

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

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

v

THE REPUBLIC OF COSTA RICA (Respondent)

**FIRST WITNESS STATEMENT
OF NÉSTOR MORERA VÍQUEZ**

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

1. I make this statement in support of the Claimants' 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.

I. Background

4. I am a senior partner at Bufete Morera & Morera, a Costa Rican law firm founded by my father 35 years ago. The firm has expertise in numerous practice areas, including criminal defence, environmental law, and most recently, intellectual property. The U.S. embassy has listed the firm as a criminal litigation firm since 2003. This is, I believe, one of the reasons David Aven hired us to defend him against criminal charges brought by the Costa Rican government. Most of our criminal litigation cases deal with agricultural and environmental crimes, as my father has an academic specialty in environmental law, which has been paired with the firm's background in criminal litigation. However, the firm has also handled other criminal matters, such as extradition cases for the U.S.
5. My primary litigation focus is on criminal defence. Before Mr. Aven hired me to represent him, I had experience with cases similar to his, in which the government charged individuals with forestry law violations. My previous experience related to other sites in Costa Rica, mainly in the North (Sarapiquí) North Pacific (Guanacaste) and the Atlantic regions. These cases generally concerned developers or farm owners who cut down trees without permits or cut down more trees than their permits would allow. The penalties for these violations may include condemnation of land for a certain number of years and/or payment of a fine. Prison time for such offences, even if proved, is extremely rare, almost unknown. Our firm had also handled several criminal cases involving wetlands violations, and many of those cases also included forestry issues.
6. Our law firm is used to dealing with the technical environmental requirements of Costa Rican government agencies. The environmental agency officials drive the enforcement process in Costa Rica, and the agencies' technical criteria are

very important. One of the biggest problems in Costa Rica is that there are too many agencies involved in the enforcement of environmental regulations, and this causes a significant amount of confusion. That confusion is compounded by frequent changes in agency leadership and the lack of coordination between them. The top agency official in each area of the country is responsible for enforcement of environmental regulations. Some areas have rigorous enforcement, while others are less strict. The degree of enforcement is not only inconsistent across regions, but it constantly changes, depending on the current leadership.

II. Introduction to Costa Rican criminal procedure

7. I first became familiar with the Las Olas project when I received a call from Manuel Ventura, who is also a Costa Rican litigation attorney. This would have been around May, 2012. Mr. Ventura and I have been friends for many years, and he knew that I had handled cases involving environmental crimes. I met with Mr. Aven at Mr. Ventura's offices and Mr. Aven explained the charges filed against him. A different Costa Rican attorney named Gavridge Perez Porras had previously represented Mr. Aven.
8. In addition to meeting with Mr. Aven, I visited the Las Olas site one time in the fall of 2012. The construction site is near the road, so I had already seen it a number of times before the 2012 visit. During that visit I toured the property, including the area of the alleged wetland, and observed no body of water whatsoever on the site.
9. There are three stages in Costa Rican criminal proceedings. And the investigation and prosecution stages are handles separately. The governmental institution dealing with the prosecution of criminal actions is the Public Ministry, through its section against frauds. The police force that conducts criminal investigations is the Judicial Investigation Bureau (*Organismo de Investigacion Judicial*) under the control and direction of the prosecutor. This includes gathering evidence.

