

ARBITRATION GOVERNED BY ARBITRATION RULES OF THE UNITED NATIONS COMMISSION

ON INTERNATIONAL TRADE LAW (UNCITRAL 2010)

AND

BY THE FREE TRADE AGREEMENT BETWEEN CENTRAL AMERICA, THE UNITED STATES,  
AND THE DOMINICAN REPUBLIC

BETWEEN:

DAVID R. AVEN, SAMUEL D. AVEN, CAROLYN J. PARK, ERIC A. PARK,  
JEFFREY S. SHIOLENO, DAVID A. JANNEY AND ROGER RAGUSO

Claimants

- and -

THE REPUBLIC OF COSTA RICA

Defendant

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WITNESS STATEMENT OF HAZEL DIAZ MELENDEZ

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April 8, 2016

1. I, **Hazel Diaz Melendez**, adult, unmarried, attorney at law, resident of San José, Costa Rica, Barrio Don Bosco, Condominium 6-30, Apartment No. 1006 B, do declare that:
2. This is the first statement that I am making in the arbitration between David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, David A. Janney and Roger Raguso versus the Republic of Costa Rica, which is developed according to the Arbitration Rules of the UNCITRAL and the Free Trade Agreement between Central America, the United States, and the Dominican Republic (the "Arbitration").
3. It has been requested that I participate in the Arbitration indicated herein to explain my knowledge of the proceedings carried out by the Office of the Ombudsman (the "Ombudsman") in connection with complaints of inactivity of the Public Administration regarding possible violations of environmental laws by the developers of the "Las Olas" residential project. Furthermore, given that the claimants have also made many completely false allegations about me, I will also respond to the same in this witness statement. I will attempt to answer all the accusations made against me, but if I am not able to cover all the issues raised by the claimants, I do expressly reserve the right to complete this statement in accordance with the procedural calendar that the Court has established for the parties in the Arbitration.
4. I confirm that I have neither direct nor indirect interest in the present Arbitration and I present this statement in my own name and in my position as Special Advocate of the Ombudsman.
5. Excepting those instances where I thereby provide indications to the contrary, the facts and affirmations contained in this witness statement do proceed from my own knowledge and are true to the best of my knowledge and belief. In the cases where the facts and affirmations contained herein do not proceed from my own knowledge, I have identified the sources of information upon which I have based them or from which the information proceeds to which I have made reference in the present witness statement.
6. I have been assisted in the preparation of this witness statement by the attorneys at law of Herbert Smith Freehills, but I do confirm that each and every one of the affirmations and statements made herein represent my knowledge of the facts. Likewise, for the preparation of this statement I have reviewed documents that are contained in the administrative record No. 64593-2010, which is in the possession of the Ombudsman, and I have spoken with the civil servant in charge of the record (Alejandra Vega Hidalgo, Lic.) so as to be able to relate in the greatest detail what the actions were of the institution in the case under discussion.

#### **BACKGROUND**

7. I am a law school graduate, Attorney, and Notary Public with title granted by the University of Costa Rica in the year 1994. Furthermore, I possess a Master's Degree in Environmental Law granted by the University for International Cooperation in the year 2010.
8. I have worked in the Office of the Ombudsman since July of 1994, caring for responsibilities at

the professional level initially and since 2004 at the level of Special Advocate, assigned as the Director of Administrative Management Control until the year 2009, when I became the Director for Quality of Life for the Ombudsman until 2013. From that time until now, I returned to my normal position as Director of Administrative Management Control. I highlight the foregoing for the purpose of emphasizing that I am a public civil servant with a broad administrative career at the internal level of the Ombudsman and that with a basis in the Management positions that I have held, I have full knowledge of the structure of the Costa Rican State apparatus as regards its functions and jurisdictions. I have never been sanctioned or formally reviewed in my professional career, particularly of the kind that has been alleged by the claimants in the present Arbitration. Furthermore, I have never been the subject of any investigation (internal or external) regarding the exercise of my duties as a public civil servant. As a result, I am proud of having carried out my duties diligently and in a professional manner throughout my career and I vehemently reject the accusations, which are both unjustified and without foundation, that have been made about my person by the claimants.

9. The Ombudsman is a body attached to the Legislative Branch that functions in a watchful and independent manner so that the functioning of the public sector is adjusted for legality, morality, and justice; moreover, it is the national institution for the protection of human rights, in accordance with the Paris Principles, approved by the United Nation in 1992.<sup>1</sup>
10. The position of the Ombudsman is located within the Costa Rican institutional framework, so that with its intervention the Costa Rican Public Administration reviews its own actions, in light of the possibility that these are not adjusted to the binding national and international regulatory provisions for Costa Rica, in such a way that the Administration carries out the necessary corrective actions, all initially at the administrative headquarters, completing the work of prevention and detection of misconduct, all of which will integrally improve the functioning of the Costa Rican institutions. The Ombudsman has the power to initiate any investigation, either for itself or at the request of a third party, which would lead to the clarification of the material proceedings, of the act

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<sup>1</sup> R-164, Law 7319, March 10, 1993, Articles 1 and 2; R-165, Executive Decree Regulation No. 22266-J, June 15, 1993, Article 1.

or omissions of the administrative activity of the public sector by examining its legality.<sup>2</sup>

11. The procedures that the Office of the Ombudsman should carry out in relation to following up on claims that it receives is established in Law 7319<sup>3</sup> and its regulation.<sup>4</sup> Furthermore, the institution has a Manual for Macro-Processes for the Defense of Human Rights, which regulates the proceedings carried out by the Ombudsman in the processes of admission, defense, and monitoring of the issues brought before the institution and those initiated on its own behalf.
12. Likewise, the Ombudsman has ample competency to hear cases related to the public sector provided these are not being heard by a judicial court.<sup>5</sup> In accordance with existing procedures, once the Ombudsman receives a complaint, it is analyzed to verify its admissibility and then transferred by the Directorate of Admissibility to be studied by the respective Directorate branch specialized in knowledge of the issues addressed by the complaint.
13. Once the file is sent for review by the Directorate, the corresponding investigation is begun, for which the Director in charge will assign the file to a professional that will carry out all formal and informal paperwork necessary in order to determine if correct or incorrect action was taken by the Public Administration. These paperwork processes imply the preparation of applications for information directed to the institutions involved, as well as direct contact with the public officials who should respond to the aforementioned applications in a timely manner with the answers requested. It is important to establish that the procedure for the Ombudsman is not capricious; on the contrary it is established in the rules that regulate the actions of the institution and should be carried out expeditiously.
14. The Directors of each directorate are those persons who sign the documents directed to each public official from which the information is requested. Likewise, if it is required to make recommendations, they are the persons who provide the backing for the reports prepared by the defense professionals to be submitted to the Ombudsman for resolution. For this reason my name appears on all the documents related to the file we are currently discussing, the investigation assigned to Ms. Alejandra Vega and handled in the Directorate for Quality of Life, for which I was responsible.

