (***AES v. Argentina***), ¶¶ 81-84.

45 *See Libananco v. Turkey*, ¶ 531.

46 *AES v. Argentina*, ¶¶ 82-84.

47 *Id*., ¶¶ 83-84: "In this respect, the Tribunal notes that production of expert and witnesses reports is common practice in international arbitration […] Without excluding the possibility of requiring Claimant, later in the course of proceedings, to produce further evidence of ownership and control of its subsidiaries in Argentina […] the Tribunal considers that it was so far sufficiently informed and has no reason to consider in essence the kind of material produced by AES in this respect to be inaccurate."

Concession

25. The Concession grants La Canícula the right to build and operate the Hotel in municipal coastal lands for 20 years.[48] Provided that the Claimants can prove their ownership interest in La Canícula as explained above, we do not see any concerns with respect to the Concession qualifying as a protected investment.

Licenses or similar instruments

26. Claimants allege that La Canícula and three of the Enterprises (*i.e.*, Mis Mejores Años Vividos, S.A., Cerros de Esterillos del Oeste, S.A. and Inversiones Cotsco) hold nine construction permits and two Environmental Permits. As already explained, La Canícula holds one Environmental Permit for the Hotel, while Inversiones Cotsco obtained a second Environmental Permit for the development of the Villas. In our opinion, the Notice of Arbitration contains sufficient evidence of ownership in this regard: Claimants attached copies of the two Environmental Permits, which appear to be valid to date, as well as copies of the nine construction permits corresponding to these entities.[49]

27. We note, however, that under the Treaty, a license, authorization, permit, or concession is an "investment" only if each creates "any rights protected under domestic law […]".[50] From our reading of the documents and without being qualified to provide advice on Costa Rican law, we believe that these permits qualify as protected investments. However, we recommend that local counsel be consulted with respect to the two Environmental Permits and the nine construction permits attached as Exhibits C-11, C-13 and C-14.

Land

28. Claimants assert indirect ownership or right of use over real property (*i.e.*, plots of land in the municipality of Parrita) and have submitted land registry information and a concession agreement to prove the Enterprises' and La Canícula's rights over such plots.[51] Provided that the Claimants can establish their ownership interest in the Enterprises and La Canícula as explained above, we do not see any concerns with respect to the land qualifying as a protected investment.

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48 Exhibit C-10, fifth clause.

49 *See* Exhibits C-11, C-13 and C-14.

50 CAFTA Art. 10.28 n.10.

51 *See* Exhibits C-5 and C-10.

29. Finally, as explained in more detail in paragraph 57 below, we note that the documents provided do not allow us to identify with certainty which of the Claimants' investments were affected by each of the measures.

C. Jurisdiction *Rationae Temporis*

30. The Treaty entered into force on January 1, 2009 and its protection extends to any investments existing at that time[52] and with respect to measures adopted thereafter (although a tribunal may consider acts prior to January 1, 2009 when evaluating breaches of the Treaty).[53] At the time of the Treaty's entry into force, Claimants had an investment, and the alleged measures took place after 2011.[54] Thus, we do not expect any objection – or at least no successful objection –by Costa Rica with respect to the Tribunal's jurisdiction *ratione temporis*.

IV. MERITS ARGUMENTS

31. Claimants assert that Costa Rica's measures are in violation of: (*a*) the Minimum Standard of Treatment; (*b*) the protection against expropriation without compensation; and (*c*) the provisions on national treatment and MFN treatment. We address each of these claims in turn.

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52 CAFTA, Art. 2.1: "covered investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence *as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter*." (emphasis added).

53 CAFTA, Art. 10.1.3: "For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement." *See also Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003 (***Tecmed v. Mexico***), ¶ 66 (analyzing breaches of the Mexico-Spain BIT): "it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force. For this purpose, it will still be necessary to identify conduct —acts or omissions— of the Respondent after the entry into force of the Agreement constituting a violation thereof."

54 *See, e.g.*, Exhibit C-8 (Mr. Aven purchased La Canícula and Inversiones Cotsco in 2002); Exhibit C-7 (listing shareholders of La Canicula as at 1 March 2013); Exhibit C-4 (listing shareholders of the Enterprises as at 1 March 2013); Exhibit C-21 (showing first alleged measure is dated 13 April 2011).

A. Minimum Standard of Treatment

1. The standard

32. Under the Treaty, Costa Rica must treat Claimants' investments in accordance with customary international law, including fair and equitable treatment.[55] The Treaty expressly clarifies that the scope of this protection must be interpreted in accordance with Annex 10-B, which states that the Minimum Standard of Treatment is equivalent to "the customary international law minimum standard of treatment of aliens."[56]

33. There is much academic and jurisprudential discussion about the exact level of protection that this standard affords. Some tribunals interpreting a similar provision under NAFTA have found that the standard places a heavy burden on the claimant to show that a state's acts were "sufficiently egregious and shocking—[*i.e.*] a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[57] However, CAFTA tribunals applying this provision appear to adopt a less strict standard equivalent to the notion of fair and equitable treatment, which arguably does not require evidence of egregiousness.[58] It is to be expected that Costa Rica will argue that the stricter standard applies to this case. Given the current status of CAFTA jurisprudence, we believe that

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55 CAFTA, Art. 10.5.

56 CAFTA, Art. 10.5.2: "For greater certainty, paragraph 1 [Minimum Standard] prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."

See also CAFTA, Annex 10-B: "With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

57 *Glamis Gold v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 616 (applying a standard closer to that of *Neer v. Mexico*).

58 *See, e.g., Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Award, 29 June 2012 (***Railroad Development v. Guatemala***), ¶ 219 ("[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety"); *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013, ¶¶ 454-455, 465 ("[…] if the Claimant proves that Guatemala acted arbitrarily and in complete and willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.").

Claimants should be more likely than not to prevail with respect to the application of a less strict standard.

2. The FET claims

34. Claimants allege that Costa Rica violated the "fair and equitable" standard (***FET***) (or "Minimum Standard" in the language of CAFTA), including:

(a) their right to: (*i*) transparency; (*ii*) due process; and (*iii*) not to be treated arbitrarily; and

(b) their "legitimate expectations" that Costa Rica would "uphold the rule of law and in accordance with its own laws and validly-issued permits."[59]

35. Claimants, however, have not identified which specific measures support these claims. For the purpose of this analysis, we identify below the main relevant measures which we understand to have had a direct impact on the Project.

(a) The Administrative Injunction,[60] following a complaint by an alleged neighbor and competitor, Mr. Steve A. Bucelato;[61]

(b) a judicial injunction issued by the Criminal Court of Parrita halting work on plots 6-79209-F-000 to 6-79496-F-000 of the Villas (the ***Criminal Injunction***, and together with the Administrative Injunction, the ***Injunctions***), in the context of criminal proceedings brought by the Environmental Prosecutor against Mr. Aven and Mr. Damjanac for alleged crimes against the environment (*i.e.*, damage to wetlands and a forest geographically located on or around the Villas);[62] and

(c) A Criminal Court's decision to grant a motion for the retrial of Mr. Aven dated January 31, 2013 (the ***Retrial***) (we address this specific measure in Section 3 below).[63]

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59 Notice of Arbitration, ¶ 53.

