

**ARBITRATION UNDER THE ARBITRATION REGULATION OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL 2010)**

AND

**UNDER 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

WITNESS STATEMENT OF LUIS GERARDO MARTÍNEZ ZÚÑIGA

April 8, 2016

[initials]

I, **Luis Gerardo Martínez Zúñiga**, whose address is at Cartago, Costa Rica, declare that:

1. This is the first statement made 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 against the republic of Costa Rica, which developed according to the ANCITRAL Arbitration Regulations and the Free Trade Agreement between Central America, the United States and the Dominican Republic (the “Arbitration”).
2. I have been asked to take part in the stated Arbitration to explain my knowledge of the proceedings undertaken by the Deputy Environmental Agrarian Prosecutor (the “Prosecutor”) in regards to the investigation and accusation of Mr. David Ricard Aven and Mr. Jovan Dushan Damjanac for violation of the Wildlife Conservation Act in the form of draining and backfilling of swamps and violation of the Forestry Act in the form of invading conservation areas and illegally exploiting forestry products (the “Case”).
3. I have also read the memorial submitted by the claimants in the Arbitration, and the witness statement given by Mr. David. Richard Aven, Mr. Jovan Dushan Damjanac and Mr. Néstor Morera Viquez, and wanted to give my version of the facts reported therein regarding my actions and what happened in the Case.
4. I confirm that I have no direct or indirect interest in this Arbitration, and submit this declaration on my own behalf and in my capacity as Prosecution Coordinator with the Deputy Environmental Agrarian Prosecutor of Costa Rica.
5. Except when stated otherwise, the facts and affirmations contained in this witness statement are from my own knowledge and are correct to the best of my knowledge and understanding. In cases when the facts and affirmations contained herein do not come from my own knowledge, I have identified the sources of information on which I based myself or where the information came from which I refer to in this witness statement.
6. In preparing this witness statement, I have been assisted by attorneys from Herbert Smith Freehills, with whom I have met to state my recollection of the facts in detail. Also, in the preparation of this statement, I have reviewed documents that contain the records of the Case and the videos of the trials, to help refresh my memory on the facts that occurred many years ago. I confirm that each and every one of the affirmations and statements contained herein represent my knowledge of the facts.

BACKGROUND

7. I am a Prosecution Coordinator with the Deputy Environmental Agrarian Prosecutor of the Attorney General since August of 2013. Prior to that, I worked since February of 2008

as a Deputy Prosecutor for the Attorney General and as a Deputy Environmental Prosecutor since January of 2009. I must also mention that I have worked from September 2005 to February 2008 at the Attorney General of the Republic as an assistant attorney. I also worked as a lawyer for the General Office of Social Adaptation from July of 2003 to July of 2005, and as attorney for the General Customs Office from March to June of 2003. Likewise, I have liberally exercised the profession of Attorney and Notary Public from August of 2001 to March 2003. I am an attorney and Notary Public through Universidad de Costa Rica [University of Costa Rica]. I have been a professor at the University of Costa Rica. During my experience as environmental inspector I have had cases in my charge related to the mining project of Crucitas, related to the building of Ruta 1856 (Trocha Fronteriza), to the construction of Ruta 35 (San Ramón – San Carlos), related to the tourism project Mar Serena (mentioned as professional experience by Mr. Manuel Ventura, attorney for the claimants),¹ the one against the owner of the Pedregal companies Rafael Ángel Zamora Fernández, the one against the Riu Hotel Complex, among many others.

1. REGARDING THE CRIMINAL PROCESS IN COSTA RICA

8. The criminal process in Costa Rica has five stages.
9. The first is an investigation stage that begins with the receipt of a complaint. Publicly prosecuted cases may be filed by any citizen, including anonymously, which binds the prosecutor to carrying out an investigation. Environmental crimes are all publicly prosecuted. In this first stage, injunctions can be requested, based on the possibility or probability of commission of a crime. The prosecutor requests them, and the defender of the accused disputes them. The accused is always invited to participate in the hearings. The investigation stage ends with a petition to dismiss or acquit (archive) the cause or the criminal accusation.
10. In the event that the prosecutor decides to accuse, a second stage begins that is called intermediary, in which the judge gives the parties the chance to negotiate. If no conciliation is reached, the judge decides whether or not to take the accusation to trial, after a preliminary hearing. In this stage, the judge analyzes the accusation and if there is the probability (no certainty is required) that the facts occurred, that the accused committed them and that they are described correctly in the accusation, he orders taking the cause to trial.
11. The third is the arguments stage, also known as a trial. Before this stage begins, some courts allow settling the case if the parties reach an agreement. There, all documents which the defender and the prosecutor offered as evidence in the previous stage

¹ Witness Statement of Manuel Ventura, paragraph 7.

are incorporated. The parties make their arguments and interrogate witnesses. This stage ends with a sentence that may be a conviction if it was demonstrated that the facts really did occur and the accused participated in them, or it may be an acquittal if the judge is not convinced to that level. In cases where the sentence to be imposed does not exceed 5 years, the trial is carried out by a single judge, and in cases where the crimes call for penalties that exceed that maximum, the trial must be done by a court composed of 3 members.

12. Then comes a fourth stage of appeals, and finally, if there is a conviction, the last stage is execution of the sentence.

2. REGARDING THE CASE AGAINST DAVID RICHARD AVEN AND JOVAN DUSHAN DAMJANAC

13. Next, I will detail each of the procedural stages described in the previous section, within the Case pursued against Mr. David Aven and Mr. Jovan Dushan Damjanac.

2.1. Investigation Stage

a) The complaint

14. This case begins with a complaint submitted on February 2 of 2011 by US citizen Steve Bucelato, residency ID 184000102328, a neighbor of Esterillos Oeste [West], against David Richard Aven and Jovan Dushan Damjanac, for damage to the environment, to the forest ecosystem and to a swamp for submitting a false document to a case file with SETENA.

15. Dr. Morera Viquez seems to be surprised that the Prosecutor decided to investigate this complaint because it was filed by Mr. Steve Bucelato, when he argues that:

“The investigation and prosecution case had not been initiated as a consequence of proactive prosecutorial behavior or because the local community was suffering. There was a foreign link between Mr. Bucelato, a private person, and the criminal case.”²

16. Nevertheless, Mr. Steve Bucelato filed a complaint, considering himself affected by the environmental damage of the Las Olas project, as a neighbor of the area. Environmental crimes are normally reported by neighbors of the parties who are committing the unlawful acts, since they are the first to discover what is happening. The right to a healthy environment is expressly protected by the Constitution of Costa Rica (article 50) and is considered a right that protects widespread interests, which implies that any person that feels that the environment is being damaged can legitimately complain for it to be remedied. In criminal matters, the reasons or identity of the complainant are

² Witness Statement of Néstor Morera Viquez, paragraph 51.

not relevant to the investigation. In fact, it is possible to receive anonymous complaints. Therefore, the accusation that there was a supposed “foreign link between Mr. Bucelato... and the criminal case” makes no sense.

