

**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)

**SECOND WITNESS STATEMENT
OF NESTOR MORERA VÍQUEZ**

I, **NESTOR MORERA VÍQUEZ**, of calle 9, avenidas 7-9, Heredia, Costa Rica,
SAY as follows:

1. I am the same Nestor Morera Víquez that gave a witness statement on 27 November 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 evidence, expert reports, and witness statements contained therein.
5. In my First Witness Statement, I have already set out the details concerning the criminal trial of David Aven, and I will not repeat that here. In this statement, to the extent that I am able, I provide further details in response to certain points related to Mr. Aven's criminal case as addressed in (1) the Witness Statement of Luis Martinez Zúñiga, dated April 8, 2016; (2) the Witness Statement of Mónica Vargas Quesada, dated April 8, 2016; and (3) the Respondent's Counter Memorial. I have also included additional commentary regarding Mr. Martinez's misleading statements of law and the general inappropriateness of bringing criminal charges against Mr. Aven.

I. Clarifications of the Law

6. Both the Respondent's Counter Memorial and Mr. Martinez's Witness Statement of April 8, 2016 contain several legal assertions that are either incorrect or otherwise misleading.
7. First, Mr. Martinez claims that there is "*ample case law*" confirming that individuals have served prison time for the illegal felling of trees. This is a misleading statement, as it is highly unlikely for someone to go to prison for this type of crime if it is the person's first offense. The authorities relied upon by Mr. Martinez largely deal with repeat offenders, in which case prison sentences are common. However, neither Mr. Aven nor Mr. Damjanac had ever been charged with crimes in Costa Rica before the charges of October 21, 2011. In any event, as discussed below, given the lack of evidence in this case, it was highly inappropriate for Mr. Martinez to prosecute Mr. Aven for any type of crime, much less a crime that carried even a slight possibility of prison time.
8. Second, Mr. Martinez claims in his Witness Statement that he opposed entering into an agreement in which the adjournment of Mr. Aven's criminal trial would be extended, such that the "ten-day rule" as set forth in Article 336 of the Criminal Code would not apply. It is true that Mr. Martinez stated that if he accepted the defense's proposal to enter into this type of agreement, he believed that future acts and proceedings of this case would be deemed null by higher courts. Mr. Martinez is incorrect on this issue. In fact, the most recent line of cases in the Constitutional Court,¹ the Tribunal de Casación Penal,² and the Third Chamber of the Supreme Court³ all confirm that an agreement to extend the ten-day period as set forth in Article 336 would not pose a risk of unenforceability on appeal. Pursuant to the local rules of interpretation of laws and legal provisions, it is those more recent decisions that would be considered in determining the effect of an agreement to extend the ten-day period. Mr. Martinez is fully aware of these recent authorities, as he

¹ Exhibit C231, Sala Constitucional, Decision No. 5200-99

² Exhibit C234, Tribunal de Casación Penal, Decision No. 147-2000

³ Exhibit C253, Sala Tercera, Decision No. 36-2011

specifically acknowledged them in our discussions regarding the ten-day rule at trial, but he still refused to agree to the extension. In my opinion, the so-called “*ample case law*” referenced by Mr. Martinez had no effect on his decision to refuse our proposal. Instead, he made this decision in order to get a second trial after making detrimental mistakes in the first. It is also my opinion that any such second attempt would fail in light of the lack of evidence of any criminal wrongdoing.

9. Third, Mr. Martinez discusses the “*precautionary principle also known as in dubio pro-natura*” in his witness statement. The precautionary principle under Costa Rican law provides that serious environmental threats and health hazards should be anticipated and forestalled before the damage takes place, even if scientific understanding of the risks is inadequate. However, the precautionary principle does not, in and of itself, necessitate the filing of criminal charges. In fact, there is substantial case law from the Constitutional Court of Costa Rica that follows the principle of “*ultima ratio*,” under which criminal prosecution should be the last remedy pursued, and should only be pursued if other remedies are inadequate.⁴ In the case of Mr. Aven, Mr. Martinez ignored the principle of “*ultima ratio*” and considered criminal prosecution to be his first and only option, despite the fact that any disputes related to the Las Olas site could have very easily been dealt with through the contentious administrative or civil jurisdictions, as discussed in further detail below.
10. The precautionary principle does not excuse the criminal prosecutor from the duty to gather evidence in formulating a criminal case before filing a charge. In my opinion, Mr. Martinez failed to fulfil this duty in many respects, including but not limited to the following:
 - (a) Failure to interview the environmental regent for Las Olas project;
 - (b) Reliance on a series of non-technical witnesses who made inaccurate statements to support a case that was complicated and highly scientific; and
 - (c) Disregarding much of the evidence cited by Mr. Aven in his original declaration, which demonstrated that Mr. Aven carefully and diligently went through a permitting process for the Las Olas project that took years.
11. In light of these factors and others discussed in detail below, it cannot be said that Mr. Aven had the intent to commit a crime. Mr. Martinez has used the precautionary principle to justify his decision to move forward with a criminal