60 The Administrative Environmental Tribunal is an organ within the Costa Rican Ministry of Environment (MINAE).

61 Exhibit C-21; Statement of David Aven, paragraph 24; quantum-related document 17, December 2010 report (1), p. 2.

62 Exhibit C-23.

63 Notice of Arbitration, ¶¶ 49-51 and Statement of David Aven, ¶¶ 82-83.

36. Provided that evidence is submitted and accepted by the Tribunal,[64] the following facts would likely serve to reinforce the Claimants' arguments with respect to the unlawfulness of the measures above:

(a) The fact that the Environmental permits for the Villas and Hotel did not mention the presence of wetlands or call for any particular action from the Claimants in that respect.[65]

(b) The fact that at least four follow-up reports prepared by authorities from the Ministry of Environment (MINAE) and SETENA up to August 2010, many of which were based on site inspections, expressly confirmed there were no wetlands on the Las Olas Project (together with (a) above, the ***Resolutions and Reports***);[66]

(c) The fact that government officials presumably requested bribes from Mr. Aven on two opportunities: one time by Mr. Christian Bogantes (the Director of the MINAE office in Quepos) during a site visit, and another by the Municipality of Parrita;[67]

(d) The fact that the MINAE, where Mr. Bogantes worked, suddenly changed its stance as to the presence of wetlands in Las Olas only *after* Mr. Aven refused to pay the abovementioned bribes;[68]

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64 There is an outstanding question of whether the recordings of the bribery attempt may be admissible as evidence in this arbitration, especially if Costa Rican law forbids recordings of third-parties without their consent. The recordings' admissibility will depend on the evidentiary legal standards that will apply to this arbitration. According to the Treaty Article 10.22 ("Governing Law"), the tribunal "shall decide" the "issues in dispute" under the Treaty and "applicable rules of international law." Because there is no universally accepted evidentiary legal regime under international law, tribunals have some flexibility in choosing which evidentiary legal standards to apply. Typically, investment tribunals have referred to the International Bar Association's Rules on the Taking of Evidence in International Arbitration as a guideline to decide such evidentiary legal issues. These Rules allow for challenges to evidence based on "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable." *See* Rule 9.2(b). If Costa Rican law applies, and if it prohibits recordings without consent, there is the potential that, under Rule 9.2(b), the tape of the bribery-attempt may be found inadmissible. In any event, local counsel should be consulted to determine whether Costa Rican law allows this type of evidence.

65 *See* Exhibits C-11 and C-13. Both Environmental Permits appear to remain in force, after SETENA revoked its prior decision to place an injunction on the Project based on an accusation of forgery that was ultimately dismissed. *See* Exhibits C-19 and C-20.

66 Exhibits C-12, C-15, C-16 and C-17. Exhibit C-12 does not expressly address the subject of wetlands, but states that the property in Esterillos Oeste is not within a "protected wilderness area" (in Spanish: "*área silvestre protegida*").

67 Notice of Arbitration, ¶¶ 31-32. According to Claimants, the second bribery attempt is documented on tape. *See* Statement of David Aven, ¶¶ 11(a), 19.

68 Notice of Arbitration, ¶¶ 33-36 and Statement of David Aven, ¶ 20.

(e) The fact that Steven A. Bucelato, the neighbour who filed the complaint that led to the Administrative Injunction, was a competitor allegedly "acting in cahoots" with MINAE to close down the Project;[69]

(f) The fact that Claimants Mr. Aven and Mr. Shioleno were victims of a murder attempt preceded by threatening emails, presumably tied to their activity in Costa Rica.[70]

i. The claims related to the right to transparency, due process and freedom from arbitrary treatment[71]

37. Arbitral tribunals have found that measures similar to those at stake in this case constituted a breach of the FET standard in violation of the right to transparency, due process and freedom from arbitrary treatment. In particular:

(a) With respect to the revocation of existing permits motivated on political considerations: in *Abengoa v. Mexico*, permits of the investor were revoked following a change in the municipal government, and in the midst of local opposition and a political campaign by the new government to close down the project. In reaching its decision that Mexico had violated its FET obligations under the Spain-Mexico BIT, the tribunal accorded weight to the fact that the decision to revoke existing permits seemed to have been *motivated by political considerations* and unfounded reasons, rather than on true—and demonstrable—potential environmental concerns.[72] Here, the Municipality and Mr. Bogantes' alleged bribery attempts and the suspension of the project when it had already been cleared by the relevant authority seem to provide support for arguments of political motivations.

(b) With respect to the direct inconsistency between the attitudes of different organs of the State towards the investment:

(i) *Arif. v. Moldova*: in this case the tribunal found that the inconsistency between the attitude of some authorities—who had awarded and signed a concession—and the *local courts* that later

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69 Statement of David Aven, ¶ 24; *see* Exhibit C-21.

70 Notice of Arbitration, ¶ 51; Statement of David Aven, ¶¶ 11(i), 84.

71 As noted above, for the purpose of this Opinion we have analysed the most relevant decisions (as measured by sector, type of measure, and applicable Treaty), but our review of the case law is not to be considered exhaustive of all relevant cases.

72 *Abengoa S.A. y COFIDES S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/09/2) Award, 18 April 2013 (***Abengoa v. Mexico***), ¶¶ 649-651.

found it to be illegal amounted to a breach of the FET standard.[73] A similar inconsistency between different Costa Rican authorities can be found in the case at hand: the concession contract and initial determinations by SETENA on the environmental feasibility of the Project were subsequently contradicted or rendered inoperative by the Administrative Tribunal and the criminal court that ordered the Injunctions.

(ii) *MTD v. Chile*: in this case, the tribunal found that the inconsistent treatment by the Foreign Investment Commission, which initially approved an investment that was later scrapped by the Ministry of Housing for being contradictory to urban policy, amounted to a violation of FET. The tribunal held that the initial approval granted to MTD was unreasonable given that the investment was bound to be frustrated by Chile's urban development policies. At the same time, however, the tribunal penalized MTD for failing to undertake adequate "due diligence" of its own, and this had an impact on the overall damages.[74] In the present case, Claimants' investment was directly approved by all the relevant authorities after having confirmed that it complied with environmental rules.[75] Thus, Claimants would seem to be even in a better position than MTD since they will be able to prove that they did their due diligence.[76]

(c) With respect to the lack of transparency regarding the rules to grant permits: in *Metalclad v. Mexico* (a NAFTA case), an investor was denied a construction permit by local authorities after having previously secured permits from the federal and state governments and received assurances that no further permits were needed. The tribunal found that the absence of a clear rule concerning municipal construction permit requirements in Mexico, had "failed to ensure a transparent and predictable framework for Metalclad's planning and investment."[77] We note that in the present

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73 *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013 (***Arif v. Moldova***), ¶ 547(b).

74 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) 25 May 2004 (***MTD. v. Chile***), ¶¶ 165-166, 176-178.

75 Exhibits C-11 and C-13.

76 *See* Exhibits C-11 and C-13; quantum-related document 5, Fee proposal (showing Claimants hired local experts to conduct the permitting process for the Project); quantum-related document 10, Mussio Permitting Proposal (1) (same as quantum-related document 5).

77 *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000 (***Metalclad v. Mexico***), ¶ 99. This award was partly annulled by the Supreme Court of British Columbia on the grounds that the tribunal had incorrectly read transparency

case, the rules seemed to be clear and to have been properly followed by Claimants, as evidenced by SETENA's decision of November 15, 2011 to reinstate the Villas Environmental Permit.[78] Thus, Claimants' case is arguably stronger in this respect than that of *Metalclad*.

ii. The claims related to the frustration of legitimate expectations

38. The Claimants also allege that Costa Rica's actions frustrated their legitimate expectations that it would "uphold the rule of law and act in accordance with its own laws and validly-issued permits".[79]

39. Arbitral tribunals have found that measures similar to those at stake in this case constituted a breach of the claimants' legitimate expectations. Specifically:

(a) In *Abengoa v. Mexico*, the tribunal determined that, because claimants had obtained all necessary administrative and environmental approvals, their investment was made in reliance on the legitimate expectation that it was fully compliant with domestic law. The Municipal authorities' political campaign to shut down the plant disregarded the decisions of the federal and state authorities that had issued the permits and frustrated the claimants' legitimate expectations.[80]

(b) In *Tecmed v. Mexico*, the tribunal found that Mexican authorities' arbitrary refusal to renew a permit to operate a landfill in contradiction with prior reassurances, which led to the permanent shut-down of the facility, violated the Spain-Mexico BIT.[81] In particular, Mexico contradicted the expectations created by the successive and continued renewal of permits and other documents executed by the parties.[82]

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requirements into NAFTA Chapter 11's "minimum standard" and "expropriation" provisions. *See The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664. For the most part, however, arbitral case law has recognized that, as a matter of principle, a lack of transparent treatment may amount to a violation of FET. *See, e.g., Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award on Jurisdiction and Liability, 14 January 2010, ¶ 284; *Saluka v. Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 309.