17. On the other hand, in addition to the report from Mr. Bucelato, the Aguirre prosecutor also had a complaint on 8 February 2011 against Mr. David Aven from Lic. Luis Picado Cubillo, in his capacity as employee of MINAE and in fulfillment of that provided in Article 54 of Forestry Act No. 7575.3 That complaint stated that:

“1- The property of the Condominio Horizontal Residencial Las Olas [Residencial Horizontal Condominium Las Olas] has a forest as stipulated in the definition of forest described in Forestry Act No. 7575, Article 3, paragraph d), where vegetation has been eliminated in an area greater than 03 hectares, with trees of 5 cm to 40 cm in diameter and the smaller vegetation (understory) eliminated, causing environmental damage that harms the free development of small and medium-sized plants and trees, as well as the free transit of bigger and smaller wildlife that exist in the place of the clearing. In short, the ecosystem that is present was harmed, and the habitat of many species, both animal and vegetable, has been displaced.

2- In application of the Soil Use, Handling and Conservation Act No. 7779, it is necessary to take a soil sample to determine the appropriate use of it, so as to not produce environmental damage that would be difficult to recover from in an ecosystem as fragile as the complainants stress to the existence or presence of a swamp.

3- In accordance with Article N 11. Paragraph 2) of the Biodiversity Act N 7788, which states that effective protection measures should be taken to prevent possible damage to natural resources and the environment, the work should be immediately paralyzed until the appropriate field studies can be done to conclude if said product is not causing irreparable or disastrous damage to the environment.

4- That the property in question has bodies of water supposedly classified as wetlands, and it is important that MINAE’s national Wetlands Program state its position in this regard.”⁴

18. Therefore, given the repeated complaints regarding possible environmental damages, the Deputy Environmental Agrarian Prosecutor was supposed to investigate the case. In any case, crimes against the environment are publicly prosecuted, it is sufficient to know that they were committed for the Public Prosecutor to be obligated to investigate.

³ R-66, Official Letter No. ACOPAC-CP-015-11-DEN.

³ R-66, Official Letter No. ACOPAC-CP-015-11-DEN, p. 3.

b) The collecting of documentary evidence

19. On 8 February 2011, one of the first measures I took in the investigative stage was to request the seizure of SETENA's⁵ records to see what documentation was there from the SINAC-MINAE, which is the agency with competence to determine the existence of wetlands and forests. Likewise, reviewing it was essential to investigating the submission of false documents from the SINAC-MINAE in those SETENA records. Therefore, I'm completely surprised by Mr. Aven's accusations in his witness statement that I had not taken SETENA's records into account during the investigation.⁶
20. I also collected all of the documentary evidence relevant to the case by making requests to the city and to SINAC-MINAE.⁷ From this, it arose among other things that the ACOPAC (a dependent agency of SINAC-MINAE) on 1 October 2008 had issued a report that stated that there were two possible wetlands in the project area, and it was up to the wetlands department of SINAC-MINAE to issue the technical criteria on that.⁸ This in itself was sufficient motive to continue the investigation in order to guarantee the application of legislation on environmental protection.

c) The request for studies and technical reports

21. Likewise, I requested that SINAC do some work to determine if there were ecosystems in the project area that Costa Rican environmental legislation protects. Specifically, I asked ACOPAC to determine if there was a forest at the location. I asked the National Wetlands Program of SINAC-MINAE to send technical criteria on whether or not there were wetlands on the property. I also asked the National Institute for Agricultural Innovation and Technology Transfer (INTA) to take soil samples to determine if usage was in accordance with the Soil Use, Handling and Conservation Act, No. 7779.
22. The first inspection of the site based on the Prosecution's request was done on 16 March 2011. The following persons participated in it: Lic. Jorge Gamboa Elizondo, employee of the National Wetlands Program of SINAC-MINAE, Lic. Luis Picado Cubillo from ACOPAC, and Mr. Diógenes Cubero Fernández and Mr. Luis Molina Cambroner, employees of INTA.
23. On 17 March 2011, Lic. Jorge Gamboa Elizondo sent me a detailed 21-page report which concluded that:

⁵ R-69, Order of Seizure.

⁶ Witness Statement of David Aven, paragraph 178.

⁷ R-71, ACOPAC-D-114-11.

⁸ R-20, ACOPAC-SD-087-08 mentioned in official letter C-80 (ACOPAC-OSRAP-468-10).

“On the Western sector where a demonstration house was built, is a palustrine non-tidal seasonal wetland, with a surface water table due to the hydromorphic soil present in the area...

The palustrine wetland described is being directly affected for the construction of a drainage and sewage canal that is connected to the sewage outside the inspection site in a public area, and which drains into the limits of the lumber estuary wetland about 450 meters from the inspection site.

At the time of the inspection, there was machinery doing earth moving and placing sewage systems on the drainage canal in the wetland. The work of channeling, construction of access routes and landfill have affected the cultural dynamics of the wetland. In breach of the provisions of Article 45 of the Organic Environmental Act, which prohibits activities aimed at interrupting the natural cycles of wetland ecosystems, such as the construction of dykes that prevent the flow of sea or fresh water, draining, drying, backfilling or any other change that causes the deterioration and elimination of such ecosystems.”⁹

24. To my understanding, the conclusions of the report of Lic. Gamboa Elizondo that covered the effects on a wetland at the site were of greater relevance as evidence in the process, since Lic. Gamboa Elizondo was the Coordinator of the National Wetlands Program. That program is a part of SINAC-MINAE, which is the agency with competence to determine the existence of wetlands.
25. On 5 May 2011, Mr. Cubero from INTA issued the technical criteria on soil use. It concluded, among other things, that:

“2. Anaerobic processes are evident due to the difficulty in waters from this area flowing out, and thus the depth adds to the processes of reduction, where at about 80 centimeters, such processes are radical due to the presence of gleyed soil.”¹⁰

“5. The anthropic interference that has occurred for decades in this sector (highway infrastructure, deforestation, livestock) and the definition of the Handling Unit in point 4 do not support cataloging the soil at this site as typical of wetland systems.”¹¹

⁹ R-76, Inspection Report GASP-093-11, p. 20.