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<sup>2</sup> R-164, Law 7319, Articles 12 and 14.

<sup>3</sup> R-164, Law 7319.

<sup>4</sup> R-165, Executive Decree No. 22266.

<sup>5</sup> R-164, Law 7319, Article 19.2.

15. The Ombudsman transfers the complaint submitted to the public institution involved, and the public official under implication has a period of five working days to respond.<sup>6</sup> The answer should contain the information requested by the Ombudsman for each point of the complaint submitted. The Ombudsman does not make any value judgment prior to the answer by the public officials; they are only to transfer the complaint submitted and request the information. This includes placing the verbatim text of the complaint in quotation marks in the documents that are passed on to the public officials.
16. During a complaint proceeding, the Ombudsman has no obligation to provide notification to third parties, since their power is limited only to the actions of the Public Administration. As such, notification should be made only to the public officials involved in the complaint and to the complainant.<sup>7</sup>
17. Each investigation concludes with a report signed by the Ombudsperson, in which it is established whether or not a violation of human rights has been committed, and if it is determined that a violation has taken place, then recommendations will be made for corrective actions to be taken by the Administration.<sup>8</sup> If during the investigation the case comes to the attention of the judicial headquarters, the Ombudsman will issue an act of suspension and will cease consideration of the case, in accordance with Article 19 of Law 7319. The rules that govern the actions of the Ombudsman establish that the institution has a period of two months to consider and respond to the petition by the citizens, without prejudice to the extension of said period for the complexity of the case itself. Ordinarily matters are resolved by coming to a full knowledge of the complaint; the suspension of the file for having come to the attention of the judicial headquarters being an extraordinary way of completing the process without the Ombudsman issuing a decision on the complaint.

#### **1. MY ROLE IN RELATION TO AND MY KNOWLEDGE OF THE LAS OLAS PROJECT**

18. As I will now explain, the claim against the Las Olas Project was filed with the Ombudsman by Mr. Steve Allen Bucelato on 20 July 2010.<sup>9</sup> Upon receipt of the claim, as in any other case, what was done was to literally copy the content of the claim in italics and expressly clarify that it did not imply that the Ombudsman had accepted as true certain facts that the claim contained.<sup>10</sup> As I will explain later, I have never met Mr. Bucelato, nor have I ever had a personal or professional relationship with him. I was not aware of his situation or if he had any special interaction with

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<sup>6</sup> R-164, Law 7319, Article 20.

<sup>7</sup> R-164, Law 7319, Article 23.

<sup>8</sup> R-164, Law 7319, Article 14.2.

<sup>9</sup> R-40, Complaint to the Ombudsman, July 20, 2010.

<sup>10</sup> R-43, Admissibility of the Complaint, July 23, 2010.

any of the developers of the Las Olas Project. This complaint was received the same as all the others, and the procedures followed were done so by applying the same objective criteria used in all cases.

19. In accordance with the aforementioned institutional procedures, once the complaint was received in the Directorate for Quality of Life, it was assigned to Ms. Alejandra Vega Hidalgo, the attorney in charge of conducting the investigation process. As such, in accordance with what is established in Article 20 of Law 7319, on August 7, 2010, the transfers were processed to the relevant institutions so that they could issue a report on their knowledge of the complaint and on the actions that they had taken in response. For this purpose, the institutions have a primary period of five days to respond to the request issued. An official document was issued to the Environmental Administrative Tribunal,<sup>11</sup> to the Municipality of Parrita,<sup>12</sup> to SETENA<sup>13</sup> and to SINAC/ACOPAC,<sup>14</sup> requesting information about the complaint received. This is the normal procedure. In all cases, it was made known that the professional in charge of the investigation was Ms. Alejandra Vega Hidalgo, Lic., with whom they should be in contact for any paperwork, formality, or additional information, and for which reason they were given her telephone number. As the undersigned Director, I signed the four communications. However, I had no other contact with the file, since according to standard procedure, Ms. Vega Hidalgo, was the person responsible for following up on the case. Of course, as her superior, Ms. Vega Hidalgo, reported to me on any and all advances made on the case.
20. As stated in the file, the Municipality of Parrita answered the request on August 18, 2010, providing the information that they had made various trips to the site and had sent investigation requests to the MINAE and to the Environmental Administrative Tribunal. It was also mentioned that Mr. David Aven, in representation of the Las Olas Project, had delivered a document issued by the SINAC, 67389RNVS-2008, signed by the Engineer Roland Vargas Brenes, director of the SINAC, indicating that the project did not constitute any threat to the Esterillos Oeste biological corridor nor did it in any way undermine the biodiversity of the National Wildlife Refuge. Likewise, information was provided that the Las Olas Project had no permits for construction and that in fact, if they had obtained the environmental viability from the SETENA then it would actually have expired.<sup>15</sup> To said note are attached the following documents:

- Official Document No. DeGA-049-2009;<sup>16</sup>

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<sup>11</sup> R-46, Official Document 08952-2010-DHR, August 7, 2010.

<sup>12</sup> R-44, Official Document 08947-2010-DHR, August 7, 2010.

<sup>13</sup> R-45, Official Document No. 08949-2010-DHR, August 7, 2010.

<sup>14</sup> R-61, Official Document 13835-2010-DHR, December 09, 2010.

<sup>15</sup> R-49, Official Document No. DeGA-200-2010, August 18, 2010.

<sup>16</sup> R-26, Official Document No. DeGA-049-2009, April 26, 2009.