78 Exhibit C-19 (revoking SETENA's prior decision to place a temporary injunction on the Villas due to the alleged presence of a forged document in SETENA's original file).

79 Notice of Arbitration, ¶ 53.

80 *Abengoa v. Mexico*, ¶ 646.

81 *Tecmed v. Mexico*, ¶¶ 154-167, 172-174. *See especially id*., ¶ 154: "The foreign investor also expects the host State to act consistently, *i.e*. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."

82 *Id.*

(c) In *Arif v. Moldova*, the tribunal held that a concession contract, construction and municipal permits issued to build and operate a duty free shop created the legitimate expectation in the investor that they would operate in a secure legal framework and see their investment through. The domestic court's subsequent cancellation of the concession in contradiction with the granting authorities' prior conduct amounted to a violation of the legitimate expectations of the investor.[83] Further, the tribunal reaffirmed the principle that an entity's determination under domestic law may create legitimate expectations for the purposes of international law, even if another entity legally revokes that determination.[84] As applicable here, this would mean that even if expert assessments in the context of the pending Injunctions finally determine that there are indeed wetlands on the Project, Costa Rica could arguably nonetheless be held liable for inducing Claimants to believe otherwise.

40. We note, however, that tribunals have found that government acts do not create legitimate expectations if they are based on erroneous or misleading information provided by the investor.[85] We understand found no evidence that this was the case in the present dispute.

41. Subject to our observations below, and in light of existing case law, we believe that Claimants are more likely than not to prevail in an FET claim with respect to the Injunctions that halted the work on the Project, ignoring that Claimants had followed the required procedures and obtained the necessary permits (which were reaffirmed by the competent authority SETENA in its decision of November 15, 2011).[86] The evidence in the record generally supports these allegations and prior tribunals have found that these types of measures constitute a breach of the FET standard. This conclusion should be irrespective of whether

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83 *Arif v. Moldova*, ¶¶ 541-542.

84 *Id*., ¶ 539 *citing Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (ICSID Case ARB/84/3) Award, 20 May 1992 (***SPP v. Egypt***), ¶¶ 82-83: "Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts." *See also MTD v. Chile*, ¶¶ 165-166.

85 *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006 (***Thunderbird v. Mexico***), ¶¶ 166, 196 (finding that a government advisory opinion as to the legality of investing in certain gaming activities in Mexico did not create legitimate expectations, since it was based on the claimant's misleading request).

86 Exhibits C-11, C-13, C-19, C-21, C-23. *See also* Annex C (listing documents that may have given rise to legitimate expectations).

new inspections and expert assessments ultimately determine that the Project area did have wetlands.

42. The Claimants' case might be further strengthened if: (*i*) they can provide tangible evidence of the bribery allegations (and this evidence is accepted by the Tribunal);[87] (*ii*) the evidence submitted in the criminal trial supports the Claimants' position;[88] (*iii*) they can provide evidence of the alleged assassination attempt of Messrs. Aven and Shioleno and its link with governmental action;[89] and (*iv*) they can produce evidence that Mr. Steven Bucelato, who filed the claim that resulted in the Administrative Injunction, was a direct competitor acting with government officials to shut down Las Olas.[90]

43. We note, however, that the criminal proceedings also relate to the Prosecution's claims that Mr. Damjanac, an employee of Las Olas, arguably violated domestic law by cutting trees without prior authorization.[91] In fact, it seems that Costa Rican authorities had previously warned Claimants that they had to request permission to cut down trees.[92] We do not have sufficient information to assess the strength of these allegations. However, if Costa Rica were to prove them true, the Claimants' case might suffer since: (*i*) the Environmental Permit for the Villas clearly established that trees on the Project site could not be cut without prior authorization;[93] and (*ii*) any breach of domestic environmental law obligations could lead to the automatic cancellation of the Environmental Permits or the imposition of sanctions under the Organic Environmental Act.[94] That said, the fact that Mr. Damjanac was finally acquitted could constitute evidence that there was no violation of domestic law regarding the cutting of trees, and this could suggest that the Criminal Injunction was ultimately

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87 Establishing a link between the bribery attempts and the process that led to the Injunctions would certainly give Claimants' case the political flavor that normally pervades arbitrary treatment in the context of FET violations. See *Abengoa v Mexico*, ¶¶ 649-651. For a discussion of the evidentiary value of the recordings *see* footnote 64 above.

88 There is no such evidence in the record at the moment.

89 Notice of Arbitration, ¶ 51; Statement of David Aven, ¶¶ 11(i), 84.

90 Statement of David Aven, ¶ 24. There is no such evidence in the record at the moment.

91 Exhibits C-22 and C-23.

92 *See* Exhibit C-16.

93 Exhibit C-13, third whereas clause, ¶ 7 ("[…] en caso de requerirse la eliminación de algún árbol, debe de tramitar el permiso correspondiente ante la oficina del MINAE") (author's translation: in case of needing to eliminate any tree, you must apply for the corresponding permit at MINAE).

94 Exhibit C-11, third whereas clause and fourth operative clause; Exhibit C-13, fourth operative clause.

unfounded in that regard.[95] Additionally, the fact that the criminal proceedings are not only limited to this alleged violation, but rather put in question the granting of the permits in general, may help the Claimants' case.

44. Finally, Costa Rica may claim that it issued its initial determinations on the absence of wetlands based on misleading information furnished by Claimants. The methodology to issue the Resolutions and Reports must be examined by a domestic law expert. Nonetheless, it is our understanding that the Resolutions and Reports were primarily based on site visits, and not on documents provided by Claimants. To obtain environmental permits, however, the investors did provide Costa Rican authorities with two Environmental Impact Assessments, copies of which have not been made available.[96] Claimants' representations in the Environmental Impact Assessments may have a bearing on their legitimate expectations claims.

3. The Due Process Rights Claim (Denial of Justice)

45. Separately, Claimants assert a claim for denial of justice, which is expressly listed as a breach of FET under CAFTA.[97] In particular, Claimants argue that Costa Rican courts violated the Treaty by ordering the Retrial of Mr. Aven's criminal case.[98]

46. Denial of justice can be of a procedural or substantive nature. While the former occurs when the courts or administrative authorities refuse to entertain a claim, subject it to undue delay, administer justice in a seriously inadequate way or deny the investor the opportunity to be heard,[99] the latter is related to an error in the application of law that no "competent judge could reasonably have made"

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95 *See* Statement of David Aven, ¶¶ 11(l), 87.

96 Exhibits C-11, C-13.

97 CAFTA Art. 10.5.2(a): "The obligation in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

98 Notice of Arbitration, ¶ 54.

99 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2) Award, 1 November 1999, ¶¶ 102-103; *Thunderbird v. Mexico*, ¶¶ 197-201; *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8) Award, 11 September 2007, ¶ 317: "[I]f the contracting-party is denied access to domestic courts, and thus denied opportunity to obtain redress of the injury and to complain about those contractual breaches, then an arbitral tribunal is in position, on the basis of the BIT, to decide whether this lack of remedies had consequences on the investment and thus whether a violation of international law occurred."

and that results in "an outcome which offends a sense of judicial propriety".[100] The nature of an eventual violation in the present case will depend on whether the law was incorrectly applied by the judge or whether there was a violation of the due process rule. This will have to be determined by a criminal law expert.

47. A claimant's burden to prove denial of justice is generally high and refers to *manifest* injustice. Generally, a mere error by a domestic court in the interpretation of national law is not a denial of justice. A grossly wrongful application of law may nonetheless provide "elements of proof of a denial of justice," only if the error is of a kind which would mean that "the state has failed to provide even a minimally adequate justice system."[101] For example, in one of the CAFTA cases that addressed this claim, the *Iberdrola v. Guatemala* case, the tribunal rejected the claimant's denial of justice arguments on the grounds that "mere discrepancies" with the reasoning of the Costa Rican Constitutional Court, the lack of application of some methods of interpretation and the misuse of others, did not amount to a denial of justice.[102] The threshold for the Claimants is thus high.