¹⁰ C-124.

¹¹ Id.

d) The declaration of Mr. David Richard Aven

26. On 6 May of 2011, Mr. David Richard Aven appeared at the prosecutor's office to deliver a statement.
27. The meeting of 6 May 2011 which Mr. David Aven refers to in his witness statement,¹² is not a meeting properly said. It was a procedural act named inquest or summons, in which the prosecutor explains to the accused, who must be accompanied by a lawyer of their confidence or a public one provided by the State, what are the facts they are being investigated for, what is the crime allegedly committed, and what is the proof that exists until then. All of that was done at that time.
28. It's important to note that at the summons, Mr. Aven had an interpreter into English, since that is what he and his lawyer requested. At that time, there was no one from the official court list, so one was named due to lack of means. This procedural act was done with the translation to English by the designated person, and at no time was there a protest, either from Mr. Aven or his lawyer, that the interpreter was translating poorly. In fact, all that the accused declared was added to the document made for that purpose in Spanish, which is the official language of the country and which was signed by the accused, by his attorney, and by myself.
29. The language in which procedural acts are done in Costa Rica is Spanish, because this is the official language of our country, and given that, it is not an additional obligation of the Prosecutor performing these acts in the language of the country, to provide the accused with a written translation into another language. For this, an interpreter was named, who was duly sworn in for this purpose, and swore to translate what was said there faithfully.
30. Likewise, at the inquest, the dynamic is that once warned of their right to abstain, if the accused decides to make a statement, they say what they consider, and then the prosecutor and defense can ask questions, and the accused decides whether they answer or not. It is not a pleasant conversation between the prosecutor and the accused and their lawyer, but rather a formal act of procedure. That is, the prosecutor has no reason to answer the accused's questions or to give opinions or estimations in that regard.
31. It's important to clarify that Mr. Aven was summoned for this act, which he appeared for of his own free will, with no coercion, and he initialed what was declared there in any case, of his own free will and under no pressure. If Mr. Aven was fearful or concerned, this was due an inner thing, and not because there were outward signs by the undersigned or any other person that were threatening or coercive in any way. Likewise, at no time did Mr. Aven say he felt any kind of

¹² Witness Statement of David Aven, paragraphs 181-189.

pressure in addition to what may be caused to any person going to the Courts of Justice.

32. In that meeting, Mr Aven showed me the SINAC-MINAE document identified as "67289RNVS-2008" and insisted that it was valid and that the SINAC-MINAE had indicated that there were no problems with the project. The witness statement of Mr. Aven mentions that I did not investigate the matter of the false document.¹³ This is completely incorrect. It can be proven by the case records that the report supposedly issued by SINAC-MINAE identified as "67289RNVS-2009," that established that the project was not a threat to the environment, had been falsified. I personally interviewed the persons whose names and signatures appeared in that document, and both categorically denied they created it, and refuted that those were their initials; they also stated that the supposed office that issued that document did not exist.
33. Clearly, given that that document only benefited the Las Olas project and that Mr. Aven himself, during the summons meeting he attended at the Prosecutor's Office, had insisted that that document was true, the investigation lines led to Mr. Aven as the main suspect of having procured the falsification of the document in order to benefit his project.
34. On the other hand, the evidence collected leaned toward the theory that that document had been submitted in the records for the Las Olas project with SETENA, where the Environmental Viability by architect Edgardo Madrigal Mora had been processed. That person was from the firm Mussio Madrigal, that represented the interests of the Las Olas project to SETENA, and had many times submitted documentation in representation of the project. For example, on 14 March 2008, architect Edgardo Madrigal Mora had submitted a letter to SETENA that mentioned that:

"On 26 March, the current employees of MINAE, specifically of the sub regional office of Aguirre Parrita inspected the property with faults, where they were able to verify that the area was not a forest nor is it within a Wild area protected by law.

Regarding the inspections done by its dependency and the MINAE of Aguirre, there must be reports that validate the reality of the property, which in the case of the ones from SETENA, are within their reach, and the ones from Aguirre we will add later to the records of the case in question."¹⁴

¹³ Witness Statement of David Aven, paragraph 185.

¹⁴ R-16, letter from Edgardo Madrigal Mora to the National Technical Office of the Environment on 14 March, 2008.

35. We must take into account that the false document is dated 27 March 2008. That is, one day after the supposed inspection of 26 March 2008 by SETENA, mentioned in the letter from architect Madrigal. Likewise, the letter from architect Madrigal is dated 14 March 2008, wherefore there is a complete inconsistency in terms of time, since it mentions an inspection that would only occur a week later (on 26 March 2008) as having already occurred. Personally, I don't know if this supposed inspection actually occurred.
36. Therefore, it was strongly suspected that the false document had been introduced in SETENA's records by Mr. Edgardo Madrigal Mora to induce SETENA to make a mistake in benefit of Mr. Aven's Las Olas project. Nevertheless, there was no conclusive evidence that assured that it was Mr. Edgardo Madrigal Mora who introduced that document into the records, since there was no record of who submitted it, nor that it was done with the complicity of the accused David Richard Aven. It is for this reason that, in applying the principle of objectivity that governs the work of prosecution, a definitive acquittal (archiving of the cause) was requested in favor of Mr. Aven for the crime of using false documents.¹⁵
37. "In this regard, it also caught my attention that in the Claimants' Memorial and the witness statement of Mr Aven, it was suggested that I had something personal against him or an illegitimate purpose in connection with the investigation of the case because I had made the accusation without any evidence. That is not true and I strongly reject such an unjustified accusation.
38. If that were true, then it is incomprehensible why I decided to drop the charges against Mr Aven on the basis of the use of a forged document, which is a very serious crime with penalties of up to 6 years in prison. Of course even if one has well-founded suspicions, in accordance with the principle of presumed innocence, one can never accuse a person without having enough evidence that he or she has committed a crime. That is why the investigation into the use of a forged document did not allow us to determine with probability that Mr Aven used this document or that Mr Madrigal developed or used it before the SETENA. Therefore I decided to seek dismissal of the charge.
39. Far from what is suggested by the claimants, my intention was never to punish Mr Aven with a long prison sentence, because of a personal issue. My role as an environmental prosecutor is to enforce Costa Rican environmental legislation and especially, if there has been environmental damage, that the person responsible repairs it. My investigation and prosecution of the case in all instances had that as the sole objective.

¹⁵ R-115, Withdrawal for using false documents and disobedience.