⁴ See, Constitutional Court Decisions *e.g.*, Exhibit C229, 153-A-97 September 23, 1997; Exhibit C230, 64-F-99 March 1, 1999; Exhibit C232, 473-99 October 29, 1999; Exhibit C233, 2000-86 February 4, 2000; Exhibit C235, 2000- 639 August 21, 2000; Exhibit C238, 2002-1021 December 19, 2002; Exhibit C239, 2003-948 September 22, 2003; Exhibit C240, 2004- 98 February 12, 2004; Exhibit C243, 2005-1209 November 15, 2005

investigation and indictment in the absence of sufficient evidence to do so. This is not a proper use of the precautionary principle.

II. Prosecution of Mr. Aven's Case

A. Competence Issues

12. It is important to understand that Mr. Aven's case never should have been the subject of a criminal prosecution. The criminal branch of the government is not the competent authority on the issues raised in Mr. Aven's case. Instead, Mr. Aven's case was an administrative one, which dealt with a complex permitting regime and highly technical environmental classifications.
13. The existence of a wetland is a technical discussion in the sense that the definition of a wetland requires demonstrating several conditions that are far beyond the scope of a criminal proceeding. Criminal proceedings require certainty in all concepts and definitions. In Mr. Aven's case, SINAC arbitrarily changed its criteria for determining the existence of a wetland. From 2007 to 2010, witnesses such as Rolando Manfredi of SINAC issued agency reports that noted the existence of small bodies of water that did not constitute wetlands. For an unknown reason, in 2011, that same small body of water suddenly became a wetland, according to SINAC. The basis for the change, as described by Mr. Manfredi in his trial testimony, turned on whether the property was assessed during the dry season or during the wet season. It is absurd to think that the question of whether Mr. Aven is guilty of a crime can somehow be answered differently depending on the time of year.
14. Technical environmental discussions are generally reserved for civil or administrative proceedings that include more detailed evidentiary discussions. Criminal proceedings must be limited to determining the certainty or uncertainty of the facts related to the accusation. Criminal proceedings are not intended to address technical issues such as the difference between a small body of water and a wetland. In the case of Mr. Aven, the fact that different agencies arrived at different conclusions based on different criteria demonstrates in and of itself that there was a lack of sufficient certainty to proceed with a criminal prosecution, and that this particular matter should have been resolved at the administrative level.
15. This is further confirmed by the Principle of Objectiveness as set forth in Article 63 of the Criminal Procedure Code. Mr. Martinez knew about the inconsistencies among the various agencies in their conclusions as to the environmental conditions of Mr. Aven's property and their criteria for determining the existence of a wetland and/or a forest. As a prosecutor, Mr. Martinez has a duty to decline his own competence to prosecute certain cases, and he should have exercised that duty in regard to Mr. Aven's case. Mr. Martinez and the criminal branch in general are not competent to discuss the existence or non-existence of a wetland or a forest. This is something he should have recognized in determining whether to move forward in filing criminal charges.

16. Mr. Martinez's misconceptions about his own scope of competence were evident in his conduct at trial. During the preliminary hearing phase of Mr. Aven's case, Mr. Martinez listed numerous witnesses in an effort to prove the existence of wetlands and a forest by means of declarations. Not all of these witnesses were permitted to testify, as there are limitations on the number of witnesses that can testify in Costa Rican criminal proceedings. Eventually, the judge permitted a total of eleven witnesses for the prosecution. However, the fundamental problem for Mr. Martinez was that witness declarations are insufficient to prove the existence of certain environmental conditions, especially when there are disagreements among public agencies as to the existence of those conditions.
17. Mr. Martinez chose to rely on the testimony of several laypeople at trial who did not have any sort of technical background, such as Steve Bucelato. During his testimony, Mr. Bucelato offered a highly exaggerated and ridiculous description of the project site that included references to exotic animals such as flamingoes and panthers, neither of which inhabit the Las Olas site. His testimony is just one example of witnesses testifying for the prosecution despite having no understanding whatsoever of the actual issues of the case. Monica Vargas is another example, as she was similarly lacking in an environmental background and therefore not in any way qualified to give an opinion of the technical matters at issue. The ineffectiveness of these witnesses was the reason that Mr. Martinez applied a second time at trial to introduce additional witnesses. However, similar to the application made during the preliminary hearing phase, the judge rejected Mr. Martinez's request at trial, and also on appeal.