48. Most cases that have found a violation of denial of justice under the FET rule or similar provisions in investment agreements have focused on procedural denial of justice, in particular, on issues such as failure to comply with court rulings,[103] undue court delays or extended domestic procedures, in some cases lasting as much as ten years.[104]

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100 *Pantechniki v. Albania* (ICSID Case No. ARB/07/21) Award, 30 July 2009 (***Pantechniki v. Albania***), ¶ 94. *See also Azinian v. Mexico*, ¶¶ 99, 102-103; *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012 (***Iberdrola v. Guatemala***); ¶¶ 477-508; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶¶ 54, 132, 137: "Manifest injustice in the sense of a lack of judicial due process leading to an outcome which offends a sense of judicial propriety is enough […] The whole trial and its resultant verdicts were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."

101 *Pantechniki v. Albania*, ¶ 94; *Jan de Nul N.V. & Dredging International N.V. v. Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008, ¶ 209.

102 *Iberdrola v. Guatemala*, ¶¶ 501-508. *See especially id*., ¶ 503: "What the Plaintiff is asking from this Tribunal is to review the decision of the Constitutional Court and replace it with a new one, based on different criteria of interpretation, or to declare that there is denial of justice because the Court should have applied different interpretive criteria and reasoning. Obviously this is not the function of this Tribunal."

103 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15) Award, 1 June 2009, ¶¶ 451-456 (finding a denial of justice based on the failure of Egypt's President, Prime Minister, and Minister of Tourism to comply with eight Egyptian court rulings from 1996 to 2003).

104 *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) Award, 8 May 2008, ¶ 659; *Chevron Corporation (USA) and Texaco Petroleum*

49. Only one tribunal arguably faced with facts similar to those of this case decided that a trial ruling which clearly discriminated against a foreign investor amounted to a denial of justice. In *Loewen v. United States*, a NAFTA claim arising out of domestic litigation for breach of a funeral services contract, the tribunal found that the decision of a Mississippi judge and jury ordering Loewen post an appeal bond for 125% of the judgment as a condition to stay execution amounted to a denial of justice. In reaching that decision, the tribunal observed that the judge and jury had been clearly prejudiced against Loewen for being foreign, fuelled by the plaintiff's persistent appeals to his Canadian nationality. The tribunal found that the jury's decision was clearly misguided and that the judge had failed to discharge his duty to ensure that Loewen received a fair trial.[105]

50. This case could be instructive if Mr. Aven could support his allegation that both the Prosecutor and the Judge that ordered the Criminal Injunction were clearly prejudiced against him or the Project.[106] We note that there is no evidence in the record that would support such an allegation.

51. We understand that the central question as regards denial of justice is whether Article 326 of Costa Rica's Criminal Code of Procedure (or other provisions) allowed the court of Aguirre and Parrita to order the Retrial of Messrs. Damjanac and Aven, after the first trial had been fully heard save for closing arguments.[107] In their Notice of Arbitration, Claimants argue that this provision exists to protect defendants from protracted criminal trials, and does not allow the

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Company (USA) v. The Republic of Ecuador (UNCITRAL, PCA Case No. 34877) Partial Award on the Merits, 30 March 2010, ¶¶ 253-254 (not applying FET strictly speaking, but rather the guarantee of "effective means of redress" in the applicable treaty). *See also White Industries Australia Limited v. The Republic of India* (UNCITRAL) Award, 30 November 2011, ¶¶ 10.4.22-10.4.24, 11.4.19 (rejecting the argument that 9-year domestic set aside proceedings amounted to a denial of justice under the FET standard, but applying a similar reasoning to accept that, in allowing such lengthy set aside proceedings, India did not guarantee an "effective means of redress"—a potentially less strict standard).

105 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶¶ 119, 135-137: "By any standard of evaluation, the trial judge failed to afford Loewen the process that was due […] International law does, however, attach special importance to discriminatory violations of municipal law. In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant […] the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. The tribunal eventually dismissed Loewen's denial of justice claim because he had failed to exhaust domestic remedies."

106 Statement of David Aven, ¶¶ 11(c)-(g), 82-83.

107 Notice of Arbitration, ¶¶ 48-50.

Prosecution to have "a second bite" at pleading their case.[108] According to Claimants, the judge would have illegally granted the Environmental Prosecutor a fresh start since his witnesses—largely government officials which led many of the environmental enquiries into Las Olas' activity—would have forcefully admitted during trial that the Project area had no wetlands.[109] We note that we have not been able to find in Article 326 or other provisions of the Criminal Procedural Code the rules invoked by the Claimants.

52. Subject to confirmation by local counsel that the criminal judge's interpretation and/or application of the Criminal Code of Procedure were outrageous and clearly misguided (and that indeed a Retrial can only be granted in favor of the accused), there could be enough grounds to substantiate a claim for denial of justice. This claim could be strengthened by providing evidence to support Claimants' allegations that the Prosecutor and MINAE were conspiring to shut-down the Project.[110] The success of Claimants' FET claim on the basis of a denial of justice, however, will largely depend on the expert determinations on issues of criminal law and procedure, outside our area of expertise.

53. Finally, we note that Costa Rica might argue that to invoke a denial of justice, Claimants must exhaust local remedies, since in principle denial of justice only occurs where there are no reasonably available national mechanisms to correct the challenged action.[111] Costa Rica may further argue that there has been no denial of justice since the procedures have not yet been completed and it could well be that Mr. Aven is acquitted. Claimants need to be ready to demonstrate that in this case local remedies should be considered exhausted since they do not provide a reasonable possibility of effective remedy and would imply putting the safety of Mr. Aven at risk.

D. Protection Against Expropriation

54. Claimants argue that Costa Rica has indirectly expropriated their investment by "enjoining" the Project and "creating a situation" where Mr. Aven cannot return to Costa Rica, thus "effectively depriv[ing]" them of any "reasonable prospect of

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108 Notice of Arbitration, ¶ 50

109 Notice of Arbitration, ¶¶ 43-46; Statement of David Aven, ¶ 11(h). In fact, a trial judge in Costa Rica found Mr. Damjanac was not guilty of the crime of which he was accused. *See* Statement of David Aven, ¶¶ 11(l), 86-87, 90.

110 Statement of David Aven, ¶ 11(c)-(g).

111 We note that there are some tribunals which have questioned this requirement. *See, e.g., Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 96 ("Thus under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule are interlocking and inseparable") (internal quotations omitted).

develop[ing]" and reaping profits from their investments.[112] Given the similarity of the arguments relating to FET and indirect expropriation claims, all of our conclusions with respect to the FET claim above are applicable to the expropriation claim. We note, however, that in practice tribunals are more inclined to find breaches of FET than an indirect expropriation, when the claims relate to the same or similar measures.

55. We highlight below some specific aspects related to this claim.

56. *First*, while the Claimants appear to imply that the deprivation of their investment is permanent, Costa Rica will likely argue that even if true, the effect of the measures on the investment is temporary and therefore does not amount to an expropriation. In particular, since the measures halting the Project are injunctions, by definition temporary, the trial could arguably be concluded and the Injunctions lifted if Mr. Aven appeared in court and was acquitted. Claimants' success will thus depend in great part on the evidence available regarding the threats to Mr. Aven, the links between these threats and governmental action, and the risks incurred if he were to go back to Costa Rica. We do not have in the record any evidence that would allow us to assess the evidentiary weight of such threats, links and risks.

57. *Second*, the extent of the effects of the measures would have an impact on the recoverable damages. In this respect, we note that there may be an argument that the totality of the Project has not been affected. The true scope of the impact is unclear from the documentation provided. In particular:

(a) the Administrative Injunction refers exclusively to the Villa's project developed by Inversiones Cotsco; and

(b) the Criminal Injunction forbids Mr. Aven from building works that "affect the natural resource and wetlands that exist where Residential Horizontal Condominium Las Olas [*i.e.*, the Villas] is taking place," and also forbids construction permits from being issued for plots nos. 6-79209-F-000 to 6-79496-F-000.[113] However, the Criminal Injunction expressly rejected the Prosecutor's request that provisional measures be extended to "all Project areas and all other areas administered by the accused."[114] The injunction seems therefore to have left some parts of the

112 Notice of Arbitration, ¶ 60.

113 Exhibit C-23, p. 12. Plots nos. 6-79209-F-000 to 6-79496-F-000 belong to one of the Enterprises, Trios International Inc., S.A. (*see* Exhibit C-5), as shown in the chart of investments at paragraph 10 above.