40. I should add that prior to the initiation of this proceeding, I have never met Mr Aven or Mr Damjanac, and I have never in my life seen or met the other claimants.
41. On the other hand, it's also worth noting in the accusation that Mr. Aven renders in his witness statement, that during the meeting of March 2011, he had stated to me that he received an alleged request for a bribe from Mr. Christian Bogantes and that I did not investigate it.¹⁶ It's worth clarifying many points about that affirmation:
42. In the first place, that complaint was filed with another prosecutor, not with the Deputy Environmental Agrarian Prosecutor, so it was not up to me to investigate it.
43. In the second place, the complaint was made a year after the date of the supposed act, when there were already many charges filed against the project for violations of environmental legislation. In fact, Mr. Aven's report against Mr. Bogantes, for the supposed crime of requesting a bribe, was presented when the criminal process against Mr. Aven and Mr. Damjanac was underway and was known to them.
44. In the third place, I understand that the prosecutor in that cause was supposed to request the archiving of the complaint due to a lack of evidence, since Mr. Aven did not appear after many requests, as stated in the case records opened for this purpose at the Quepos Prosecutor's Office, and as indicated by the claimants' witness, Mr. Manuel Ventura.
45. Lastly, at no point did Mr Aven or his lawyers suggest to me that the alleged bribery could have something to do with the facts established by the technical officials of SINAC-MINAE in relation to a wetland and a forest at the project. In fact, throughout the trial, the counsel for the accused placed constant emphasis on a report of a visit made by Mr Bogantes and Mr Manfredi in July 2010 in which it was mentioned that there were no areas of wetlands (ACOPAC-OSRAP-371-10).¹⁷
46. If what the claimants suggest were right, that the accusations regarding environmental damage are all based on Mr. Bogantes' anger, because Mr. Aven had refused to pay him a bribe in July-August of 2010, it really is incomprehensible what would be the logic that the only document on which they base their defense is a document that was the result of that visit from Mr. Bogantes in July of 2010.
47. Moreover, Mr Bogantes was a witness during the trial and Aven's defense had the opportunity to interrogate him at length. There was not a single question or reference to the alleged bribery solicitation. If that fact were allegedly connected to the charges against Mr. Aven for environmental damage, this would have been the correct instance

¹⁶ Witness Statement of Mr. David Aven, paragraph 185.

¹⁷ C-72.

to prove it. Although, as I have said before, this was never even alleged by Mr Aven's defense. When Mr Bogantes attended the hearing of the criminal trial in which he was called as a witness, the accused's counsel, Mr Nestor Morera, having the opportunity to question the witness (who was under oath) on the alleged bribe, did not do so.

48. On the other hand, Mr. Aven is offended by the fact that the studies conducted to determine the existence and involvement of the wetland and the forest were carried out by SINAC-MINAE because in his opinion it was not an impartial party.¹⁸ However, that accusation is completely groundless. Even if one assumes that the solicitation of a bribe from Mr Bogantes was true, which was never proved, the fact is that none of the reports that I requested were written by Mr Bogantes but by the Coordinator of the 'Programa Nacional de Humedales', Mr Jorge Gamboa Elizondo and the Coordinator of Protection of ACOPAC Luis Picado Cubillo.
49. To pretend that the fact that those professionals work under the scope of MINAE, like engineer Bogantes, is enough to consider them biased, without any indication whatsoever that those gentlemen had knowledge of or participated in the supposed attempt to solicit a bribe by engineer Bogantes, is simply far-fetched. Hundreds of people work under MINAE, and won't for that reason be biased in regards to a professional expert report requested by a prosecutor, by the mere fact that there is an unsubstantiated complaint of an alleged attempt at corruption by some official of MINAE.
50. On the contrary, not only do I consider that Jorge Gamboa and Luis Picado Cubillo exercised their work in an absolutely professional and impartial manner, but also they were the officers assigned by SINAC, the competent authority under Costa Rican law, to determine the existence and impact to a wetland and a forest.
51. In any case, counsel for the accused at no point during the trial argued that the officers of SINAC/MINAE were biased or that they could be in any way related to an alleged solicitation of bribery by Mr Bogantes, thus, I find Mr Aven's suggestion in this Arbitration completely unacceptable.

e) Visit to the site

52. One of the procedures that a prosecutor investigating a case must do is visit the site. I went to the site personally during the investigation. At that visit I was able to observe the damage that was caused to the wooded area, and the filling and drainage that was

¹⁸ Witness Statement of Mr. David Aven, paragraph 185.

being done at the wetland area where machinery was working, the laborers working at the location were identified, Mr. Francisco Iglesias Caldera and Mr. Gabriel Alberto Montero Arce, who were interviewed regarding who had hired them for that work. All of this was documented in a video.

53. The visit occurred on 13 May 2011, and many technical professionals from ACOPAC accompanied me, as well as Lic. Gamboa from the National Wetlands Program of SINAC-MINAE. At that visit, the palustrine wetland area was determined, as well as how it had been completely filled in and a drainage canal and sewage had been left uncovered, and how the area was affected by felling of the forest.
54. The claimants state the only evidence that there was illegal felling of trees at the site was a stump of a small tree. This is not realistic either, since during the visit we were able to document many trees that had been cut to ground level, which was recorded on video.
55. I want to clarify that in this case, many smaller diameter trees were cut, with the clear intent of weakening the forest located in a part of the Las Olas project, and certainly therefore, having eliminated the density of the ecosystem, the claimants requested a permit to cut the bigger trees, alleging that there was no forest proper. This is precisely a typical technical delinquency in order to eliminate a forest. Nevertheless, according to the Forestry Act, the felling of trees is still a crime even though they were not in a forest, simply because it was done without a permit, as regulated by Article 61 paragraph a) of the Forestry Act.¹⁹
56. On 16 May 2011, ACOPAC issued a photographic summary of the visits made,²⁰ and on 18 May 2011,²¹ Lic. Gamboa Elizondo, Lic. Picado Cubillo, and Lic. Wohl from the SINAC issued a report on our visit of 13 May 2011, in which they concluded that the wetland area backfilled was approximately 1.35 hectares.²² On 22 May 2011, I asked ACOPAC to issue the exact coordinates of where the wetland had been,²³ and a response was sent on 23 May 2011.²⁴
57. On 4 July of 2011, personnel from ACOPAC visited the wooded area of the property again, and sampled the trees in 3 lots. The result of that sampling is stated in a report of 7 July 2011, which concluded that

¹⁹ C-170, Article 61, paragraph a).

²⁰ C-126.

²¹ It's worth clarifying that by mistake, the date in the report is 18 March 2011, but the correct date therein is "May" instead of "March."

²² R-95, ACOPAC-OSRAP-0345-11.

²³ R-99, Official Letter 143-FAA-2011.