- Official Document No. DeGA-090-2010 dated April 26, 2009;<sup>17</sup>
  - Official Document No. DeGA-0910-2010 dated May 31, 2010;<sup>18</sup>
  - Official Document No. DeGA-092-2010 dated June 9, 2010;<sup>19</sup>
  - Official IOM Document No. 113-2010 dated June 16, 2010;<sup>20</sup>
  - Official IOM Document No. 114-2010 dated June 14, 2010;<sup>21</sup>
  - Official Document No. DeGA-106-2010 dated June 15, 2010;<sup>22</sup> and
  - Official SINAC Document 67389RNVS-2008 dated March 27, 2008;<sup>23</sup>
21. On August 19, 2010, SETENA answered the request, attaching the ASA-1216-2010-SETENA technical report.<sup>24</sup>
22. On August 27, 2010, ACOPAC also responded, mentioning among other things that on March 27, 2008, by means of the SINAC-67389-RVNS-2008 report, SINAC had concluded that the project did not constitute a threat to the biological corridor nor to the biodiversity of the local wildlife and that on April 2, 2008, SETENA had granted viability to the project. Likewise, it mentioned that in the official document ACOPAC-SD- 087-08 dated October 1, 2008, it indicated that in the area near the project there were two possible wetland areas and queried as to what would be required from the wetlands department in order to issue a technical opinion. On the other hand, it was made known by means of the official documents ACOPAC-D- 1063-08 dated October 1, 2008, and SINAC-SE-GASP-070 dated March 30, 2009 that the authorities had been informed of the existence of irregularities in the project and that there existed false documents. It was also made known that visits were made to the site in 2010, during which there had been no indication that the project was located in wetland areas. Furthermore, it was mentioned that no paperwork had been obtained for permits to fell trees.<sup>25</sup>.
23. On November 23, 2010, the Ombudsman received a note signed by seven neighbors of the Las Olas Project, in which they requested that SINAC investigate whether or not the document "Informe SINAC 67389RNVS-2008 [SINAC 67389RNVS-2008 Report]" was an official and valid document, since there existed grave doubts on the subject because the signatures were not those of the persons who supposedly signed it, the regional unit mentioned therein did not exist, and the

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<sup>17</sup> R-29, Official Document No. DeGA-090-2010, May 31, 2010.

<sup>18</sup> C-67.

<sup>19</sup> R-30, Official Document No. 09-2010, June 09, 2010.

<sup>20</sup> R-34, Official IOM Document No. 113-2010, June 14, 2010.

<sup>21</sup> R-35, Official Document No. 114-2010, June 14, 2010.

<sup>22</sup> C-69.

<sup>23</sup> C-47.

<sup>24</sup> R-50, Official Document SG-ASA-1039-2010, August 19, 2010; C-79, Official Document No. ASA-1216-2010-SETENA, August 19, 2010.

<sup>25</sup> C-80.

numbering and type of report did not match those normally from SINAC.<sup>26</sup> On the basis of said note, that same day we issued a request for SINAC to provide an explanation of the matter.<sup>27</sup>

24. On November 25, 2010, the ACOPAC again sent a report<sup>28</sup> communicating to us that, among other things, in accordance with certain official documents issued in the year 2008 by ACOPAC (ACOPAC -SD-87-08 and ACOPAC-D-1063-08) and SINAC (SINAC-SE-GASP-070), they had noticed of certain irregularities in the document in question. Given also that they had been able to prove that the document had not been signed by any public official of ACOPAC, it had been determined that the document in question was not, in fact, a valid one. Furthermore, it was made known that Mr. Picado Cubillo, Lic., had been requested to make a field visit to the location for the purpose of resolving the complaints which had been filed, and that the report from said professional would be issued before December 3, 2010. To said note were attached the following documents:
  - Official SINAC Document 67389RNVS-2008 dated March 27, 2008;<sup>29</sup>
  - Official Document ACOPAC-SD-087-08 dated October 1, 2008;<sup>30</sup>
  - Official Document ACOPAC-D-1063-08 dated October 7, 2008;<sup>31</sup>
  - Official Document SINAC-SE-GASP-070 dated March 30, 2009;<sup>32</sup> and
  - Official Document ACOPAC-D-1519-10 dated November 25, 2010;<sup>33</sup>
25. On December 9, 2010, since the ACOPAC had still not informed us of the results of the scheduled field visit, we again requested that they inform us regarding the status of the investigation.<sup>34</sup>
26. On March 2, 2011, the Ombudsman received two new communications from the ACOPAC. The first of these was dated February 4, 2011, and mentioned that during the month of December of 2010 various new visits to the project site had taken place, and as a result the technical report ACOPAC-CP-003-11 had been issued. Given the recommendations of said report, a request had been made of the National Wetlands Program of SINAC that they carry out an inspection of the site to determine if in fact the area involved a wetlands ecosystem. Furthermore, it had also been requested that the INTA determine the type of ground. Lastly, it mentioned that Mr. Picado Cubillo, had been instructed to file the corresponding complaints

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<sup>26</sup> R-59, Complaint against various individuals to SINAC, November 18, 2010.

<sup>27</sup> C-91.

<sup>28</sup> C-92.

<sup>29</sup> C-47.

<sup>30</sup> R-20, Official Document No. ACOPAC-SD-087-08, October 10, 2008.

<sup>31</sup> R-21, Official Document No. ACOPAC-D-1063-08, October 10, 2008.

<sup>32</sup> R-25, Official Document SINAC-SE-GASP-070, March 30, 2009.

<sup>33</sup> R-60, Official Document No. ACOPAC-D-1519-10, November 25, 2010.