A. INVESTIGATION STAGE

10. The prosecutor is in charge of the investigation, prepares the accusation, and follows it up in court. He will open the investigation file, with the name of the offended, the offender, and the criminal qualification of the crime. He is entitled to determine how the crime is qualified, and decide if it is prosecutable or not, depending on various factors: such as:
 - a. The time frame: If the crime is very old, it might already have expired and be non-prosecutable (This is determined by the highest penalty applicable to the specific crime).
 - b. Whether the crime is so insignificant that it would be more expensive to prosecute than to forget it.
 - c. Whether the offender has already suffered a punishment so severe that imposing a new penalty would make it disproportional to the crime (This is called Natural Penalty).
11. After analyzing all this, as well as the evidence, testimonies, etc., he presents his case before the criminal judge of the preliminary phase, for him to decide if the matter should go to trial or not.
12. On the other hand, the victim has the right to participate in the criminal proceedings and must be notified about any court rulings that conclude the case and can appeal if there are findings that dismiss a criminal charge. He can help the Prosecutor to obtain all the evidence necessary to prosecute the offender. He can also obtain remunerative indemnity for the damage made to him in this same process, so the Fiscal will ask the offended if he wants to become "*Querrellante*," to help him prosecute and/or "*Actor Civil*," to get indemnity for this damage.

B. PRELIMINARY HEARING:

13. After the investigation is over, and the judge has enough evidence to consider if there is a possibility to present the case to trial, he calls a preliminary hearing to hear the arguments of all the parties before deciding whether to

send it to trial or not. The prosecutor, the offended (if he decided to act as Querellante or Actor Civil), the offender, and any interested party will present themselves before the judge and present their case to him. Also, as part of the normal procedure, if the crime allows, a deal or negotiation can be made between the offender and the offended. Before starting the hearing the judge will ask the parties if there is any possibility of settlement between them, or if there is any proposition by any of the parties for the other to analyze.

14. If a settlement is reached between the parties involved, and the prosecutor also considers he is satisfied with the agreement, then they present it to the judge for his consideration. After analyzing all the issues, the judge will approve or disapprove the settlement, propose different conditions he thinks necessary for the agreement, and make his decision. If the settlement is approved then the criminal case is closed; if the agreement has time limits to be met as part of the settlement, then the case will be closed when the conditions are reached. If there is no agreement, each party will present its case before the judge, and he will decide if the case goes to trial or not, normally within a lapse of two days after the hearing.
15. If the judge finds that there are not enough merits, evidences and grounds to continue to next stage, then he will issue a dismissal of the case (*sobreseimiento*) that may be appealed by any of the parties within three working days. The strategy in this case is to intervene in this hearing and offer new arguments stating that this conflict is of commercial or civil nature rather than criminal. Therefore, the case must be heard in the commercial or civil courts and not in the criminal one.

C. DEBATE HEARING:

16. The trial itself is public and both sides must orally set forth their cases. Three panel judges retire to deliberate, then give a verdict. The verdict sets forth the basis for the court's decision and legal principles. Then comes sentencing. The decision of the Criminal Court may be appealed to a Superior Tribunal which

in turn can be appealed to the Third Chamber of the Supreme Court which hears only criminal appeals.

III. Mr. Aven and the Criminal Case

17. I became Mr. Aven's attorney right before the preliminary hearing, which is the middle stage of the process. It is normal for an entire case to last about three years. In some areas of the country, the time period may be shorter, but three years is normal for areas near the coast. Typically it takes between a year and eighteen months to get from the middle phase to the trial.

18. One of the initial challenges in my representation of Mr. Aven related to an alleged forged document. Prior to my involvement, Mr. Aven had voluntarily submitted numerous documents as part of a declaration to the environmental prosecutor in May of 2011. Some of these documents were not material to the case, and in some instances they actually had a negative impact on the case. One such document was a National System of Conservation Areas, or Sistema Nacional de Áreas de Conservación ("SINAC"), report dated March 27, 2008 describing an investigation of the Las Olas project, which Mr Aven had received from SINAC by fax some years later.¹ After SETENA issued the environmental permit to the condominium section of the Las Olas project on June 2, 2008,² the Ministry of the Environment, Energy and Technology (MINAE) alleged that SETENA's decision was based in part on the alleged forged document. As a result, SETENA revoked the environmental viability permit on April 13, 2011.³ However, SETENA subsequently reinstated the permit on November 15, 2011 when it determined that the alleged forged document did not actually form the basis for the original permit, meaning that whatever the status of the report in question, it was irrelevant to the permitting of work at Las Olas.⁴