²⁴ C-129, Annex No. 3.

a forest was present, as per the definition stipulated in Forestry Act No. 7575, article 3, paragraph d).²⁵

58. On 3 October 2011, Lic. Picado Cubillo sent me a police report expanding the complaint, which mentioned that an inspection had found 4 people doing illegal activities of felling, removing stumps, burning and covering the residue from the burn with dirt.²⁶ At that time, I understood that the investigation had brought up enough evidence to file an accusation against the defendants for the environmental damages they had caused.

f) Investigations requested of the OIJ (Organismo de Investigación Judicial [Judicial Investigation Agency])

59. At the same time as the requests for technical reports from the MINAE, I asked the Judicial Investigation Agency (OIJ), an investigation agency with judicial powers, to determine who was carrying out the actions against the two ecosystems. The OIJ determined that the project administrator Jovan Dushan Damjanac was the one who gave the orders for the trees to be cut, and Mr. David Richard Aven had ordered the drainage of the wetland.

2.2. Intermediate stage

a) Criminal complaint and opening of a case

60. On 21 October of 2012, I submitted a formal criminal complaint and asked that a trial begin, to the criminal Judge of the intermediate Stage of the Aguirre y Parrita Criminal Court, against David Richard Aven and Jovan Dushan Damjanac, for committing the crimes of violating the Wildlife Conservation Act by draining and backfilling wetlands, and violating the Forestry Act by invading conservation areas and illegally exploiting forestry products.²⁷
61. The Attorney General of the Republic filed a complaint for the same facts the Public Prosecutor filed, and submitted a Civil Lawsuit for Compensation against both of the accused, and against the company Inversiones Costco S.A, represented by David Richard Aven, to recover for the environmental damages caused.
62. Mr. Morera states that prison sentences in forestry crimes are “almost unheard of.” But to the contrary, there is ample case law that confirms sentences for the illegal felling of trees.²⁸

²⁵ C-134.

²⁶ C-141.

²⁷ C-142.

²⁸ See, for example, R-173, Resolution No. 2002-0979 by the Second Circuit Criminal Cassation Court of San José (upholding a prison sentence for the accused for building works that affected a forest); R-178, Resolution No. 964-2007 by the Second Circuit Criminal Cassation Court of San José (upholding a prison sentence for the crime of violating the Forestry Act committed in prejudice of natural resources); R-181, Resolution No. 2011-0280 by the Second Circuit Criminal Cassation Court of San José (upholding a prison sentence for the illegal felling and illegal exploitation of forestry resources); R-183, Resolution No. 32-2014 by the Cartago Criminal Sentencing Appeals Court (upholding a prison sentence for the felling of two hectares of forest); R-180, Resolution No. 175-2010 by the Guanacaste Criminal Cassation Court (upholding a prison sentence for the felling of a tree).

63. In short, the facts attributed to the accused were the following:
- 63.1 The accused David Richard Aven, in the project Condominio Horizontal Residencial Las Olas and the owners of the lots that had been set aside previously from property 6-142646-000, ordered the gradual backfilling and drainage of the wetland located in the Western sector of the project. That action was increased in the months of November 2010 to February 2011, on which dates he hired a group of laborers, among them Mr. Francisco Iglesias Caldera and Mr. Gabriel Alberto Montero Arce, who he ordered to make, in the Western sector of the cited project, firmly within the limits of the subsidiary properties of the project Condominio Horizontal Residencial Las Olas, a drainage canal in which a sewage system was placed. Through said canal, a palustrine wetland was drained measuring approximately 13,500 square meters, located between geographical coordinates 1054150-444340 Northwest; 1054150-444580 Northeast; 1053950-444580 Southeast; 1053950-444340 Southwest. Continuing with his criminal actions, the defendant ordered the mentioned workers to backfill the space the wetland occupied, which had been drained, by placing a large amount of dirt and building cobblestone streets and placing wiring services, with which the stated conservation area was invaded. All of the above without any permits from SINAC-MINAE.
- 63.2 In the Southeast sector of the stated project, firmly within coordinates 9°32' Latitude North / 84°30'10" Longitude West and 9°32' Latitude North / 84°29'50" Longitude West is a site that qualifies as a forest. Without specifying an exact date, but within the months of November and December of 2010, the accused Jovan Dushan Damjanac, to the advantage of the project Condominio Horizontal Residencial Las Olas, hired a group of farm workers, among them Mr. Melvin José González Benavides, who he ordered to cut down and eliminate the forest floor and understory of a forest (around 400 trees with diameters from 5 to 25 centimeters, in wooden species such as guacimo, amargo, espave, madroño, cedar, lagartillo and gallinazo). By those actions, Jovan Dushan Damjanac affected an area of approximately 75,150 square meters of forest. All of the above without permits from the State Forestry Administration and with the sole purpose of benefiting the development of the project Condominio Horizontal Residencial Las Olas.

64. To prove those facts, abundant evidence was attached, which supported the accusation made, among this:
- 64.1 Report number ACOPAC-CP-015-11-DEN,²⁹ of 28 January 2011, by which employee Luis Picado Cibillo notified the Public Prosecutor of the impairment of a forest and wetland area in the project Condominio Horizontal Residencial Las Olas, and in it showed in detail the facts that occurred until January of 2011.
 - 64.2 Official letter SINAC-GASP-093-11,³⁰ of 18 March 2011, subscribed by licenciado Jorge Gamboa Elizondo, coordinator of the National Wetlands Program of the SINAC, which showed that at the discretion of that professional as an expert on the matter, in the area of the project Condominio Horizontal Residencial Las Olas and certain properties separated from the property that gave rise to this project, was a palustrine wetland that had been severely affected.
 - 64.3 A copy of official letter DEGA-091-2009,³¹ of 16 June 2010, signed by the witness Mónica Vargas Quesada, from the Environmental Management Department of the municipality of Parrita, which showed that in properties 6-156482-000 and 6-156489-000 there was an ecosystem that merited being categorized by MINAE, since there were complaints by the community that it was a wetland that was being backfilled.
 - 64.4 A copy of the master plan for the project Condominio Horizontal Residencial Las Olas,³² which showed that the accused had planned to develop the entire area of the property, including not only the wetland areas, but the forest areas too, among other aspects of interest.
 - 64.5 A copy of official letter ACOPAC-OSRAP-468-10,³³ of 27 August 2010, which showed that since 1 October 2008, ACOPAC had mentioned the possibility of the site where the project Condominio Horizontal Residencial Las Olas was being developed contained two wetlands, but that it was up to SINAC's Wetlands Department to issue the technical criteria, and that no permits had been granted for the felling of trees at the site.
 - 64.6 Official letter SINAC-GASP-143-11,³⁴ dated 18 March 2011, signed by Lic. Jorge Gamboa Elizondo, Lic. Luis Picado Cubillo, engineer Fulvia Wolf Jiménez, which

²⁹ R-66, ACOPAC-CP-015-11-DEN.