<sup>34</sup> R-61, Official Document No. 13835-2010-DHR, December 09, 2010.

for illegal logging and the precautionary measure of halting the project.<sup>35</sup> The following documents were attached to the report:

- Official Technical Report ACOPAC-CP-003-11 dated January 3, 2011;<sup>36</sup>
- Official Document ACOPAC-D-80-11;<sup>37</sup>
- Official Document ACOPAC-D-81-11;<sup>38</sup>

27. The second note was dated February 11, and there the ACOPAC made it known that Mr. Picado Cubillo, had inspected the site in December of 2010 and had issued the report ACOPAC-CP-003-11, where he mentioned that they had been able to observe illegal logging and the possible impact on a wetland area from backfilling. It also mentioned that by virtue of this, a complaint had been filed with the public prosecutor of Aguirre for the crimes of falsifying documents, elimination of vegetation in undergrowth areas and possible backfilling of wetland areas. Lastly, it mentioned that it had been requested of the National Wetlands Program of the SINAC that they issue a decision on whether or not the ecosystem being affected was in fact a wetland area and that the INTA collaborate accordingly to determine the soil type.<sup>39</sup>
28. On February 28, 2011, the plaintiff was notified of the suspension of the case by virtue of Article 19.2 of Law 7319,<sup>40</sup> since the Defender had knowledge of the complaint filed with the Public Prosecutor's Environmental Office on February 4, 2011 for the same facts, judicial file No. 11-000009-600-PE.
29. On November 1, 2012, Mr. Manuel Enrique Ventura Rodríguez requested a certified copy of the file,<sup>41</sup> which was provided on the following day.<sup>42</sup>
30. In conclusion, the proceedings on the part of the Ombudsman toward the complaint presented by Mr. Bucelato were fulfilled in harmony with the procedures defined by the law and regulations of the institution, which were expedited by the fact that a judicial action was filed and as such the case was suspended, for which reason no in-depth analysis was conducted nor was a final report or any recommendation issued.

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<sup>35</sup> R-78, Official Document ACOPAC-D-83-11, April 02, 2011.

<sup>36</sup> C-101, Official Document No. ACOPAC-CP-003-11, January 03, 2011.

<sup>37</sup> R-68, Official Document No. ACOPAC-D-80-11, February 04, 2011.

<sup>38</sup> R-67, Official Document No. ACOPAC-D-81-11, February 04, 2011.

<sup>39</sup> R-72, Official Document ACOPAC-D115-11, August 19, 2010.

<sup>40</sup> R-58, Official Document 02282-2011-DHR, August 19, 2010.

<sup>41</sup> R-130, Request for copies, November 1, 2012.

<sup>42</sup> R-131, Request for copies, November 19, 2012.

## 2. REGARDING THE ALLEGATIONS OF THE CLAIMANTS

31. I want to express my total and complete repudiation of the lies, slanders, and defamations that the claimants have included in their memorial dated November 27, 2015 regarding my participation related to the complaint filed by Mr. Bucelato before the Ombudsman. Hereafter, I am going to address each one of the false allegations made by the claimants, for the purpose of clarifying the truth in each case.

### 2.1 Regarding the requests for reports to the administrative institutions implicated

32. In a large number of passages of their memorial, the claimants take offense to the fact that I wrote requests for reports to the administrative institutions that were implicated, and they maintain that this implies that I was “spreading lies” or making “unfounded complaints”. For example, this can be seen in the following excerpts from the memorial:

"348....Ms. Diaz opened up her first investigation of the Las Olas site on July 20, 2010; on the same day she had received Mr. Bucelato's false claims that Las Olas employees had back-filled wetlands and cut down a protected forest. Over the next month, she **demanded an investigation from the Mayor's Office and made an official complaint to the TAA**, each time repeating **Mr. Bucelato's lies without an ounce of independent verification** – just as Ms. Vargas had done." (Emphasis ours)

"357. The same was unfortunately also true of the investigation that was opened by the TAA that summer, instigated, yet again, by Ms. Diaz and Ms. Vargas. The TAA had received the unsubstantiated Vargas complaint on July 16, and the correspondingly **unsubstantiated Diaz complaint on August 7...**" (Emphasis ours)

"358. ...it was apparently accepted as fact that **the unsubstantiated allegations made by Ms. Diaz** and Ms. Vargas were true." (Emphasis ours)

"362. ...the SINAC accusations had been modelled on the **false allegations that Ms. Diaz** and Ms. Vargas had been pushing on him for the better part of a year..." (Emphasis ours)

33. In the first place, no claim for investigation was ever made to the Mayor's Office, nor was a formal complaint made to the Environmental Administrative Tribunal, nor were false accusations and/or unfounded complaints made, as related by the claimants. On the contrary, following the standard procedure established by the Law, what the Ombudsman did upon receiving the complaint from Mr. Bucelato was to transfer it to the administrative institutions implicated (Environmental Administrative Tribunal, Municipality of Parrita, SINAC, ACOPAC, and SETENA). Said notification was carried out in fulfillment of Article 20 of the Law of the Ombudsman (Law No. 7319) according to which, in light of a complaint filed with the Ombudsman, the same “*shall provide notification of the act being admitted to the corresponding administrative dependence, so that the director and public official under implication remit the*

*respective report within a peremptory period of five business days.*<sup>43</sup> This is the verbatim content of my notifications:

- Notification to the Environmental Administrative Tribunal:

The complaint was ADMITTED for its study and investigation in conformity with the provisions of Articles 12, 17, 18, and 19 of the Law of the Ombudsman, number 7319, dated November 17, 1992, and Articles 44, 45, and 46 of their Regulations (Executive Decree No. 22266-J, dated July 15, 1993).

By virtue of what is indicated in Article 20 of said regulatory body, it is cordially requested that within a period of FIVE BUSINESS DAYS beginning on the day following the receipt of this communication that you remit to this institution the corresponding REPORT.

Aside from referring to the acts that make up the aforementioned complaint, your account must contain the corresponding proofs and detail of the following:

**Indicate whether or not said Tribunal has knowledge of this complaint and what actions have been carried out in relation to this issue.**

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- Notification to the Municipality:

The complaint was ADMITTED for its study and investigation in conformity with the provisions of Articles 12, 17, 18, and 19 of the Law of the Ombudsman for the Republic, number 7319, dated November 17, 1992, and Articles 44, 45, and 46 of their Regulations (Executive Decree No. 22266-J, dated July 15, 1993).

By virtue of what is indicated in Article 20 of said regulatory body, it is cordially requested that within a period of FIVE BUSINESS DAYS from the day following the receipt of this communication that you remit to this institution the corresponding REPORT.

Aside from referring to the acts that make up the aforementioned complaint, your account should contain the corresponding proofs and detail of the following:

1. Make it known whether or not you had knowledge of what is indicated in the complaint.
2. Indicate if the Las Olas residential project has the required permits for construction.
3. Indicate if the area where the project is located is considered a residential zone or if it is a wetlands area.
4. Make it known if the residential project is in line with the use of the ground of the zone.
5. Remit any other additional information that is important for the investigation of the complaint.