¹ Exhibit C47, SINAC Report on Las Olas, March 27, 2008

² Exhibit C52, SETENA Environmental Viability, June 2, 2008

³ Exhibit C122, SETENA Revocation, April 13, 2011

⁴ Exhibit C144, SETENA Reinstatement of Environmental Viability, November 15, 2011

19. Mr. Aven gave his declaration to the environmental prosecutor in May of 2011, shortly after SETENA revoked the environmental viability permit. During the meeting, Mr. Aven brought the alleged forged document to the prosecutor's attention in an attempt to defend himself, and argued that he did not believe it was forged. At the time of the meeting, the environmental prosecutor had not made any allegations regarding the alleged forged document. However, after the meeting, the prosecution began a new line of investigation against Mr. Aven for submission of a false document.

20. From that moment on, we were tied to those allegations. The prosecution filed a new charge against Mr. Aven in relation to the alleged forged document, and as a result, Mr. Aven's case became much more serious. The prosecution was not only alleging that he was an environmental infringer, but also that he would submit whatever he wanted in support of his case—even a false document. This altered the tone of the criminal investigation, as it made the prosecution's case appear much stronger. It also affected our defence strategy, as we were forced to confront allegations of fraud in addition to the environmental charges.

IV. Preliminary Hearing

21. The preliminary hearing took place on June 19, 2012. At the hearing, I applied to have the case stricken and argued that it had no merit on the basis that :
 - a. It was demonstrated that the project started in 2002 as a development of a horizontal condominium.
 - b. That the permits and authorizations required for such a project were gradually requested and granted with the help and expert criterion of professionals in different matters: topographers, engineers, lawyers and finally an official regent: Mr. Esteban Bermúdez.
 - c. That the alleged facts and criminal behaviors required the demonstration of the knowledge and specific intent of the environmental damages. The demonstration of a clear and unquestionable knowledge that a crime

was/can be committed is an indispensable element that was not complied with and/ or satisfied by the parties.

- d. The alleged trees did not comply with the technical criterion to be considered as such (dimensions, diameter).
22. That request was denied, and the judge decided to move Mr. Aven's case to trial. This is the simpler course of action for a judge at a preliminary hearing in Costa Rica. If the judge wants to withdraw a case on the merits, the judge has a much more intensive job, as opposed to just sending the case to the third and final stage. The judge's decision at the preliminary hearing was a poor one and lacked any serious consideration of the issues before him. The opinion was just five pages and it followed a standard form, despite the fact that the case involved numerous accusations and a great deal of technical criteria.
 23. The deficiencies at the preliminary hearing stage became more evident at trial. The preliminary hearing stage provides the prosecutor with the opportunity to remove anything that is not relevant to the case. In this case, the prosecutor had a bad filter, and not enough of the case was taken out of play. This meant that we took too much information with us to trial, which is one of the reasons the trial lasted too long. It should have been over within a few days.

V. Trial Procedure

24. A typical day at court during a criminal trial in Costa Rica starts at 8 AM and lasts until 4:30 PM, with a one-hour break for lunch and other shorter breaks of five to ten minutes. The state must prove everything. There is no particular standard such as "*beyond a reasonable doubt*," but the practice is the same. The state has the burden of proof.
25. At trial, the party that submits witnesses asks questions first, followed by the counterparty and then the judge. Written statements are not allowed, so the person that introduces the witnesses has to bring out their evidence orally. There is no cross examination, and leading questions are prohibited. We are required to ask questions related to specific facts, but the questions must be

open-ended and cannot contain part of the answer. Experts must answer everything. Judges can often tell when people are withholding information, and they will put pressure on those people to provide a complete answer.