³⁰ R-76, Inspection Report GASP-093-11.

³¹ C-70.

³² C-54.

³³ C-80.

³⁴ C-117.

showed that the palustrine wetland described in report SINAC-GASP-093-11 was completely backfilled and that it measures 1.35 hectares; and illustrating with pictures the current state of this place, among other aspects.

- 64.7 Report ACOPAC-CP-081-11,³⁵ of 16 May 2011, signed by Lic. Luis Picado Cubillo, engineer Fulvia Wolf Jiménez, and technician Dionel Burgos, which illustrated the existence of a wetland at the site mentioned, and showed and illustrated the affected forest area (75150 square meters) in the months of November and December 2010, due to the actions ordered by the accused Jovan Damjanac, among others.
- 64.8 Official letter ACOPAC-CP-099-11,³⁶ dated 7 July 2011, signed by Lic. Luis Picado Cubillo, Control and Protection Coordinator for SINAC-ACOPAC, which demonstrated that at the site of the reported facts by the defendant Jovan Damjanac, a sample was taken at random locations, the result of which was that at the place in question there was a forest by the definition contained in the Forestry Act.
- 64.9 Also, testimonial evidence was requested of 18 witnesses.

b) The defense of the accused

The exception to settle preliminary matters

65. In their defense, the accused filed an exception to settle preliminary matters in which they held that despite the crimes the defendants were accused of having been committed, the procedure should be suspended until the matter is resolved regarding the existence of environmental damage in a contentious-administrative proceeding.³⁷
66. That exception was dismissed by the judge in trial since he considered that environmental law intends to preserve widespread community interests protected by legislation, and that the prosecution of crimes against the environment is a criminal matter.

The environmental viability of SETENA and permits from the municipality

67. As to the merits, the main defense put forward by the defendants was that they held permits issued by the public administration to perform the acts of which they were accused.³⁸ In this regard, they relied on the environmental viability granted by SETENA on 2 June 2008 and on the permits of the Municipality of Parrita for easements of 16

³⁵ C-126.

³⁶ C-134.

³⁷ R-116, Formal Exception to Settle Preliminary Matters by David Aven.

³⁸ Mr. Néstor Morera Viquez also recognizes this in his witness statement, paragraph 32.

July 2010 and construction of 7 September 2010. However this argument lacks any value if one considers the following.

68. SETENA analyses whether a project is environmentally viable once it receives all studies from the developer. [The environmental viability] is simply a requirement to start a project; SETENA does not grant permission to perform works. This is regulated by Article 17 of the Environmental Organic Act, which is even quoted by the claimants in their submission, which shows that they know of it.
69. The developer has to go to SINAC-MINAE to request permission to cut down trees, to affect a wetland; to the Municipality to obtain construction permits; to the mining authority if it is to exploit mines, etc. The environmental viability can never authorize the affectation of a wetland or the cutting down of trees on a site.
70. In fact, the environmental viability that SETENA granted to the Condominio Horizontal Residencial Las Olas expressly mentions and highlights in the third recital, point seven "*If the removal of a tree is required, a permit must be obtained at the MINAE office.*"³⁹
71. On the other hand, it was demonstrated that the SINAC document submitted to obtain the environmental viability from SETENA is a fake. The defendants claim that SETENA reconfirmed said environmental viability on November of 2011 by virtue of which they, still not considering the document a fake, SETENA's record contained an official letter from SINAC on 2 April 2008 named "ACOPAC-00282-08" which mentioned that the project area was not within a conservation area.
72. Nevertheless, this changes nothing. The fact that there is a wetland or a forest that has not yet been categorized by SINAC as a conservation area does not imply that these ecosystems do not exist and do not merit protection. There is plenty of jurisprudence in this regard.⁴⁰ Protection of the environment under Costa Rican law only considers the reality. What is protected is a real situation, and therefore, the fact that an ecosystem has not been identified previously can never mean that when it is identified, it is not the State's obligation to guarantee its protection.

³⁵ C-52.

³⁶ For example, R-172, Resolution No. 12817-2011, Constitutional Room of the Supreme Court of Justice ("Now, if in this case MINAE certifies that the protected property is not within a Wildlife Protected Area, according to the areas it manages, this does not in any way imply that the wetland found should not be protected. We must remember that the International Agreement signed by our country that establishes the State's obligation to foster the conservation of wetland and waterfowl areas by creating natural reserves in the wetlands, whether or not they are in the "List" and of adequately seeing to their management and care, is fully valid in this case.").

73. As I mentioned previously, SETENA is based on the documents submitted to it by the developer. If they do not mention the existence of a wetland or forest, it is possible that SETENA will grant environmental viability for development in the entire area of the project. In SETENA's records, the defendant David Richard Aven declared under oath his commitment to comply with all environmental regulations and conditions established by SETENA and environmental legislation. This means that if the competent agency, which is SINAC-MINAE, determines that a wetland and/or forest exists in the area of that project, not only is it essential for the developer to request the applicable permits for cutting trees and affecting the wetland, but it was Mr. Aven's obligation to inform SETENA of that circumstance.
74. On the other hand, the environmental viability had a validity of two years counted from the date of its granting (2 June 2008), within which time work was supposed to commence, and Mr. Aven was ordered to comply with certain permits and present documentation on the fulfillment of this a month before beginning the works. Recently, on 14 June of 2010, that is, when the environmental viability was already expired, the defendant stated to SETENA that the work had begun on 1 June of 2010, without having fulfilled by that date the deposit of eight thousand dollars established by SETENA.
75. Nevertheless, note that the municipal permits in regards to the easements were granted on 16 July 2010, and the construction permit was recently granted on 7 September of 2010. Therefore, if it is a fact that work commenced on 14 June 2010, then that was done without any construction permits issued by the municipality, and with SETENA's environmental viability expired.
76. As to the permits granted by the municipality, it's worth clarifying that municipal competence insofar as permits is only in the matter of construction, views of construction plans, the payment of municipal taxes and fees, and does not cover the environmental aspect since it is not an aspect related to construction permits. For this reason, having a permit from the municipality never covers the required permits from SINAC-MINAE in order to affect a wetland area or fell trees.