B. The Element of Intent

18. It was clear from the outset of the criminal proceedings that it would be impossible for the prosecution to meet its burden of proof. Criminal liability under Costa Rican law requires proving the element of intent. This means that it was Martinez's burden to show that Mr. Aven intended to drain and fill a wetland and intended to cut down trees that fell within the scope of Costa Rican forestry laws. On the most basic level, proving the intention to harm a forest and a wetland requires proving the defendant's knowledge that a forest and a wetland actually exist.
19. Mr. Martinez's failure to recognize that he could not establish the element of intent was a gross mistake. Mr. Aven had already been granted environmental viability permits as well as construction permits for the project site. The permits were the product of Mr. Aven's compliance with environmental regulations. Indeed, the permits were direct evidence that Mr. Aven intended to comply with and reasonably believed that he was in compliance with Costa Rican law. Certain agency officials might have disagreed with the environmental findings underlying the decision to issue those permits, but that is not a matter to be resolved through criminal prosecution. Instead, it is a matter to be resolved through the administrative agencies that issued

contradictory findings. Mr. Martinez's failure to recognize this was a serious misstep.

III. Testimony During the Trial

20. In addition to providing misleading or otherwise inaccurate statements of law, Mr. Martinez and the Respondent have also mischaracterized portions of the witness testimony during Mr. Aven's criminal trial. I have described the testimony in detail in my First Witness Statement and will not do so again in this Statement. Instead, I will address certain portions as described in the Counter Memorial and witness statements related to the criminal trial that I consider to be inaccurate or otherwise misleading.
21. First, Mr. Martinez describes the witness testimony of Dionel Burgos González as "*very important,*" and criticizes my First Witness Statement for not addressing the testimony. It is a gross exaggeration to claim that Mr. Burgos's testimony was "*very important.*" Mr. Burgos apparently visited the Las Olas project site and made conclusions as to the existence of wetlands based on such factors as the existence of small lagoons and visual observation of birds and other animals. He did not conduct any sort of technical analysis, nor is he qualified to do so. Many of the prosecution's witnesses, including Mr. Burgos, were not educated in the criteria for classifying an area as a wetland. I was able to expose this during cross examination, when I asked these witnesses to provide an accurate definition of the term "wetland" under Costa Rican law. None of them were able to answer this question.
22. Second, Mr. Martinez claims that "*[o]f all the witnesses heard, the most relevant and illustrative to the court in regards to the wetlands matter was Lic. Jorge Gamboa Elizondo.*" Again, the importance of Mr. Gamboa's testimony is misstated. Mr. Gamboa did not have sufficient experience to cover all aspects of the classification of a wetland, and Mr. Martinez failed to fill the gaps in Mr. Gamboa's qualifications through the testimony of other witnesses. Specifically, Mr. Gamboa does not have any education on edaphology, or the study of soils. This is an indispensable element in a wetlands determination, which is the precise reason that Mr. Martinez ordered the soil analysis from INTA.
23. Once he received the INTA report, and he became aware of the inconsistencies between the INTA report and Mr. Gamboa's report, Mr. Martinez should have recognized that there were serious doubts as to whether wetlands existed on the project site. Once again, the fact that environmental experts disagreed as to whether wetlands existed on the project site should have been a clear indicator that it would be impossible to establish that Mr. Aven actually *intended* to drain and fill the alleged wetland. Mr. Gamboa's testimony was relevant, but not for the reasons stated by Mr. Martinez. The testimony was relevant because it further reinforced the fact that the issues raised in Mr. Aven's case should have been resolved through the administrative or civil process, and not in the criminal courts.

24. Third, Mr. Martinez's discussion of the settlement of Mr. Aven's criminal case is misleading and largely irrelevant. According to Mr. Martinez, "*it could be seen that the multiple attorneys hired by the defense were interested in negotiating a settlement, but Mr. Aven was not in agreement with this.*" He further states that "*it was due to Mr. Aven's decision that no settlement was reached.*" Mr. Martinez offers no explanation as to how it could be "*seen*" that Mr. Aven's attorneys encouraged negotiating a settlement. Additionally, the reason Mr. Aven refused to settle the case was a matter of principle. Mr. Martinez would have required Mr. Aven to admit to committing a crime as part of any settlement. Mr. Aven refused to do this. The implication that Mr. Aven's refusal should somehow be held against him is nonsensical. Mr. Aven had the right to a trial, and the prosecution had little to no evidence to support its case. It is also important to understand the consequences of the "*restoration*" plan proposed by the prosecution. Such a plan would have impeded Mr. Aven's development of the project site, in spite of the permits that had already been issued. Mr. Aven did not believe that this was an acceptable alternative.

IV. Conclusion

25. As mentioned above, the discussion of these points is in addition to the deficiencies in the prosecution's case as described in my first witness statement. It is my opinion that Mr. Martinez acted improperly in charging Mr. Aven with a crime given the lack of evidence and the administrative nature of the case.

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

Signed.....

Nestor Morera Viquez

Dated.. 8/21/16