

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN  
REPUBLIC CENTRAL AMERICA FREE TRADE AGREEMENT AND THE  
UNCITRAL RULES OF ARBITRATION (2010)**

**DAVID R. AVEN, SAMUEL D. AVEN, CAROLYN J. PARK, ERIC A. PARK,  
JEFFREY S. SHIOLENO, DAVID A. JANNEY AND ROGER RAGUSO  
(United States of America) (Claimants)**

v

**THE REPUBLIC OF COSTA RICA (Respondent)**

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**SECOND WITNESS STATEMENT  
OF ESTEBAN BERMUDEZ RODRIGUEZ**

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I, **ESTEBAN BERMUDEZ**, of San José, Costa Rica, SAY as follows:

1. I am the same Esteban Bermudez that gave a witness statement on November 11, 2015 (my “**First Witness Statement**”). I make this second statement in support of the Claimants and their Reply Memorial in these proceedings.
2. The matters contained in this witness statement are true to the best of my knowledge, information and belief. The facts and circumstances contained in this statement are within my own knowledge or derived from information and documents provided to me by those reporting to me, in which case I refer to the corresponding source of information.
3. I confirm that the Claimants’ lawyers, Vinson & Elkins RLLP, have assisted me in preparing this statement, but I also confirm that its contents set out my evidence to the Tribunal in these proceedings.
4. I make this statement to address matters arising from the Respondent’s Counter Memorial dated April 8, 2016, as well as the Respondent’s evidence, expert reports, and witness statements referred to therein.

5. In my First Witness Statement, I have already set out the background to my involvement in the Las Olas project and I will not repeat that here. In this statement, to the extent that I am able, I provide further details of my involvement with the Las Olas project and respond to other discrete issues raised by the Respondent.

**I. The Environmental Viabilities**

6. I have read paragraph 141 of the Respondent's Counter-Memorial, in which the Respondent references four separate Environmental Viability applications – two each for the Concession and Condominium Sites. My company, DEPPAT, helped the Claimants obtain the first Environmental Viability for the Concession Site in 2005. We did not assist the Claimants with any of the other Environmental Viability applications.
7. In addition, as I explained in my First Witness Statement, I acted as Environmental Regent for the Condominium Site after its Environmental Viability was obtained in 2008.
8. In relation to the Environmental Viability that the Claimants obtained for the Condominium Site in 2002, I note that the Respondent states at paragraphs 146 and 147 of the Counter-Memorial that the Claimants submitted their file to SETENA without a biological study addressing the presence of wetlands or forests. I have no direct knowledge of this file, as I was not involved, so I cannot comment on the veracity of this statement. However, in my experience of applying for Environmental Viabilities, the responsibility to submit all necessary studies is shared by the developer and the environmental consultant. If they consider that a particular study is not needed, they must justify their position to SETENA and it is SETENA, as the approving authority, that has responsibility for accepting or rejecting the justification given. Therefore, if the Claimants did not submit a biological study with their application, they would have been required to justify this omission to SETENA, who apparently allowed the application to proceed on that basis.
9. In the circumstances, when SETENA received the Claimants' application for the Environmental Viability for the Condominium Site, it was SETENA's responsibility to ask for a detailed biological study if they thought it necessary. As part of the Environmental Viability process, SETENA reviews in detail all the documents submitted by the developer and the environmental consultant and conducts a site inspection. These steps should be sufficient for SETENA to decide whether a biological study (or any other study) is needed before an Environmental Viability will be granted. In the circumstances, I do not think it is a fair reflection of the way the application process works for the Respondent to imply that the failure to obtain a biological study (if one was necessary) is the Claimants' fault. SETENA must share in that responsibility since it ultimately decided to grant the Environmental Viability for the Condominium Site.
10. At paragraph 293 of its Counter Memorial the Respondent states that the Claimants' "*omissions*" in their Environmental Viability application for the

Condominium Site enabled them to obtain a “*low score*” in order to avoid having to conduct an Environmental Impact Study, which is a more stringent requirement than the Environmental Management Plan. Although I had no involvement in this application process, as mentioned above, I would like to point out that this statement ignores the fact that the “*low score*” has to be reviewed by SETENA, who has a shared responsibility in failing to identify any additional studies or data, where needed, to evaluate the site and the project. For example, SETENA must have known that the project site was “*within a few meters of the Aserradero River*” if that is indeed the case. If, as a result of that fact, SETENA required additional studies to be undertaken or should have increased the Claimants’ overall score, then SETENA must take responsibility for failing to do so. SETENA alone is responsible for approving the application and issuing the Environmental Viability and any “*omissions*” from the file by the developer or the environmental consultant must either be allowed or identified by SETENA.