The technical reports that allegedly determined there were no wetlands

77. Lastly, the defense of the accused during the trial was strongly based on report ACOPAC-OSRAP-371-10 created by Rolando Manfredi, which stated that there are not wetlands at the site. Nevertheless, during that visit the specialist in categorizing wetlands from the National Wetlands Program did not attend, but rather Mr. Manfredi made a visual inspection in which he could not see that there was a lagoon since the zone had been filled in, that is, the natural condition of the site had been changed, seeking to eliminate every trace of the existence of a wetland. Nevertheless, this can in

no way be an excuse to not know that the reports by the specialist from the National Wetlands Program say that a palustrine wetland exists.

78. In addition, the defense placed significant emphasis on the report prepared by INTA that determined that the land of the area at issue was not typical of a wetland.⁴¹ Nevertheless, INTA does not have any jurisdiction regarding the issue of wetlands. INTA is the national agricultural and livestock institute, under the Ministry of Agriculture and Animal Livestock. The methodology used by INTA is based on issues of land for agricultural purposes. The fact that this methodology determines that the land is not typical of a wetland, does not imply that there is no wetland in the area. INTA was not requested to determine whether there was a wetland on the site (it could not have issued a determination on the issue because it does not have any jurisdiction in this regard), but rather it was requested to determine whether the type of land satisfied the Law on the Use of Land. The visit by INTA that led to the report that the defense referred to, was prepared together with the Coordinator of the 'Programa Nacional de Humedales' of SINAC, who did have jurisdiction to determine the existence of wetlands and who confirmed that there was a palustrine wetland in the area.

c) Injunctive measures

79. In regards to environmental damage, the guiding principle in the matter is the precautionary principle also known as *in dubio pro-natura*. That legal principle governs environmental matters both under international treaties and in Costa Rican legislation. This is expressly stated in Article 11.2 of the Biodiversity Act and in the case law of the Constitutional Room of the Supreme Court of Justice, that has clearly established that “*if there is serious or irreversible damage—or questions in this regard—a precautionary measure should be adopted, and the activity in question even postponed.*”⁴²

Due to the precautionary principle, it is then essential that when there is at least reasonable doubt that an activity can cause environmental damages, it must be halted.

⁴¹ C-124.

⁴² R-174, Vote No. 6322-2003, Constitutional Room of the Supreme Court of Justice. The Courtroom pronounced itself in the same sense in: R-169, Vote No. 1999-644, Constitutional Room, Supreme Court of Justice (“The State must assume a double behavior of doing and not doing; on the one hand it must abstain from attempting the same against the right to have a healthy and ecologically balanced environment, and on the other hand it must assume the task of issuing injunctions that allow complying with constitutional requirements.”); R-179, Vote No. 9122-2010, Constitutional Room, Supreme Court of Justice (“[i]f there is a risk of serious or irreversible damage—or questions in this regard—the guiding principles of Environmental Law require adopting the injunctions deemed convenient so that effect will not be produced, and even postpone the activity in question, if the harmful biological and social consequences were already produced, the post-fact coercion is ineffective, and it would have only moral significance, because it would hardly compensate for the damages caused to the environment.”).

80. It was in application of that legal principle that I immediately asked the judge to issue injunctions to halt the work being done at the project,⁴³ which were granted on 30 November 2011.⁴⁴ This injunction is based on the rules established in articles 239 to 245 of the Code of Criminal Procedure, which basically requires that there be evidence that allows supporting the likelihood that the accused is the author of a punishable act or participates in it, that the investigated crime is penalized by prison, that there be the risk of flight, recurrent criminal behavior, or behavior that is an obstacle to the investigation and/or that is a danger to the victim. If those circumstances occur, according to the analysis of each case, a criminal judge may impose precautionary injunctions, including ordering the preventive arrest of the accused.
81. The defendants appealed the injunction and the superior judge dismissed the appeal. Afterwards I requested an extension of the measure many times, and it was extended every time.

d) Preliminary hearing

82. During the preliminary hearing, the facts presented in the criminal accusation in text are read out. This is mostly done in complex cases, with many details (official letters, inspections and reports) as was the case against Mr. Aven and Mr. Damjanac. The Prosecutor must explain what evidence they have, which was already submitted in the criminal accusation, and must prove why that evidence supports the facts to a probable degree, and that they constitute a crime according to some criminal law. In this case, the representative of the State Attorney General and I took charge of demonstrating this to the judge. At this hearing, the defendants were accused of environmental crimes, and a dismissal was requested for the use of a fake document and disobedience.
83. As a result of the preliminary hearing held on 20 June 2012, the judge issued an order to open a case on the same day.⁴⁵ In that act, the judge of the intermediate stage chose to reject seven witnesses brought by the Prosecution because he considered them abundant and repetitive. Many of those witnesses were very important to the Prosecution. For example, Lic. Luis Picado Cubillo was an employee of ACOPAC who inspected the site many times and could appreciate how the wetland and forest were affected, therefore his testimony was very relevant. Likewise, among those rejected were many neighbors of Esterillo Oestes who could testify of the environmental damage that was being done at the project, and how it affected the community. Since it was important to the Prosecution to hear those witnesses, I filed an appeal for revocation of the intermediate judge's ruling, which was dismissed.

⁴³ R-114, Application for Injunction, 14 October 2001.

⁴⁴ C-146.

⁴⁵ R-122, Minutes of the Preliminary Hearing.

84. During the adversarial proceedings against both defendants, I questioned that decision based on that those were relevant witnesses to resolving the matter, and the decision of the intermediate judge was not justified, since he simply rejected the witnesses considering them abundant and repetitive, without giving a reason for this, and it was insisted that they be received in accordance with the rule in Article 320 of the Cost Rican Code of Criminal Procedure.
85. It's contradictory for Lic. Morera Viquez to take offense in his witness statement that during the trial the Prosecution did not take more neighbors than Mr. Bucelato, to prove the community's concern⁴⁶ and at the same time complain that the Prosecution had appealed the decision of the intermediate judge during the arguments to ask the judge to allow the testimonial evidence of those witnesses.⁴⁷ It is precisely obvious that the reason why the other neighbors on the Prosecution's list of witnesses did not appear to testify is that the judge rejected the witnesses, and hence the appeal that attempted to revoke that rejection.