114 Exhibit C-23, *compare* p. 1 ("paralización de obras en la totalidad del proyecto y todas aquellas que dependan de la gestión de los imputados relacionadas con este [proyecto]") *with* p. 12 (rejecting the measures requested by the prosecutor related to four plots).

Project unaffected, although it is unclear to us at this juncture which parts.

58. We believe that the effect and nature of the measures will be the central issue in asserting the expropriation claims. Tribunals have found indirect expropriation where state measures interfered with the use or enjoyment of the benefits of an investment in an "*irreversible and permanent*" manner.[115] Tribunals have found that the effect of the measures were permanent, for example, in the following cases:

(a) *Tecmed v. Mexico*: because (*i*) the government did not renew a required land-use permit, (*ii*) the landfill could not be sold in the market or (iii) used for another purpose;[116]

(b) *Abengoa v. Mexico:* because permits were revoked and the "context" surrounding the cancellation made it "definitively impossible" to operate the plant."[117] In particular, the tribunal had "no doubt" that the municipality's decision was "definitive and that there was no possibility, in the foreseeable future" that it would "change its position."[118] Mexico, in turn, argued that there was no expropriation because the investor retained ownership of the plant and could use it for other purposes or sell it. The tribunal rejected the arguments because, like in *Tecmed*, the investor could not convert the plant and there was no evidence of a willing purchaser.[119]

59. Even where the deprivation has not lasted *ad infinitum*, some tribunals have found indirect expropriation, but in so doing considered that there was evidence of permanent effect on the operative capacity of the business:

(a) *Tza Yap Shum v. Peru*: in this case the Peruvian tax authorities imposed an *injunction* preventing the claimant's investment (an enterprise) from being able to use bank accounts in Peru. The *Tza* tribunal found that the injunction was expropriatory because it: (*i*) "would have frustrated" the

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115 *Tecmed v. Mexico*, ¶ 116 (emphasis added). *See also, e.g., S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 12 November 2000, ¶ 284 (an 18-month measure "may have significance in assessing the compensation to be awarded in relation to Canada's violations of Articles 1102 and 1105, but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110."); *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 378.

116 *Tecmed v. Mexico*, ¶ 117.

117 *Id.*, ¶ 605 (authors' translation).

118 *Id.*, ¶ 606.

119 *Id*, ¶¶ 608-610.

investments for "at least three years";[120] and (*ii*) had an "immediate and dramatic impact" over the investment, including "not only reducing the business' rate of return, but also substantially *eliminating or frustrating the operative capacity of the enterprise*."[121]

(b) In *Wena Hotels*, the tribunal found that a year-long occupation of a hotel by Egypt was permanent because the investor's "fundamental rights of ownership was so profound that the expropriation was indeed a total and permanent one."[122]

60. Lastly, we should point out that there is some adverse jurisprudence regarding the relationship between *court decisions* and measures tantamount to expropriation. In *Unglaube v. Costa Rica* the tribunal found that two time periods where Costa Rica stopped the investors from building and using their investments were not expropriations. *First*, the tribunal ruled that Costa Rican authorities' "short-lived attempt [lasting about *one year*] to expropriate" land that the investors would use to build a hotel was *not* an expropriation because it was "temporary and ephemeral." *Second*, the same tribunal decided that a *nine-month delay* in developing the hotel infrastructure caused by the Costa Rican Supreme Court was *not* an expropriation because: (*i*) it had "resulted from an *amparo* petition brought by […] persons [that] were properly exercising their legal rights"; (*ii*) the Court's actions, though "objectionable on grounds of needless inconvenience and delay," resulted in "in very little change" to the investors' construction plan; and (*iii*) after the Court's decision, the investors "were free to own, develop, or sell their properties very much as they had been prior to" that decision.[123] The tribunal also noted that "unplanned delays [in building and operating a hotel] occasioned by citizens in exercise of their legal rights are a common occurrence in democracies with independent court systems" and without more—such as evidence that an "agency or ministry of Costa Rica's government was involved in" or "any suggestion that they exerted influence on" court proceedings that caused the delays—do not breach an international treaty's protection against expropriation without compensation.[124]

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120 *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) Award, 7 July 2011 (***Tza v. Peru***), ¶ 169 (authors' translation).

121 *Tza v. Peru*, ¶¶ 156, 162 (authors' translation).

122 *See Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award, 31 October 2005, ¶¶ 119-126 *citing Wena Hotels v. Egypt*, Award, 8 December 2000, ¶ 99.

123 *Unglaube v. Costa Rica* (ICSID Case No. ARB/08/1) Award, 16 May 2012, ¶¶ 184, 226-227, 231, 234.

124 *See Id.* at ¶ 184.

61. In light of the above, the investor's expropriation claims face three hurdles:

(a) *Is the deprivation permanent?* Provided that Claimants can submit evidence of the threats to Mr. Aven, they should be more likely than not to succeed in showing that the Injunctions have permanently deprived them of the use and enjoyment of their investments. Indeed, since 2010 the Injunctions have halted the Project,[125] and the Criminal Injunction may never be lifted unless Mr. Aven appears before judicial authorities for trial, which would put his life at risk. In addition, Claimants may have permanently lost the ability to build the Hotel. The concession on which the Hotel was to be built can be terminated if within a year of its "inscription" in the "General Registry of Concessions," Claimants have failed to commence construction on the Hotel[126] (it is unclear to us however whether these grounds for termination have been invoked yet). Also, like in *Abengoa*, a tribunal may find that the relevant government measures are expropriatory because "there was no possibility, in the foreseeable future" that the government entity involved in the expropriation (here, the courts) would "change its position."

(b) *If not, have the measures eliminated or frustrated the operative capacity of the investment?* If these Injunctions were finite, Claimants will need to prove that they had a "immediate and dramatic impact […] substantially eliminating or frustrating the operative capacity of the enterprise," as in *Tza Yap Shum*. We do not have enough information to opine on the strength of Claimants arguments in this regard but it could help their case if they have evidence that the Concession or other rights have been terminated due to the delay in building the Project.

(c) *What is the justification for the deprivation?* Having overcome all other issues with respect to their expropriation claim, Claimants would need to prove that the Injunctions were motivated by illegitimate means such as corruption or fraud as in *Wena Hotels* and not by their violations of the law (*i.e.* cutting trees without authorization). The likelihood of success will directly depend on the Claimants' ability to provide evidence of their allegations in the Notice of Arbitration (*e.g.* bribes, prosecutorial misconduct, government conspiracy targeting Mr. Aven).

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125 We refer to our discussion above in paragraph 57 about the scope of the Injunctions and which investments they have affected.

126 Exhibit C-10, ninth clause.

E. National Treatment & Most Favoured Nation

62. Claimants argue that Costa Rica treated similar, neighbouring investments of Costa Rican nationals more favourably, in breach of CAFTA's national treatment and MFN standards.[127] To prove such a breach, Claimants must: (*i*) identify one or more domestic and foreign-owned investments which are comparable or "in like circumstances" to the Project;[128] and (*ii*) provide evidence that the Claimants' investment was treated less favourably.[129] Arbitral tribunals have also required evidence that there were no reasonable considerations, such as legitimate policy or environmental goals, that would justify the difference in treatment.[130] Overall, the inquiry is rather case-specific. Some tribunals have found that investors "in like circumstances" are only those carrying out exactly the same economic activity, such as direct competitors.[131] Other tribunals have accepted broader comparisons to investments in the same sector or industry.[132]

63. We believe that an arbitral tribunal will likely find that hotel or timeshare developers which properties adjacent to or neighbouring the Project are investors "in like circumstances." But this claim will likely turn on whether Claimants can prove that the environmental and topographic features of their land is sufficiently similar to that of the investors "in like circumstances." The documents provided to us do not identify any such investors.