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34. On the other hand, the claimants complain that in said requests for information I was "*repeating the lies of Mr. Bucelato without a shred of independent verification.*" Evidently the claimants have a total lack of knowledge of the functioning of the Office of the Ombudsman.

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<sup>43</sup> R-164, Law 7319, Article 20.

<sup>44</sup> R-46, Official Document 08952-2010-DHR, August 07, 2010.

<sup>45</sup> R-44, Official Document 08947-2010-DHR, August 07, 2010.

The control for the legality of the actions of the Public Administration that is carried out by the Ombudsman mandates requiring the institution under implication to submit a report on their actions, for the purpose of determining at the end of the investigation whether or not a violation of rights exists. The role of the Ombudsman is to control the legality of the actions of said institutions, without superseding the material decision as regards the basis of the complaint, as expressly indicated in Article 14 of Law 7319:

"ARTICLE 14.- Nature of the intervention.

1.- The intervention by the Ombudsman for the Republic does not supersede the actions, material proceedings, or the omissions of the administrative activity of the public sector, since their competency is for all intents and purposes, for control of legality."<sup>46</sup>

35. In that sense, all of the notifications directed to the administrative institutions related to Mr. Bucelato's complaint that I signed were strictly limited to copying the verbatim content of the complaint, without making any value judgment whatsoever on them.<sup>47</sup>
36. Moreover, the Director of Admissibility for the Ombudsman, in the notification of admissibility for Mr. Bucelato's complaint, clearly expressed that said admission "*does not mean that the Ombudsman has accepted as true the facts that are stated therein*":

After analyzation, the Directorate of Admissibility, acting by delegation of the Administrative Hierarchy and in accordance with what is established in our law, the decision has been made that this is **ADMISSIBLE** for investigation.

We clarify that this does not mean that the Ombudsman has accepted as true the events that are outlined therein. Furthermore, the investigation of the Ombudsman DOES NOT INTERFERE WITH any administrative or judicial period.

37. In the following paragraph of their memorial, the claimants again proceed to completely distort the facts:

"349. It was not just **Ms. Diaz's instigation of the Mayor** that triggered his apparent involvement in setting his employee, Ms. Vargas, straight, as evidenced by the **letter sent by Ms. Diaz and Mayor Carajal to Ms. Vargas on August 18, 2010, in which the latter was forced to admit that the Las Olas site actually had all of its permits in order**. This communication, combined with the fact that SETENA had made quick work of the ambiguous allegations by Bucelato regarding wetlands and forests to which she had forced a response with a denunciation, seems to have quieted Ms. Diaz, but not for long..." (Emphasis ours)

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<sup>46</sup> R-164, Law 7319, Article 14.1.

<sup>47</sup> R-46, Official Document 08952-2010-DHR; R-44, Official Document 08947-2010-DHR; C-91; R-61, Official Document 13835-2010-DHR; R-45, Official Document No. 08949-2010-DHR.

<sup>48</sup> R-43, Admissibility of the Complaint, July 23, 2010.

38. To start with, there never existed any kind of "instigation" on my part of the Mayor. As seen from the previous accounting of the actions taken, upon receiving the complaint, it was transferred to the relevant institutions, among them the Municipality of Parrita.<sup>49</sup> This can hardly be classified as instigation on my part to the Mayor's Office; on the contrary, it is simply the fulfillment of the legal responsibility with which I have been entrusted. Conversely, it would be highly irregular if upon receiving a complaint I did not inform the public official involved.
39. Furthermore, there exists no letter that I would have sent jointly with the Mayor's Office to Ms. Vargas. I want to make it understood that this is an error on the part of the claimants and what they are referring to is the response we received at the Ombudsman on the part of the Municipality of Parrita on August 18, 2010. Said report was found to be signed by the Mayor's Office (Mr. Acuña Calderon) and Environmental Management (Ms. Vargas). However, said report did not mention that the Las Olas project had the lawful permits as claimed by the claimants; on the contrary, it clearly states that the project did not have any permit for construction and that if environmental viability had been obtained from the SETENA, it would have been found to be expired, as can be seen in the excerpts of said documents, which I have copied as follows:

The engineer, Ms. Castro, responded to said official document dated June 14, 2010, No. 113-2010, indicating that the Las Olas SA project, located in Esterillos Oeste, had no permits for earthworks, nor for construction of private roads. (Official document MIM No. 113-2010 is attached).

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10. Previously, the representatives of said project delivered the documentation for permit requests, in which they provide delivery of the environmental viability granted by SETENA; however, since this has a validity period, it was rejected until this was renewed.

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40. As follows, the claimants make a critique of the request for information that I made to the SINAC as a result of the complaint received in the Ombudsman on the part of the neighboring residents of the Las Olas project dated November 23, 2010 in relation to the falsification of a document that would have been issued by the SINAC in 2008:

"349. [...] Within weeks of the Investors' having received the final construction permits for Las Olas, **Ms. Diaz reappeared on the record, this time championing both Mr. Bucelato's defamatory allegations** about the origin of the 2008 Environmental Viability for the Condominium Section and reviving the same wetland and forestry allegations that had been determinatively addressed by SETENA just two months earlier.

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<sup>49</sup> R-44, Official Document 08947-2010-DHR, August 07, 2010.

<sup>50</sup> R-49, Official Document No. DeGA-200-2010, p. 2, August 18, 2010.

<sup>51</sup> Ibid, p. 3.

"350. In a letter to SINAC in San Jose, dated November 23, 2010, **Ms. Diaz demanded to know why Mr. Bucelato had not received an official response to allegations, which she had apparently helped him to also file with SINAC**, that the same wetlands had been tampered with and the same protected forest cut down. Ms. Diaz must have been well aware of the fact that the complaint, for which she was now demanding redress, had already been considered and rejected by the government agency actually responsible for ensuring environmental compliance at the Las Olas site: SETENA. **To make matters worse, she also demanded a SINAC investigation** into whether SETENA had been duped in 2008, as per Mr. Bucelato's repeated defamatory theory, which she noted had been put to the Municipality (having been accepted by Ms. Vargas)."