26. Witnesses are generally not to be interrupted and the practice is to let them speak. Asking for opinions is prohibited, and the judge may intervene to prevent this practice. Questions may only elicit facts, although there are ways of overcoming this with the proper technique. Some judges are very strict, while others are not. Rafael Solis Gullock was our judge in the first trial. I had prior experience litigating cases in his court, and Judge Solis was somewhat lazy. He had little technical knowledge and did not appear engaged in the substantive issues. Judge Solis's approach at trial differed from Judge Maureen Víquez Córdoba, the judge in the second trial. Judge Víquez was younger and fairly strict—she was proactive and engaged on the issues and she directed and managed the case very well.
27. Plea bargaining takes place during the trial, and at Mr. Aven's trial the state requested an extraordinary amount of money that was in the millions. Mr. Aven did not want to settle anything, as a matter of pride. At one point, the prosecutors claimed that their boss would not allow them to negotiate a settlement with Mr. Aven, stating that settlement requires permission from two or three levels of seniority above their position, and they did not have that. Additionally, the prosecution believed Mr. Aven's case was important for the memory of the year. Every prosecutor's office in Costa Rica maintains a report that tracks convictions. The prosecution felt that a conviction in this case would reflect positively on their yearly statistics. This was likely another factor in their decision to move the trial through to the final stage.

VI. The Prosecution's Motivations

28. The prosecution's approach in the trial was very interesting. The trial was a very lengthy process for a claim that amounted to US\$ 12,000, which was the amount requested in the monetary claim attached to the criminal charge. There

is no logic to having a three-week trial for this type of case. At worst, the trial could have resulted in a three-year prison sentence and a fine of US\$ 12,000.

29. Nonetheless, the prosecution in Mr. Aven's case demonstrated a high level of commitment, and the reasons for this were not entirely clear. There was allegedly political pressure leading up to the trial. Prosecutors in Costa Rica tend to push those cases that they believe will send a political message. There were also allegations that the surrounding population was very angry with the project, and that some neighbours had suffered flood damage as a result of the construction. Prior to the trial, Mr. Ventura and I went to a very strange meeting with Sergio Baldelomar, head of the environmental prosecution unit. He suggested that Mr. Aven's case was an important one for the unit, and that they could not retreat from prosecuting it. He stated that the community was affected, and that the prosecution's role was to protect communities.
30. Nonetheless, the prosecution failed to substantiate any of the allegations regarding the project's effect on the community. In fact, the prosecution never investigated the surrounding population or verified which neighbours should be contacted. They also failed to provide any identification or names of any of the allegedly concerned neighbours, and presented no evidence of flood damage caused by the construction.

VII. Defence Strategy

31. During the trial we applied to have the case stricken, arguing that it had no merit. The argument was premised on a lack of jurisdiction, and I was very sincere in advancing this argument. Our position was that even if the property had sustained environmental damage—which we denied—a criminal court was not the proper venue to have that very technical discussion. A criminal proceeding is not that open to having balanced, nuanced issues. This would be better dealt with in a civil proceeding, where the offender's property can be condemned and the offender can be forced to pay a monetary fine, regardless of intent.

32. One of the strongest arguments that we used at trial was that the works had been authorised by government authorities. Under Costa Rican law, criminal liability requires proving intent. We argued, as a matter of fact, that Mr. Aven could not have had the intent to violate environmental laws when he had various experts' opinions and permits duly granted by the municipality and by SETENA, all confirming that there were no protected wetlands or forests on site. Mr. Aven only started the work at Las Olas after receiving the relevant permits and approvals. Proving intent was always the prosecution's weakest point.

33. In some jurisdictions, ignorance is never a defence, but in Costa Rica things are quite different. Someone who violates Costa Rican environmental laws must pay fines, regardless of whether that person intended to violate those laws. This is not the same in criminal cases. In criminal law, the prosecution must prove that the defendant acted with the requisite intent. In Mr. Aven's case, the prosecution had the burden of fully demonstrating that Mr. Aven purposefully dried the wetlands for his own economic gain. We submitted the entire story, from 2002 when the first documents concerning the Las Olas project were filed, to 2010 when the Municipality of Parrita granted the permits. After receiving those permits, Mr. Aven began the works, and that is when the case started.