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127 Notice of Arbitration, ¶¶ 55-58

128 CAFTA, Arts. 10.3 and 10.4.

129 *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 83.

130 *GAMI Investments Inc. v. The Government of the United Mexican States* (UNCITRAL) Award, 15 November 2004, ¶ 114 (That measure was plausibly connected with a legitimate goal of policy […]"); *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 238.

131 *Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶¶ 171-172; *Methanex Corporation v. United States of America* (UNCITRAL) Award, 3 August 2005, Part IV, Chapter B, p. 6 *et seq*. (explaining that selling similar products may not be considered "in like circumstances").

132 *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467) Award, 1 July 2004, ¶ 173.

V. COMPENSATION

64. Claimants claim three heads of damages: (*i*) compensatory damages valued at USD 70 million;[133] (*ii*) unspecified contingent damages;[134] and (*iii*) moral damages for Claimant Mr. Aven.[135] Below we discuss the bases for each of these heads of damages below. We do not, however, provide an opinion on whether Claimants' monetary estimations are correct.

A. Compensatory Damages

65. We have been asked to opine on the utilization of the discounted cash-flow (***DCF***) method to calculate damages in the present case.[136] We provide below our conclusions on the basis of existing case law and our knowledge of the present case.

66. The Treaty does not stipulate the standard of compensation for breaches of its provisions.[137] In cases where treaties remain silent as to this issue, tribunals apply principles of international law, according to which a monetary award on damages must put a claimant in the position it would have been in had the breach never occurred.[138] In conducting this exercise, arbitral tribunals usually determine the "fair market value" of the investment, by comparing its value in scenario including the measures *vs*. a counterfactual scenario.[139] Investment treaty

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133 Notice of Arbitration, ¶ 61.

134 Notice of Arbitration, ¶ 62.

135 Notice of Arbitration, ¶ 63.

136 Quantum-related documents 11-13 ("discounted cash flow projection modelled over 15 years").

137 The Treaty only sets outs the standard of compensation applicable to *lawful* expropriations, that is, those that comply with the requirements of Article 10.7: "Compensation [for expropriation] shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation'); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable."

138 *Railroad Development v. Guatemala*, ¶ 260 *citing* International Law Commission, Articles on State Responsibility (International Law Commission, 2001), Article 31.1: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *See also Vivendi v. Argentina II* (ICSID Case No. ARB/97/3) Award, 20 August 2007 (***Vivendi v. Argentina II***), ¶ 8.2.7; *Factory at Chorzów*, p. 47.

139 *Vivendi v. Argentina II*, ¶ 8.2.10; *CMS Gas Transmission Co. v. Argentina* (ICSID Case No. ARB/01/8) Award, 12 May 2005 (***CMS v. Argentina***), ¶¶ 409-410. See *Starrett Housing Co v. Iran* (Iran-U.S. Claims Tribunal) Award No. 314-24-1, 14 August 1987, ¶ 277: "Fair Market Value" has been defined as "the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat."

tribunals have generally applied the DCF method to calculate the fair market value of going concerns.[140]

67. However, arbitral tribunals have been reluctant to accept a DCF methodology to assess damages for investments that are not a going concern, or for those that have no proven record of profitability.[141] In the hospitality sector, for example, the tribunal in *Wena*, found that a lack of meaningful sales information rendered DCF calculations "speculative" and only allowed the recovery of sunken costs.[142] Similarly, in *Metalclad*, it allowed only the recovery of the actual expenses incurred.[143]

68. Even though there are some exceptions where tribunals have accepted the DCF methodology to value investments that were not going concerns, these are mainly in the mining and oil industries, where proven reserves coupled with international commodity prices make it easier to conduct cash flow projections accurately even without a track record of operations.[144]

69. In the present case, for the purposes of compensation, the Project can be divided into two main components: (*i*) the Hotel and Beach Club; and (*ii*) the Villas.[145] There might be some indication as to the value and marketability of the Villas, given that the Claimant sold some of the lots.[146] Notably, in *SPP v. Egypt*, while

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140 *CMS v. Argentina*, ¶ 416 (applying DCF to estimate damages of breaches of a treaty's FET standard); *Enron v. Argentina* (ICSID Case No. ARB/01/3) Award, 22 May 2007 (***Enron v. Argentina***), ¶¶ 384-385.

141 *See, e.g.*, *Metalclad v. Mexico*, ¶¶ 119-120; *Tecmed v. Mexico*, ¶ 186 (rejecting the DCF valuation because of the lack of sufficient historical data of profitable operations—just over two years—and a large disparity between the amount of the investment and the compensation claimed).

142 *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award, 8 December 2000, ¶¶ 122-125 (finding that Wena's claims for lost profits, lost opportunity and reinstatement using a DCF analysis would be "too speculative" since the investment was not a going concern); *confirmed in id.*, Decision on Annulment, 5 February 2002).

143 *See, e.g.*, *Metalclad v. Mexico*, ¶¶ 119-120.

144 *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (064/2008), Final Award, 8 June 2010, ¶¶ 74-75: "The application [of DCF] might be justified, inter alia, where the exploration of hydrocarbons is at issue. The determination of the future cash flow from the exploitation of hydrocarbon reserves need not depend on a past record of profitability. There are numerous hydrocarbon reserves around the world, and sufficient data allowing for future cash flow projections should be available to allow a DCF calculation."

145 Exhibits C-11, C-13; Quantum-related document 7, Las Olas Luxury Beach Resort Project Investor Summary, 15 March 2008, pp.6-7; Quantum-related document 16, Business Plan Las Olas Beach Dec 2010, pp, 6-8.

146 Quantum-related document 18, Jovan December 2010 Report to investors; Quantum-related document 17, December 2010 Report (1); Quantum-related document 14, Las Olas Sales

the tribunal rejected claimants' proposal to use DCF, it agreed to reimburse their out-of-pocket expenses plus a lump sum for *lost profits*.[147] Even though SPP's sales were not enough to apply DCF, the tribunal found a way to compensate the investors for the lost opportunity to sell villas in the future. The Tribunal calculated SPP's lost profits on the basis of the actual sales that were made before the project was cancelled (6% of all lots), which it used to determine the "minimum measure of the value of the loss of commercial opportunity".[148] Thus, in this case, Claimants might be able to prove the estimated lost profits of the Villas portion of the project on the basis of past transactions.

70. With respect to the Hotel and Beach Club, however, Claimants' ability to use DCF to calculate their damages will depend on their capacity to provide evidence of comparable projects. In the *Vivendi* case, for example, the tribunal indicated that:

> A claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first-hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of Treaty violation.[149]

71. In conclusion, Claimants have some arguments to support the use of a DCF methodology, but the risk that the Tribunal may consider the projections too speculative (in particular with respect to the Hotel and Beach Club) is material.

Agreements. Sixteen contracts for the sale of lots entered with buyers up to December 2010, totalling USD 874.500 and 7 deposits totalling USD 387,500.

147 *SPP v. Egypt*, ¶¶ 188-218 (refusing to apply a DCF analysis where the investment, a tourist complex, had not been in existence long enough to generate the data necessary for a meaningful DCF calculation and only six percent of lots had been sold; and instead granting out-of-pocket expenses, plus interest and a lump-sum for loss of commercial opportunity).

148 *SPP v. Egypt*, ¶¶ 216-218. The tribunal based its conclusion on the fact that the Claimants had commenced construction of the project and put in place part of the infrastructure, and, in those circumstances, the tribunal could not accept that the project had no value beyond Claimants' out-of-pocket expenses. The Tribunal also recognized that "[t]his determination necessarily involves an element of subjectivism and, consequently, some uncertainty. However, it is well settled that the fact that damages cannot be assessed with certainty is no reason to award damages when a loss has been incurred." *But see Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award, 8 December 2000, ¶¶ 122-125 (arriving at the opposite conclusion and rejecting a claim of lost profits for being overly speculative).