41. It is quite difficult to understand what the claimants are taking offense to . As I previously explained, on November 23, 2010 the Ombudsman received a note signed by seven neighbors of the Las Olas project, in which they requested that the SINAC investigate whether the document "Informe SINAC 67389RNVS-2008" was a valid and official document, since there were great doubts on that respect based on the fact that the signatures were not those of the supposed signers, the regional unit mentioned in the report did not exist, and the numbering and type of report did not match those normally from SINAC.<sup>52</sup>
42. In the light of said situation, the corresponding action to be taken was that the Ombudsman transfer the report to the SINAC, and this is exactly what was done, no more, no less. The document did not appear and disappear in the capricious manner as the claimants want to make it seem. It must be remembered that the Ombudsman had an investigation in process that required having the corresponding information. Just as in the notification issued, once more the complaint of the residents was copied word for word, without this being "in support" of the same or making a value judgment on whether it was "defamatory" or not, and a request was made to SINAC that they provide the corresponding information. Of course the Ombudsman was not aware that SETENA had already been informed on this matter as suggested by the claimants, which is evidenced by the notification to SINAC in which I requested that they communicate their response to SETENA as well:

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<sup>52</sup> R-59, Complaint against various individuals to SINAC, November 18, 2010.

In this institution, file number 64593-2010-SI was processed, related to a complaint filed by Mr. Steve Allen Bucelato. The interested party declared the following:

*That he is a resident of Esterillos Oeste. That he presented a formal complaint to the Municipality of Parrita, since in the said area a Residential Project is taking place, known as Las Olas.*

*As a result of said project, the wetlands areas and lakes of the zone are being affected, as well as the vegetation at the site, since these have all been back-filled with soil, and the trees of the area were cut. With these activities the natural habitat of the area has been considerably damaged.*

*Furthermore, with the beginning of the rainy season, all of the houses get flooded, a result of the backfilling of the wetlands and the lakes. The flooding causes damage to the dwellings of all the residents of the area (as can be seen in the attached photographs). This situation never happened before until the beginning of the residential project development.*

*Approximately three weeks ago, the complaint about these situations was presented to the Municipality, and the public officer of the Municipality, Mónica Vargas, received it, but to date no answer has been given regarding the complaint, and the company developing the project continues its activities, causing damage to the environment and consequently to the lives of the neighbors.*

*We request the intervention of the Ombudsman to investigate the case under complaint.*

With respect to this matter, the Ombudsman received a note addressed to you and signed by various neighbors in the area, dated November 23, in which they request indication of whether or not the document "INFORME SINAC 67389RNVS-2008 REFUGIO NACIONAL DE VIDA SILVESTRE ÁREA DE CONVERSACIÓN ESTERILLOS OESTE" [SINAC REPORT 67389RNVS-2008 NATIONAL WILDLIFE REFUGE AREA UNDER DISCUSSION ESTERILLOS OESTE] is in fact an official and valid report.

Given the importance of knowing whether said document is valid or not, please answer as quickly as possible and indicate also the actions that will be taken in the short term, considering that the company developing the project continues their work in the zone.

In the same manner, this Ombudsman considers that the answer to that known should be brought to the attention of both SETENA as well as the Municipality of Parrita; since this document is the basis for permits granted by those institutions.

Please provide your answer within **FIVE BUSINESS DAYS** following the receipt of this document. The professional in charge of the case is Ms. Alejandra Vega Hidalgo, Atty., telephone 2258-8585, ext. 1185.

<sup>53</sup>

43. The claimants continue their attack on my person in the memorial regarding the response we received at the Ombudsman's Office from SINAC on November 25, 2010:

"351. Two days later she would receive the **response from SINAC, which she seemed to have both hoped for and feared**. She was informed that SINAC did not regard as valid the document "identified" by Mr. Bogantes in his late August correspondence to her. **That was apparently enough for Ms. Diaz, who – over the many months she had now devoted to promoting Mr. Bucelato's scurrilous allegations** – had never once notified the Investors of her activities, much less give them an opportunity to reply to them. **On the same day she wrote back to SINAC, demanding that urgent action be taken to investigate how SINAC and/or SETENA had come to (at least in her estimation) participate in a grave environmental fraud. She also demanded that SINAC – not the responsible agency, SETENA – immediately suspend the Project's Environmental Viability...**" (Emphasis ours)

44. The claims made by the claimants are quite scandalous and defaming to all extremes, not just because of their inaccuracy but also for the large quantity of qualifiers used that undermine my personal and professional dignity. I am going to again make several clarifications. In the first place, at no time was I "afraid" of any communications nor did they "try my patience". For me, this was an investigation that required the same objectivity and responsibility from me in my position as Director as would have been required in any other. It is much less true that I would have dedicated my time to promoting injurious claims over a period of months. As it emerges in the file, the processing of the claim consisted on the indispensable procedure of notification being provided to the relevant institutions of the complaint. This took place by means of an official document issued to the Municipality of Parrita,<sup>54</sup> an official document to Environmental Administrative Tribunal,<sup>55</sup> and another to the SINAC/ACOPAC.<sup>56</sup> In the same manner, notification was provided to SINAC when certain residents broadened the complaint to include the determination of validity or invalidity of a SINAC document.<sup>57</sup> It is unthinkable that this could have been considered as dedication to promoting injurious statements over a period of months. I reiterate that what is completely irregular is that the claim was made that in the light of

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<sup>53</sup> C-91.

<sup>54</sup> R-44, Official Document 08947-2010-DHR, August 07, 2010.

<sup>55</sup> R-46, Official Document 08952-2010-DHR, August 07, 2010.

<sup>56</sup> R-61, Official Document 13835-2010-DHR, December 09, 2010.

<sup>57</sup> C-91.

a formal complaint, the Ombudsman would not act in accordance with the established legal provisions, which seems to be the intention of the claimants.