VIII. Trial

34. Shortly before the trial began, Judge Solis called a meeting to discuss the possibility of a settlement. Typically settlement negotiations take place during the preliminary hearing phase as opposed to trial. When I showed up to this particular meeting, the prosecutor was already in the judge's office. The judge is never supposed to have anyone in his office, but the prosecutor attempted to do this anyway. Given the substantial evidence that supported his case, Mr. Aven was not interested in a settlement and instructed me to decline any settlement offer. As a result, the trial began on December 5, 2012.

A. Witnesses

1. Defence Witnesses

35. The only expert that I met and interviewed was Johannes Cuvero, a wetlands specialist working for the National Agricultural Technology Institute, or Instituto Nacional de Tecnología Agropecuaria (“INTA”). We had a productive interview in which he provided a credible explanation that he maintained during his testimony. He explained the technical definition of the term “wetland,” and described the soil of a wetland and why the soil at the Las Olas site was not the same. Mr. Cuvero had no doubt that there were no wetlands on the Las Olas site. A real wetland consists of dead soil of a particular colour, with no vegetation. The water stays there for weeks and is not absorbed.
36. He told us that there are eight types of soil—types one through four cannot be considered wetlands, while types five through eight can. The soil at the Las Olas site was between type three and four. The prosecutor’s allegations were particularly flawed because he did not pay attention to the soil, instead choosing to focus on factors such as the amount of water and birds.
37. Mr. Diogenes Cubero testified twice—he was indispensable to us and one of the strongest parts of our defence. We were mostly addressing technical criteria from several agencies. He provided the only technical counterargument from a non-partial institution. Mr. Cubero also had the advantage of being very eloquent, a quality that is not common in technical experts. He is a teacher, which made him very didactic—another helpful quality. In his testimony, Mr. Cubero complained about why the various agencies never pay attention to the soil. The agencies were following obsolete biological definitions not used by anyone.
38. Mr. Cubero also emphasized the fact that SETENA, a very important government agency, issued a report three years prior to the closing of the project stating that there were no wetlands on the property. On that basis, SETENA granted an environmental viability permit to the project, and in

doing so, took into account the issue of whether there were wetlands on the project site. In response, the prosecution pointed out that SETENA also suspended the project from April 13, 2011 to November 15, 2011, but subsequently reopened it. However, there was no technical basis for the temporary suspension. The prosecutor also argued that SETENA could not be trusted given they had less technical expertise than other agencies that were better able to assess environmental issues. This was a very poor argument.

2. Prosecution's Witnesses

39. Initially, we feared Steve Bucelato. His complaint against Mr. Aven, which was submitted to the prosecutor, was well-drafted and authenticated by a lawyer. Nonetheless, our fears proved to be unfounded, as his declaration at trial was very poor. During his testimony, Mr Bucelato did not appear lucid and his demeanour was strange. He attempted to establish himself as a nature lover and protector, and spoke about various animals such as jaguars, as if the project site was the most biodiverse place in the country. At one point he said he was a nature lover and went to the property to take photographs, after which Mr. Aven pointed out that this was trespassing. Nothing that Mr. Bucelato said was supported by any documentary evidence. I asked him whether he recognized certain pictures in the file, and he said that he took them with his camera. When I asked where he took those pictures, the location he provided was completely different from the location listed in the complaint that he signed.

40. Another neighbour by the name of Alberto "Beto" Mora testified at trial. Mr. Mora was a politician who was running for congress, and he also owned a nearby hotel. He testified that he had always lived in the area and had not seen the type biodiversity referenced by Mr. Bucelato. However, he did note that the property was full of cows. This may have been the reason for the Guácimo trees, which are linked to livestock and grow very quickly in the presence of livestock. The presence of Guácimo trees is an indicator that cows have been in the area recently. This was an important point for us from a technical perspective, as it demonstrated that the property had previously been used as a

cattle pasture and that the Guácimo trees were not the types of trees contemplated by Costa Rican forestry laws.