## **II. Environmental Contingencies Plan for Land Movements**

11. The July 22, 2010 Environmental Contingencies Plan for Land Movements was prepared by my company, DEPPAT.<sup>1</sup> Mr Aven asked DEPPAT to prepare this plan which he said was required by the Municipality of Parrita before construction could commence.
12. The Respondent points out at paragraphs 172 to 174 of its Counter Memorial that this Plan refers to the wrong SETENA file number. The Respondent is correct. The Plan should have referenced the SETENA file for the Condominium Site (1362-2007), since that is what it related to. This was a simple clerical error on DEPPAT’s part, presumably because at that time we were only just familiarising ourselves with the construction of the Las Olas project. In any event, nothing came of it and I note that the cover page of the Plan does refer to the “*Proyecto Condominio Horizontal Residencial Las Olas.*”

## **III. Alleged Presence of Wetlands**

13. Prior to the Respondent’s Counter Memorial, I had never had sight of the Protti Report. I note that the Respondent claims that this Report shows that since 2007 the Claimants were aware of the existence of wetlands on the Las Olas project site. From what I observe in relation to the Protti Report and from a map of the Las Olas project site attached to the Counter Memorial, the Protti Report describes an area of poor drainage located on the Condominium Site and the area of the easements.
14. Although I am no expert in wetlands identification, in my view poor drainage of rain water is not a conclusive indication of the presence of a wetland. If this were the case, the whole of Esterillos Oeste town and its streets, especially the area around the soccer field which has the worst drainage problems, would be potential wetlands.

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<sup>1</sup> Exhibit C249 Mitigation Plan for Las Olas; Exhibit C252 Updated Management Plan for Las Olas

15. In my experience as an Environmental Regent, I would have expected the Claimants, their environmental consultant and SETENA to have this issue of poor drainage in mind throughout the Environmental Viability process, regardless of the Protti Report, since it was obvious from a visual inspection of the project site that that particular area suffered from poor drainage. As I mentioned earlier, SETENA is required to conduct a thorough field inspection prior to approving a developer's application. Therefore, if SETENA was concerned about this area of the project site, it should have pointed that area out and requested additional studies.
16. I do not accept that the Protti Report provides any indication as to the existence of wetlands.

#### **IV. Alleged Fragmentation of the Project Site**

17. I have read what the Respondent says about the alleged fragmentation of the project site into sub-projects and the impact this had on the overall environmental assessment. As I have already mentioned, I am not familiar with the other sections of the project but I have come across a lot of projects that are evaluated in stages, especially where the developer is planning to develop the project in a specific order.

#### **V. Site Conditions**

18. I note the Respondent's statement at paragraph 200 of the Counter Memorial that the July 2010 SINAC Report noted that vegetation had been burnt and that SINAC should demand that the Claimants "*stop destroying vegetation and obtain the necessary permits to cut down trees.*" In all the bi-monthly inspections I carried out, I only ever noticed the cutting of grass and shrubs and never the cutting of large trees or the burning of vegetation, as reflected in my reports.
19. I note that the Respondent claims that there were construction works going on at the Las Olas site after the Claimants were ordered to stop all work. As far as I know, this is not the case. As my bi-monthly reports between April and November 2011 show, there were no construction works on the site at that time - only minor maintenance works on the already constructed roads and access routes to prevent adverse environmental effects, such as planting of vegetation and sedimentation control works. The sedimentation control works included putting sand bags around the storm water drainage to block the sediments carried by run-off water and planting grass in the areas of exposed soil to prevent run off from eroding the top layers of soil.

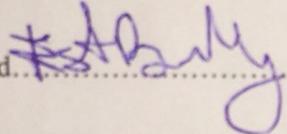
#### **VI. DEPPAT'S Role as Environmental Regent**

20. At paragraph 149 of its Counter Memorial, the Respondent states that on April 3, 2009, DEPPAT notified SETENA of its withdrawal as Environmental Regent for the Condominium Site (under the first Environmental Viability that was issued for the Condominium Site in November 2004) because the Claimants had not indicated a start date for the development of Villas La

Canícula. I was not personally involved in this withdrawal and unfortunately I have not been able to check DEPPAT's records to confirm this because DEPPAT's files have since been destroyed. This happened a few years ago, when we got rid of all of the inactive files, including Villas La Canícula.

21. I also note that the Respondent states at paragraph 156 of the Counter Memorial that on June 1, 2010, the Las Olas project developers asked SETENA for authorization to replace DEPPAT as Environmental Regent for the Concession for an alleged breach of environmental laws. At that time we were named Environmental Regent for a lot of projects. As we had not had any news from a number of developers for some time, we decided to resign from all of those projects, including the Concession Site. I have absolutely no idea where this suggestion of an alleged breach of environmental laws has come from. We certainly never committed any breaches of environmental laws. The timing of the letter does not make any sense either. We did not carry out any site inspections until September 2010 when Mr Aven first asked us to prepare an actual situation report of the site, so there is no basis on which we could have breached any environmental laws by June 2010 in any event.

I believe the facts stated in this WITNESS STATEMENT are true.

Signed.....

Esteban Bermudez Rodriguez

Date.....22/07/2016