45. Furthermore, the manner in which the claimants again distort the information coming from the documentation is really disturbing. In the paragraph transcribed, the claimants claim that on the same day that the Ombudsman received the answer from SINAC (that is to say on November 25, 2010), I had again "*written to SINAC demanding the adoption of urgent measures for investigating in what manner that SINAC and/or SETENA had come to (at least, by their understanding) participate in grave environmental fraud. It also made the request that SINAC—not the responsible organization, SETENA— would immediately suspend the Environmental Viability of the Project...*"
46. None of this exists. I sent no notification in said terms to the SINAC on the date mentioned by the claimants or on any other day. Upon referring to me in footnote (377) of paragraph 351 of the memorial in which the claimants include said claim, I see that the document to which they refer (C-92) deals only with the official document from SINAC addressed to my person. That is to say, I want to believe that the claimants again "in error" claim that a report that in reality was issued by SINAC and addressed to me was actually written by me and that therein I would have requested that SINAC suspend the environmental viability project. Not only are their claims completely false, beyond that it is not possible for the Ombudsman to "require" said actions in any way. As I explained at the beginning of my statement, the competency of the Ombudsman is limited to issuing recommendations, which did not occur in this case since the transfer of the file was suspended based on having found the complaint to be before a judicial court. It is very serious that in this proceeding they have distorted the truth and compromised the professional integrity of my person with arguments that lack complete knowledge of the truth of the facts.
47. The claimants continue their distortion of the reality in the second part of paragraph 351:

"351. [...] To make matters worse, Ms. Diaz also wrote to SINAC on December 9, demanding that further investigations be undertaken by SINAC into Mr. Bucelato's seemingly indestructible allegations regarding wetlands and forests, which – Ms. Diaz had apparently been apprised – had been filed afresh with the Municipality (again, through Ms. Vargas) in November 2010. She received a response from SINAC later that same day, in which it was confirmed that inspections were planned to address the wetland and forestry complaints, and that it was SINAC's opinion that Mr. Bogantes' mysterious report had, indeed, been falsified by means of forgery." (Emphasis ours)
48. As mentioned in the chronological report of the facts that came to light in relation to the complaint filed with the Ombudsman, the ACOPAC/SINAC informed the Ombudsman that they would issue a report providing a response to the claim of the residents.

dated December 3, 2010.<sup>58</sup> Since as of December 9, 2010, the Ombudsman had not been given any information about such a report, a request was made to ACOPAC/SINAC to provide us with information on the status of the investigation.<sup>59</sup> The claimants mention that the Ombudsman would have received a response from SINAC on the same date, December 9, 2010. Again, what they state is incorrect. The document to which they make reference in footnote number 379 of their memorial (and that they attach as C-97) involves an official document from the Director of ACOPAC to the Director of SINAC. The said document wasn't even presented with the file to the Ombudsman.

49. ACOPAC/SINAC informed the Ombudsman on November 25, 2010 of the falsification of the document that was supposedly issued by SINAC in 2008 called 67389-RNVS-2008, dated November 25, 2010.<sup>60</sup> I find it very hard to understand why the claimants refer to such a document as "Mr. Bogantes' the mysterious document ", when according to the documentation sent to the Ombudsman by ACOPAC/SINAC on November 25, 2010<sup>61</sup> certain official documents issued in the year 2008 by ACOPAC (ACOPAC – SD-87-08<sup>62</sup> and ACOPAC-D-1063-08<sup>63</sup>) and SINAC (SINAC-SE-GASP-070<sup>64</sup>) already had brought to light irregularities regarding the document in question.

## 2.2 Regarding the supposed concealment of information from the claimants

50. On repeated occasions, the claimants mention in their memorial that I would have concealed information from the developers of the Las Olas project. For example:

"351...She would receive the response from SINAC, which she seemed to have both hoped for and feared, two days later. She was informed that SINAC did not regard as valid the document "identified" by Mr. Bogantes in his late August correspondence to her. That was apparently enough for Ms. Diaz, who – over the many months she had now devoted to promoting Mr. Bucelato's scurrilous allegations – **had never once notified the Investors of her activities, much less give them an opportunity to reply to them.**" (Emphasis ours)

"413. (i). ... But for the **decisions repeatedly made by officials such as Vargas and Diaz, and of organizations such as SINAC and the TAA, to hide their investigations from the Investors and impede their knowledge of the accusations made against them and their ability to respond to them,** the falsity of those allegations could have been proved long before any interruption to the Project would have occurred." (Emphasis ours)

51. [sic] Again, the claimants' claims denote an absolute ignorance of the procedure followed by the Ombudsman. The competence of the Ombudsman is limited to a review

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<sup>58</sup> C-92.

<sup>59</sup> R-61, Official Document 13835-2010-DHR, December 09, 2010.

<sup>60</sup> C-92.

<sup>61</sup> Id.

<sup>62</sup> R-20, Official Document No. ACOPAC-SD-087-08, October 10, 2008.

<sup>63</sup> R-21, Official Document No. ACOPAC-D-1063-08, October 10, 2008.

<sup>64</sup> R-25, Official Document SINAC-SE-GASP-070, March 30, 2009.

of the legality of the acts of the Public Administration, not of private parties such as the developers of the Las Olas project. Within the scope of their competence, the Ombudsman requests information from public entities to follow up on claims filed by citizens. This procedure does not affect third parties because the acts issued by the Ombudsman do not have an adjudicatory character that could influence the rights of private parties; rather they are limited to recommendations made to the public administration. Therefore, the legal procedure in respect of claims before the Ombudsman does not provide for the notification or the participation of third parties to the case. In fact, the Constitutional Chamber of Costa Rica has held on various occasions that the Ombudsman cannot bring a private third party into its investigations.

52. [sic] This is no way implies that I have "*hidden my investigations from the investors and as such not allowed them to know about the accusations against them*". To start, no accusations against the investors were investigated in the record before the Ombudsman; rather the investigation involved a review of the legality of the acts and omissions of the Public Administration through the Municipality of Parrita, SETENA, the Environmental Administrative Tribunal and SINAC/ACOPAC.
53. Moreover, there was no type of "concealment" of information from the investors. At the same time that the attorney for said investors appeared regarding the file to request copies, which were delivered immediately.<sup>65</sup>

### **2.3 Regarding the alleged conspiracy in which I would have participated against the claimants**

54. The claimants refer numerous times to a supposed conspiracy in which I would have participated together with Ms. Vargas and Mr. Bucelato. This can be observed, for example, in the following passages of the memorial of the claimants:

"327. Just as Mr. Damjanac had cared for the SETENA inspection request in mid-August 2010, SETENA officials were efficient in deciding in August 2010 that there was no merit to the **complaints being presented by Mr. Bucelato and his two allies in local government, Ms. Monica Vargas Quesada and Ms. Hazel Diaz Melendez.**" (Emphasis ours)

"348. **Ms. Diaz played a very similar role in this administrative fiasco as Ms. Vargas. In fact, the two officials were not only both apparently in close contact with Mr. Bucelato, but also with each other...**" (Emphasis ours)

"354....The key players in this one-sided relationship were initially **Ms. Diaz and Ms. Vargas**. The record suggests that both **may have been**

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<sup>65</sup> R-130, Request for copies, November 1, 2012; R-131, Delivery of copies, November 19, 2012.