41. The prosecution then offered witnesses from government agencies. The first was Rolando Manfredi, who was Chief of ACOPAC, or the Pacific Central Unit of SINAC. We spent a significant amount of time with him. SINAC had previously issued Inspection Report ACOPAC-OSRAP371-2010 SINAC of July 16, 2010, stating that there were no wetlands on the property.⁵ This report was based on an inspection conducted by Mr. Manfredi and Christian Bogantes on July 8, 2010. SINAC subsequently reversed course and took the position that there were both wetlands and forests on the property. I asked him why this happened, particularly when he was a biologist and worked for a public agency. He was very nervous and gave a very poor excuse, claiming that within those three years they developed more accurate criteria and more accurate methodologies.

42. The second government agency witness was Mr. Bogantes, and his testimony was a total disaster for the prosecution. Mr. Bogantes opened his testimony with the allegation of the forged document. I asked him about his educational background, and he stated that he had a bachelor's degree. He claimed that he knew certain things about wetlands, so I asked him to provide a definition of a wetland, which he was unable to do. I also addressed the July 16, 2010 SINAC report with Mr. Bogantes and he failed to give a coherent explanation as to why the findings in this report were inaccurate or should not be considered. This made Mr. Aven very angry.

B. Section 336 of the Costa Rican Criminal Code

43. Under Section 336 of the Costa Rican Criminal Code, if a criminal trial has been suspended for ten days, then the proceedings must stop and start all over again. Mr. Aven's trial began on December 5, 2012 and was adjourned for the

⁵ Exhibit C72, July 2010 SINAC Inspection Report Confirming No Wetlands (SINAC ACOPAC-OSRAP371-2010), July 16, 2010.

holidays and the New Year on December 19, 2012. Before the adjournment, the court briefly suspended the trial on a few occasions, but none of those suspensions came close to implicating the ten-day provision of Section 336. One of the reasons for these suspensions was that incarcerated individuals needed to have hearings, and those hearings took priority over Mr. Aven's trial. It was also due to workloads. This was a court with only one judge and no substitutes. We were told that any substitute judge would have to come from Puntarenas, but the Puntarenas court was also very busy.

44. The trial was also unusually long due to the prosecutor. He had the choice of providing a summary of the charges. Instead, he read everything. I filed motions opposing this, but they were denied. The prosecution also tried to submit six additional witnesses at trial, citing extraordinary evidence that was not available at the preliminary hearing. Generally the trial witnesses and evidence to be offered at trial are approved at the preliminary hearing. However, in this case, the prosecutor realized that things were not going well. As a result, he filed a motion to bring on six additional witnesses who had been listed at the preliminary stage, although the judge had not accepted them. The judge had accepted about six or seven witnesses, and the prosecutor wanted six more. There was an argument that took almost an entire morning between the parties on this issue, and it lengthened the trial. Additionally, everything had to be translated, which took double the time.
45. After the holidays and the New Year, the trial was scheduled to proceed on January 16, 2013. At this point, the only matters that remained were the closing statements of the defence and the prosecution. A day or two before the trial was scheduled to resume, the judge submitted a writ stating that he would be away because he had a problem with his left hand. He also stated that he would attempt to find the time to carry on with the hearings. This was frustrating because we had shown our case and all of our resources, and the judge submitted the writ on the last day when I was supposed to give my conclusions. At this point, the prosecutor had already delivered his conclusions: The trial was close to being over.