149 *Vivendi v. Argentina II*, ¶ 8.3.10

To mitigate this risk, we recommend that Claimants present alternative valuation methods and detailed information and evidence of their sunken costs.

72. Further, we note that the fundamental rule under international law is that reparation should be made by way of restitution, *i.e.*, the re-establishment by the host State of the situation existing before the adverse measures were taken, or that would have existed had the measures not been taken. Here, that would be lifting the Injunctions and allowing Claimants to build the Project (and presumably dismissing the criminal case against Mr. Aven). Even if, in practice, restitution is hardly ever requested by parties or granted by tribunals, Claimants might consider requesting this remedy as their principal relief, and damages in the alternative.[150]

B. Contingent Damages

73. Claimants are asking the tribunal to order Costa Rica to place in escrow money to pay the costs of "potential lawsuit[s] brought by third parties who purchased lots prior to Costa Rica's breaches and who are not unable to use or occupy the land."[151]

74. The Treaty does not expressly contemplate contingent damages (*i.e.* damages that will occur after an award has been rendered). Contingent damages require a sufficient degree of certainty to be recoverable under international law.[152] Arbitral awards clarify that future incidental damages may be awarded if: (*i*) there is a strong likelihood that the damage will materialize; (*ii*) the future damage can be quantified with some certainty; (*iii*) the future damage stems directly from the state's unlawful conduct.[153]

75. We understand that Claimants entered into 16 separate agreements to sell lots and appear to have received deposits from seven other parties, presumably under similar agreements.[154] We have only been provided with copies of four third-

150 We understand that Vannin will need to find an alternative financial arrangement in this case.

151 Notice of Arbitration, ¶ 62.

152 *Amoco International Finance v. Iran* (Iran-U.S. Claims Tribunal) Award, 14 July 1987, ¶ 238: "One of the best settled rules of law on the international responsibility of States is that no reparation for uncertain or speculative damage can be awarded."

153 *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA Case No. UN3467) Final Award, 1 July 2004, ¶ 210 (refusing to award future VAT refunds on the grounds that this loss was "contingent and undeterminate" and that there was no evidence that the future expense would be incurred). *Cf. Metalclad v. Mexico*, ¶¶ 127, 131 (granting recovery of future costs that would have to be incurred by the investor in the remediation of a landfill site before passing title to Mexico).

154 Quantum-related document 17, December 2010 Report (1), pp. 1-2.

party agreements.[155] With respect to these agreements, we note that from our review, and without being qualified to provide an opinion on domestic law, we understand that they grant the buyer, as a sole remedy in case of default by seller, the right to receive a full refund of all deposits and payments.[156] Under the agreements, the sellers would default if they did not meet their obligations therein, including the obligation to provide infrastructure within a certain time period.[157] Because the Project was halted, we could assume that Claimants defaulted on this obligation, allowing the buyers to recover their deposits and payments in full. If our interpretation is correct, the claim for contingent damages would not be likely to succeed. Local counsel needs to be consulted on this aspect of the claim.

C. Moral Damages

76. Claimants seek moral damages for the "pain and suffering" that Costa Rica has caused Mr Aven, including: fear of being imprisoned; suffering for having been harassed; risk to his life; reputational harm; the impact of a potential criminal record in Costa Rica; and "a personal affront associated with an intrusion on his personal life."[158]

77. Claimants have rarely sought moral damages in investment arbitration. Some investment tribunals have acknowledged the theoretical possibility of awarding moral damages under investment treaties,[159] however, only two have granted them.[160]

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155 Quantum-related document 14, Las Olas Sales Agreements.

156 Quantum-related document 14, Las Olas Sales Agreements, clause entitled "Default."

157 Quantum-related document 14, Las Olas Sales Agreements, clause entitled "Infrastructure." Note that these agreements have an act of god or force majeure provision whereby Claimants need not provide infrastructure if "prevented [to do so] by an act of God or other event not within the control of the SELLER." *See id.*

158 Notice of Arbitration, ¶ 63.

159 *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 28 March 2011, ¶¶ 311; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Concurring and Dissenting Opinion of Arbitrator Born, 24 July 2008 ¶ 32; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009, ¶ 169; *Waguih Elie George Siag v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15) Award, 1 June 2009, ¶ 545; *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award, 13 August 2009, ¶ 181.

160 *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008, ¶¶ 290, 304 (granting the investor moral damages of US$1,000,000 or 1% of moral damages sought, which included reputational loss and the stress and anxiety suffered by the claimant's executives due to being harassed, threatened, detained and intimidated by the Respondent); *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya* (*Ad-hoc*), Award, 23

78. The test to award moral damages is a strict one and requires the presence of "extreme cases of egregious behaviour." The tribunals that have accepted these claims have required showing of "exceptional circumstances," such as physical duress, armed threat, illegal detention, a deterioration of health, stress, anxiety, or other mental suffering such as humiliation, shame and degradation. Both the cause and effect must be "grave" or "substantial."[161] At a minimum, a claimant must prove a loss of reputation, credit or social position.[162]

79. Here, Claimants allege that Costa Rica has "caused and continues to cause Mr. Aven […] significant pain and suffering, including physiological suffering due to fear of imprisonment and harassment, risk to life […] reputational harm and the impact of a potential criminal record."[163]

80. In light of existing precedents, to succeed, Claimants would need to prove: (*i*) the extent of any reputational losses he endured; and/or (*ii*) evidence of actions by Costa Rica that gravely threatened his physical or physiological integrity. In his Statement, Mr. Aven claims that he received threatening emails, some from government entities.[164] He also claims that on April 15, 2013, people linked to Costa Rica attempted to murder him and another investor, Mr. Shioleno, forcing him to flee the country.[165] We found no evidence of any of these claims in the documents reviewed, aside from Mr. Aven's own account. Assuming these claims can be established and proved, Mr. Aven may improve his odds of obtaining moral damages, although as already explained the likelihood of success of these types of claims is generally low.

March 2013, p. 369 (in the hospitality sector, granting moral damages of USD 30 million because Respondent's "tarnished" claimant's "worldwide reputation […] as a highly qualified [company], […] its reputation in the stock market, as well as in the business and construction markets in Kuwait and around the world").

161 *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB/05/17) Award, 6 February 2008, ¶ 289-290, 253, 304; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 28 March 2011, ¶ 333; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009, ¶ 169; *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award, 13 August 2009, ¶ 181; *Waguih Elie George Siag v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15) Award, 1 June 2009, ¶ 545.

162 *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 28 March 2011, ¶¶ 333-344; *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya* (*Ad-hoc*), Award, 23 March 2013, p. 369.

163 Notice of Arbitration, ¶ 63.

164 Statement of David Aven, ¶¶ 11(i), 84.

165 *Id.*

VI. COSTA RICA'S COUNTER-CLAIMS

81. Costa Rica has suggested that it may assert counter-claims against Claimants.[166] Costa Rica may have to overcome some hurdles in order to establish the jurisdiction of the Tribunal over counter-claims since the Treaty does not expressly allow a respondent to assert counterclaims. That said, the Tribunal could still assert jurisdiction or consider some of these arguments in the context of the claim presented by the Claimants. Defending against counter-claims can materially increase the cost and time of the proceedings and should therefore be carefully considered by Vannin.

* * * *

We hope that you will find this information helpful and we remain at your disposal for any additional queries.

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166 Costa Rica's Response, ¶ 34.

ANNEX A

DOCUMENT REQUEST

We suggest that you obtain the below additional documents or information to further assess the strength your clients' case against Costa Rica.