**working at the behest of Mr. Bucelato**, for whom they had been able to launch a number of duplicative and unwarranted investigations into the Las Olas Project, which eventually had the cumulative effect of first threatening and ultimately stalling and frustrating any meaningful use of the Claimants' investments." (Emphasis ours)

55. The first thing I want to clarify is that I do not know any of the persons with whom I stayed in "close contact" according to the claimants, nor were they my alleged "allies" or for whom I supposedly worked. In fact, at no point during the investigation did I have direct contact with either Mr. Bucelato or with any other public official.
56. The processing of the claim from Mr. Bucelato followed the standard legal procedure of the Ombudsman. This implies that the person responsible for contacting the plaintiff and the administrative institutions implicated is the professional in charge of the case. In this case, that was Ms. Alejandra Vega. Upon becoming aware of the allegations of the Claimants, I asked Ms. Vega if she could give me the file and comment to me on her memory of the actions related to this claim.
57. She declared to me that in fulfillment of her duties and following the same procedure that she has in all other cases under her responsibility at the Ombudsman's Office, in the case of this complaint she had attended all consultations with the plaintiff and maintained contact by telephone and through notifications to the public officials of the implicated institutions so as to continue following up on the case. To that end, she communicated to me that on certain occasions she had contact with the plaintiff, Mr. Steve Allen Bucelato, who had come numerous times to the Ombudsman or had made phone calls so that he could be kept apprised of the processing of his complaint. Furthermore, on various occasions the plaintiff had become distressed to the point of tears upon explaining how the environment in the neighboring area around his home was being damaged. Similarly, she explained to me that once she spoke on the phone with the public official from Environmental Management of the Municipality of Parrita, Monica Vargas, so as to obtain information regarding the status of the complaint against that institution. Likewise, she had maintained contact with the other implicated public officials.
58. For my own part, the only knowledge that I had of the persons whom the claimants refer to as my "allies" was after having seen their names on the complaint and reports presented in the file. Really, never in my more than 20 year career at the Ombudsman's Office have I ever been witness to an allegation that has been more baseless and aberrant as this one, where claims coming from a story built on lies serve to call into question my professional ethics.

## **2.4 Regarding my alleged intention to cause the investment of the claimants to fail**

59. The claimants also accuse me of having wished for the failure of their investment. This can be seen, for example, in the following passages:

"388. What Mr. Aven did not know, outrageously, was that there were **officials who were not just capable of derailing the progress of his investment, but who were already actively engaged in achieving that very end.** At the moment that Mr. Bogantes appeared in his office in late August 2010, Mr. Aven had no way of knowing that Las Olas had just survived **concerted attacks by two public officials, Ms. Diaz and Ms. Vargas**, whose efforts had only just been stymied, respectively, by SETENA and the Mayor. Mr. Bogantes obviously sensed that he possessed a strategic advantage so strong that he could leverage a personal pay-day worth several hundred thousand dollars from it. He knew what **Ms. Diaz and Ms. Vargas were determined to achieve, and he apparently perceived that he was perfectly placed to either frustrate, or abet, that agenda, which they apparently also shared with Mr. Bucelato.**" (Emphasis ours)

"389... Las Olas has survived the **concerted attacks** by two public officials, **Ms. Diaz** and Ms. Vargas, whose efforts had only just been stymied, respectively, by SETENA and the Mayor." (Emphasis ours)

"413 (iii) Mr. Bogantes' malicious and deceitful conduct abetted the respective **crusades upon which Ms. Diaz and Ms. Vargas had already embarked.** His or an unknown co-conspirator's manipulation of 2008 MINAE records allowed him to falsely accuse Mr. Aven of falsification of documents that were essential for obtaining the necessary permits to continue with the works of the Las Olas Project. His or an unknown co-conspirator's circulation of **this fabrication to Ms. Diaz, and possibly also Bucelato**, reinforced the likelihood that it would be used against Mr. Aven, at a safe distance from its author(s)." (Emphasis ours)

60. [sic] Honestly, these excerpts seem to have been taken from a thriller novel. Nothing could be further from the truth. I do not know the claimants, so it is hard to understand why I could have intended to thwart their investments. There was no "concerted attack" or "effort" or "crusade" against the claimants' project. Much less was I complicit with Mr. Bogantes, whom I have never seen in my life.
61. [sic] As I have stated in this statement, my only participation in relation to the complaint of Mr. Bucelato on alleged environmental damage taking place in the Las Olas project was limited to requesting information from the administrative entities through six official communications in order to review the legality of their acts and omissions.<sup>66</sup> It is simply impossible to derive from them any intention to harm the claimants

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<sup>66</sup> R-46, Official Document 08952-2010-DHR; R-44, Official Document 08947-2010-DHR; R-45, Official Document No. 08949-2010-DHR; C-91; R-61, Official Document No. 13835-2010-DHR.

### **3. RESERVATION OF RIGHTS**

62. Given the quantity and quality of slanders and defamations that the Claimants have included in their memorial about my person, I want to express in the most determined manner that I reserve the right to initiate legal proceedings against them. I have built an impeccable administrative career in the Costa Rican Public Sector; in my position as the Director of Administrative Management Control I have the knowledge of and research on complaints of possible acts of corruption or the lack of ethics and integrity which should govern the behavior of a public civil servant. The foregoing makes it impossible for me to in any way tolerate doubts as regards my personal and professional ethics, nor the amount of slanders and defamations of which I have been made the object.

### **4. AFFIRMATION OF TRUTHFULNESS**

I, **Hazel Díaz Meléndez**, do confirm the content of the present witness statement and I declare that the content and the affirmations herein are true.

Signed,



April 8, 2016