46. I knew the judge from other judicial circuits, including one near the airport, and he was lazy. It is common in Costa Rica for judges to be sent near the coast for their last phase before retirement, as the work in coastal areas is not too intense. The judge's decision was strange, given that he did not need his left hand for anything. In fact, he is right-handed, and in any event, he never wrote anything—his assistant would type for him. This was the first time in my life that this has happened. It is the first time I've seen a suspension of more than ten days, and it was especially strange given the poor excuse. Normally a suspension will only occur in the event of something serious or as a result of an unavoidable timetabling issue.
47. The judge also failed to warn us about the suspension. We were supposed to be in court on Wednesday, January 16. On Tuesday, we received notification that the judge was going to San José for medical attention. Under Section 336, there are several cases stating that although a re-trial generally is automatic after the ten-day period, the trial may proceed by agreement of the parties. In light of this rule, we scheduled a private meeting with the prosecution to discuss an agreement to proceed with the trial, but the prosecution refused to agree.
48. In reality, the prosecution wanted the case to be repeated because they had made critical mistakes. The biggest mistake was that they could not establish intent. Additionally, there was no technical evidence, and the witnesses were a mess, as they repeatedly contradicted themselves. In light of these mistakes, the prosecution had no intention of continuing with the old trial, but would try to get a new trial so that they could include the six additional witnesses. Mr. Aven's trial was my only experience with Section 336 in the past few years, and I had never experienced it in a situation similar to Mr. Aven's trial—this was not a typical example of the ten-day rule at all. The rule was not intended to provide the prosecution multiple opportunities to obtain a conviction. The prosecution used the stay to get a second chance to try the case after making mistakes in the first instance. In this sense, the prosecution was committed to its case on a level typically not seen in Costa Rica. Unfortunately, in this case it was for the wrong reasons.

49. After this sudden cancellation of the trial, Mr. Aven understandably became very upset., I told him that this was very bad news, and that it was the first time in my professional life that this had happened. However, whilst I understood his frustrations, I could not say that it was corruption. This was a case of a lazy judge. It was frustrating that the Costa Rican state could not just put one person up there for another day.

IX. Events After the Trial

50. After the trial, Mr. Aven experienced a dangerous episode involving gunshots. He was returning from Quepos, near a well-known bridge. He was with a friend from Miami. A man on a bike then fired five gunshots at his car.
51. There were allegations around this time that Mr. Bucelato hired some people to carry out the shooting. Mr. Bucelato had pursued the Las Olas property, which Mr. Aven eventually purchased. Mr. Bucelato organised a list of neighbours for the prosecutor that he claimed would support his claims against the Las Olas project at trial, but none of them showed up. I always felt that this list was false. Mr. Bucelato also raised concerns with the community. After the shooting incident, I believed Mr. Aven that Mr. Bucelato really was behind something. Mr. Bucelato was the first person to file a complaint against Mr. Aven. This was very interesting. The investigation and prosecution had not been started as a result of the proactive behaviour of the prosecutor or because the local community was suffering. It was Mr. Bucelato. There was this strange link between Mr. Bucelato, who is a private person, and a criminal trial. The link was not the community.

X. Jovan Damjanac's Acquittal

52. Mr. Damjanac was tried a second time in January, 2014. This second trial went well for us and Mr. Damjanac was acquitted. The prosecution failed to establish the element of intent to carry out the crime, and this was reflected in the judge's decision. The decision was not a good one—85% of it consisted of

the reproduction of testimony. It was also very poorly written. This is the reason that the prosecution has filed an appeal. They have argued that the judge's reasons were inadequate and the judgment should be overturned.

53. At the second trial, Judge Viquez acknowledged that the project had full permits and that it had been demonstrated that the project was handled by professionals hired to assist with acquiring those permits. The judge also briefly mentioned Mr. Aven, stating that he performed all of the requisite studies, which demonstrates that he did not intend to commit a crime. Mr. Bermúdez was particularly important at the trial. In this type of project, an environmental expert, known as an Environmental Regent, is required to keep an official record of the project's compliance with the requirements of the Environmental Viability and to report his findings to SETENA. The Environmental Regent must be registered with SETENA. Mr. Bermúdez fulfilled that role for Las Olas and he never observed or reported any environmental infractions at the Las Olas site.