EVIDENCE TO BE OBTAINED	REASON	REFERENCED IN / RELATED TO
Proof of Mr. Aven's Italian nationality, and proof of his dominant and effective nationality.	To assess whether Mr. Aven is an "investor" under CAFTA.	Exhibit C-18 at page 3; Exhibit C-20 at page 2; and Exhibit C-21 at page 1, first whereas clause.
Corporate documents of the Enterprises and La Canícula.	To strengthen Claimants' statement that they own shares in the Enterprises and in La Canícula.	Exhibit C-4.
Environmental Impact Assessments prepared by La Canícula and Inversiones Costco C&T, S.A.	To better assess legitimate expectations arguments. These might need to be reviewed by local counsel.	Exhibits C-11, C-13.
Pre-approval to cut down trees.	To better assess legitimate expectations arguments.	Exhibits C-13, third whereas clause, ¶ 7
"Actualización del plan de gestión ambiental para el Proyecto de condominio horizontal residencial Las Olas"	To assess Claimants' claims for breach of fair and equitable treatment, specifically a frustration of Claimants' legitimate expectations. This might need to be reviewed by local counsel.	Exhibit C-17, operative clause 2.
"Informe consolidado de la situación actual del Proyecto"	Same as above.	Exhibit C-17, operative clause 3
"Informes regenciales" required by Res. No. 1597-2008-SETENA	Same as above.	Exhibit C-17, operative clause 4
Evidence of the two bribery attempts including that of Mr. Bogantes of MINAE that was allegedly recorded on 27-28 August 2010.	Would bolster claims of breach of fair and equitable treatment, and potentially moral damages.	Exhibit C-18; Statement of David Aven.

Proof that the murder attempt was linked to Costa Rican authorities.	To bolster Claimants' claims of unfair and inequitable treatment and moral damages.	Notice of Arbitration; Statement of David Aven.
Recordings of the criminal trial.	To assess denial of justice claim.	Notice of Arbitration; Statement of David Aven.
Oficio SINAC 67389RNVS-2008	An administrative document alleged to be fraudulent, and which MINAE contended was the base for granting the Environmental Permit of Inversiones Costco C&T S.A. Would bolster Claimants' claims of a breach of their legitimate expectations. This document might need to be reviewed by local counsel.	Exhibit C-19, Third "Whereas" Clause, point 3.
Complete Administrative Environmental Proceedings File No. 34-11-01-TAA.	To understand the outcome of these proceedings, and whether the injunction was lifted or remains in place.	Exhibit C-21
Complete Criminal Court File No. 11-000009-611-PE.	To further understand the criminal proceedings against Claimant Mr. Aven.	Exhibit C-22, C-23.
Evidence of investors with investments "in like circumstances," as discussed above.	To substantiate Claimants' MFN and national treatment claims.	N/A
All third-party agreements in relation to the Las Olas Project.	To assess contingent damages.	Quantum-related document 14 ("Las Olas Sales Agreements").
Evidence of reputational harm to Mr. Aven.	To bolster moral damages claim.	N/A

Annex B

TIMELINE OF RELEVANT EVENTS

Date	Event
2 February 2002	Inversiones Cotsco C&T is incorporated in Costa Rica (Exhibit C-9)
18 February 2002	Concession of land to set up a Hotel granted to La Canícula (Exhibit C-10)
April 2002	Mr. Aven acquires Inversiones Cotsco C&T and La Canícula (Exhibit C-8)
17 March 2006	First environmental clearance for the hotel portion of Las Olas Project (La Canícula) (Exhibit C-11)
2 April 2008	SINAC/MINAET confirms that one of the properties is not within an wilderness protected area (Exhibit C-12)
2 June 2008	Second environmental clearance for the villas portion of Las Olas (Inversiones Cotsco) (Exhibit C-13)
29 August 2008	Construction permits for some of the properties (Exhibit C-14)
16 July 2010	SINAC inspection determines there are no wetlands (Exhibit C-15)
13 August 2010	Ombudsman's Office files an environmental complaint at the request of Mr. Steve Bucelato (neighbor) (Exhibit C-16)
18 August 2010	SETENA on-site inspection confirms there are no wetlands. (Exhibit C-17)
27 August 2010	SINAC recalls previous reports confirming there are no wetlands. No permits to cut-down trees have been sought (Exhibit C-16)
27-28 August 2010	During on-site inspection, Mr. Bogantes presumably requests a bribe (Exhibit C-18)

Date	Event
1 September 2010	SETENA dismissed complaint filed by Mr. Bucelato and confirms absence of wetlands. Requires presentation of follow-up reports. (Exhibit C-17)
July-September 2010	Construction permits for some of the properties (Exhibit C-14)
February 2011	Mr. Steve Bucelato filed an administrative environmental complaint against the villas portion of Las Olas Project (Exhibit C-21)
18 March 2011	Mr. Aven obtains copies of the SINAC report dated 16 July 2010, which determined the absence of wetlands (Exhibit C-18)
13 April 2011	SETENA places a first injunction on the Villas portion of Las Olas, based on the alleged forgery of a document used to issue initial environmental clearances (Exhibit C-20)
13 April 2011	An administrative environmental tribunal places a second injunction on the villas portion of Las Olas Project, as a result of Mr. Bucelato's February 2011 complaint (Exhibit C-21)
16 September 2011	Mr. Aven files criminal complaint against Mr. Bogantes (Exhibit C-18)
21 October 2011	The District Attorney's Office files a criminal complaint against Mr. Aven and Mr. Damjanac for crimes against the environment (damage to wetlands and unauthorized cutting of trees) (Exhibit C-22)
15 November 2011	SETENA lifts the first injunction placed by that office on 13 April 2011 (Exhibit C-19)
30 November 2011	The Criminal Court of Parrita places an injunction on Messrs. Aven and Damjanac to halt all works on Las Olas Project (Exhibit C-23)
31 January 2013	Criminal Court grants motion for re-retrial of Mr. Aven (Statement of David Aven, ¶ 83)

ANNEX C

DOCUMENTS RELEVANT TO ASSESS LEGITIMATE EXPECTATIONS

Document	Legitimate Expectation
SETENA Environmental Permits - Resolutions issued in 2006 and 2008 (Exhibits C-11 and C-13)	Do not mention the existence of wetlands or other protected areas.[167] These resolutions provided the environmental clearance for the Project.
SINAC/MINAE's letter dated 8 April 2008 (Exhibit C-12)	The property in Esterillos Oeste "is not within a protected wilderness area."[168]
SETENA Resolution No. 2086-2010 dated 1 September 2010 (Exhibit C-17)	Dismisses an environmental claim brought by a neighbor of the Las Olas Project, Mr. Steve Allen Bucelato, on the grounds that inspections to the area revealed that there were no wetlands. Specifically, the resolution states that, "in the area of the [Las Olas] project there was no evidence of a presence of wetlands […] or of bodies of water."[169]
SINAC/MINAE's report dated 16 July 2010 (Exhibit C-15)	Details the results of an environmental inspection of the Las Olas property in Esterillos Oeste, which confirmed the absence of wetlands of any kind.[170]
SINAC/MINAE's letter to SETENA dated 27 August 2010 (Exhibit C-16)	Reiterates the findings of the previous SINAC report, stating that "with respect to the [site] visits, there is no indication that there are wetlands, lakes no ponds."[171]

[167] Exhibits C-11 and C-13. We note that a Director at SINAC/MINAE subsequently filed for and obtained the administrative revocation of the environmental clearance issued to Inversiones Cotsco T&C alleging that one of the reports from her office considered in that process had been forged. However, Inversiones Cotsco's environmental clearance was ultimately reinstated by SETENA on 15 November 2011 (*See* Exhibits C-19 and C-20). La Canícula's environmental clearence was never formally challenged.

[168] Exhibit C-12 ("la propiedad ubicada en Esterillos Oeste […] no está dentro de un área silvestre protegida").

[169] Exhibit C-17 ("en el area del proyecto no se evidenció la presencia de humedales […] o de cuerpos de agua."

[170] Exhibit C-15.

ANNEX D

DOCUMENTS REVIEWED

Documents reviewed in the preparation of this Opinion:

(a) Vinson & Elkins' memorandum to Vannin Capital dated September 25, 2014, and accompanying appendices, including the so-called witness statement of Mr. David Aven and Costa Rica's response to the Claimant's Notice of Arbitration.

(b) The Notice of Arbitration, along with its twenty-five exhibits and eight legal authorities, presented by Vannin Capital's clients; and

(c) Nineteen damages-related documents.

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[171] Exhibit C-16 ("con respecto a las visitas, no se indica que se encuentren humedales ni lagos ni lagunas").