54. The following points were also demonstrated:

- a. That the project started in 2002 as a development of a horizontal condominium.
- b. That the permits and authorizations required for such a project were gradually requested and granted with the help and expert criterion of professionals in different matters: topographers, engineers, lawyers and finally an official regent: Mr. Bermúdez.
- c. That the alleged facts and criminal behaviors required the demonstration of the knowledge and specific desire of the environmental damages. The demonstration of a clear and unquestionable knowledge that a crime was/could have been committed is an indispensable element of the offense that was not complied with and/ or satisfied by the parties.
- d. That they did not demonstrate that Mr. Damjanac had that knowledge or was aware of the possible legal consequences that the cutting of the trees might produce. On the contrary, since the "bitacora" and many of the already granted permits (October 2010) were archived in the office where Mr. Damjanac worked and lived, Mr. Damjanac believed and had

elements to believe that any work performed in the field was legally performed and grounded in the previous advice and opinions of the hired experts.

- e. That there was not enough evidence that linked Jovan and the fact that he lived there (in the office) to the possibility of delivering orders.
- f. That the accusations were grounded on non-direct evidence, since there were no testimonies heard during the hearing stating that Mr. Damjanac was the one delivering orders to the employees.
- g. In the case of non-direct evidence, the conclusion of liability or not, must be very clear. If there is direct evidence that contradicts it or other non-direct evidence that contradicts it, then the non-direct evidence used by the accusers will be dismissed.

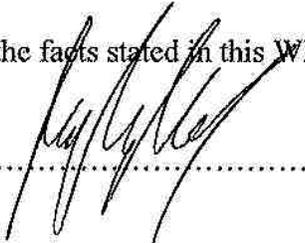
XI. Final Impressions

- 55. Working with Mr. Aven was an intense task, and we did not always see eye to eye. Mr. Aven is an eloquent client, meaning he likes to speak. This is not always a good thing in criminal cases, and we argued about this. I understood Mr. Aven's desire to clear his name, but generally speaking, once the prosecution opens a declaration, the best thing to do is to exercise the constitutional right to abstain from speaking. Mr. Aven did this in the very beginning, but it did not last. During the trial, Mr. Aven made a declaration in which he used a series of slides, and it took an entire morning. He also provided many documents. Mr. Aven prepared a perfectly organised and numbered file for his declaration before the environmental prosecutor in May of 2011. Unfortunately for Mr. Aven, the alleged forged document was in that file. That is why the prosecutor decided to investigate a forgery charge against him.
- 56. Throughout the prosecution and trial, the prosecutor failed to follow the proper procedures on numerous occasions. Examples of this include the following:
 - a. First, the selective gathering of evidence is a clear infringement of the principle to ask for everything. A prosecutor has the duty to investigate, and to bring all the documents to the file, whether those documents

support acquittal or otherwise. In particular, the prosecutor did not take into account that the project actually did receive the requisite permits, and instead acted as if they never existed.

- b. Second, the prosecutor failed to make a good faith effort to settle the case at the proper stage for settlement.
- c. Third, he did not take on a case that was brought by a community; it was brought by a single person, Mr. Bucelato, and no one else from the community showed up.
- d. Fourth, the trial was very badly translated. A proper translation is a basic expectation.
- e. Fifth, the prosecution's intention was to assert a broad accusation and not to withdraw or dismiss the claims that needed to be dismissed at a proper time.
- f. Sixth, when the prosecutor realized he was losing the case, he sought to offer six additional witnesses, despite the fact that 80% of the witnesses in the entire case were introduced by the prosecution.

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

Signed.....

Néstor Morera Viquez

Dated.....11/26/2015