2.3. Arguments

a) Settlement

86. At the negotiation tables, it could be seen that the multiple attorneys hired by the defense were interested in negotiating a settlement, but Mr. Aven was not in agreement with this.⁴⁸ I have negotiated with some of those attorneys and settled cases, but always it ultimately depends on the client's position. To this day, a settlement or suspension of the process could be done. The condition is that the site be restored to its original condition.
87. I have never refused an alternate solution in this case. It was due to Mr. Aven's decision that no settlement was reached. I stated my intention to negotiate many times to the defendants. I mentioned that it was an alternative and the idea was to restore both ecosystems and they could continue to build the project at the sites where there were no restrictions of an environmental nature.
88. When the process had just begun, Mr. Aven submitted a remediation plan which offered to plant trees on the property and in public parks and zones, and to donate an area of four thousand square meters for use as a park, that would contain a lagoon.⁴⁹ We analyzed the proposal carefully, but it was completely unsatisfactory since it did not offer to repair the affected area, but rather to donate an area that was in fact much

⁴⁶ Witness Statement of Mr. Néstor Morera Viquez, paragraph 51.

⁴⁷ Witness Statement of Mr. Néstor Morera Viquez, paragraph 44.

⁴⁸ From the beginning of the investigation in February 2011 to 21 November 2013, Mr. Aven changed defense attorneys four times. R-161, Change of attorneys in criminal case.

⁴⁹ R-206, Remediation Plan dated 25 May 2011.

smaller than the wetland area. That is why we asked that they consider restoring the wetland area, but the defendants refused, which was an insurmountable obstacle to any possibility of reaching a settlement.

89. Mr. Aven refers to an offer of \$6,000 made during the negotiations.⁵⁰ Those negotiations were done with the Attorney General of the Republic within the civil lawsuit for compensation, and not with the Public Prosecutor (which the Prosecution belongs to). This proposal of money seems to respond only to the thought of paying to destroy, and that is unacceptable from the Prosecution's point of view.
90. Lastly, I state for the record that once, before the trial began in which Mr. Aven and Mr. Damjanac participated in, even the judge insisted for about an hour that a settlement be sought. The defendants and attorney Morera were present.
91. In regards to this point, I reject the accusation of Mr. Morera in his witness statement, where he tries to blame me for having been in a private meeting with the judge during a meeting when the judge convened us to try and reach a settlement.⁵¹ On the day of the meeting in the chambers of judge Solis, all of the parties entered there almost together, maybe I was ahead a few steps, greeted the judge and sat down, and a few seconds later the rest of the parties entered. I want to clarify that it was the first time I had seen judge Solis, and since those arguments I have not seen him. I believe he may even be retired.
92. Like previous occasions, Mr. Aven also did not want to settle at this time. As Dr. Morera mentioned, Mr. Aven's refusal to settle was a "matter of pride."⁵²

b) Witness statements

93. During the arguments, eleven people rendered testimony, all of which helped to confirm the Prosecution's side.

Jorge Gamboa

94. Of all the witnesses heard, the most relevant and illustrative to the court in regards to the wetlands matter was Lic. Jorge Gamboa Elizondo, so it stands out to me that neither Lic. Morera Viquez or Mr. Aven or Mr. Damjanac mentioned that statement in their witness statements in this arbitration.
95. Lic. Gamboa Elizondo has more than 25 years' experience working for the SINAC, and when he rendered that statement it had been 8 years since he had worked in the National Wetlands

⁵⁰ Witness Statement of Mr. David Aven, paragraph 196.

⁵¹ Witness Statement of Mr. Néstor Morera Viquez, paragraph 34.

⁵² Witness Statement of Mr. Néstor Morera Viquez, paragraph 27.

- Program. Not only was he the professional in charge of that program, but he also coordinated the National Wetlands Committee in charge of applying the International RAMSAR Convention in Costa Rica. He is a professional with competence to determine the existence and/or affecting of a wetland in Costa Rica.
96. During his oral statement, he explained why, applying the relevant technical criteria upon his visit to the site of the Las Olas project, he had determined that there was a palustrine wetland there.
 97. Likewise, Lic. Gamboa Elizondo explained that during the visit he made to the site on 16 March 2011, he observed that heavy machinery was working in the wetland zone, tractors to move dirt, and a canal was being built. He mentioned he could see that the palustrine wetland area was clearly affected by that work and that it had been backfilled and drained. He also explained why it's so important to preserve the wetlands, and how affecting them modifies the natural conditions, eliminating the ecosystem.
 98. On the other hand, he referred to the conclusions of the report of Mr. Cubero from INTA. He explained that the methodology used by INTA is based on a method of categorization into 8 types of soil according to land use for agricultural exploitation. Therefore it has nothing to do with the determination of a wetland, which is up to the National Wetlands Program of SINAC. He also explained that many wetlands cases have soil that is not catalogued as typical of wetlands under the soil use methodology used by INTA, but do not cease to be wetlands for this reason, such as a river, for example, or a subterranean wetland. While the soil may not be typical of a wetland according to the methodology of agrarian use, it may be a wetland ecosystem. The important thing is that there is a combination of various features that allow determining that the ecosystem is a wetland, the most important of which is the presence of water resources.
 99. On the other hand, he explained that when the visit to the site was made with Mr. Cubero, the wetland was already being filled in, so the soil type could also be affected by this backfilling.
 100. He also explained that according to the zone the wetland is in, its characteristics may vary depending on the season, and the possibility of examining it in the dry season and in the rainy season vary. Nevertheless, all wetlands, regardless of whether their hydrological characteristics are observed only seasonally, are protected by legislation and by the RAMSAR convention.
 101. Furthermore, Lic. Gamboa Elizondo explained that while Costa Rica has a registry of wetlands that are within a conservation area, this does not mean that

any other wetland not in such registry should not be protected. It is an ecological reality that it must be protected, regardless of being registered or not.

102. And to the question as to whether the damage caused to the wetland could be repaired, he said it was possible with time to restore the natural conditions by eliminating the backfilling and the drainage canal.

Diógenes Cubero

103. The witness statements of Mr. Aven and Lic. Morera Viquez put too much emphasis on the statement of Mr. Diógenes Cubero, and nevertheless do not mention most of its content, which clearly is not convenient to them.
104. Mr. Cubero explained that there was a problem with slow drainage in the wetland area. As an expert on soil for the National Institute for Agricultural Innovation and Technology Transfer, in order to perform the soil studies, the methodology of classifying soil types with agricultural purposes was used. He clarified that it is not for real estate purposes, and that he was not competent to determine whether or not a wetland existed.
105. He also stated that there was a possibility of mistakes in the classification of soil type depending on the time of the year when the sample is taken, since the existence or not of rainfall changes the height of the water table.
106. Lastly, he mentioned that it was possible for soil to pass from one category to another if its conditions change, and admitted that there was backfilling at the wetland area, and that drainage work was being done.

Rolando Manfredi

107. The witness explained that he visited the site twice. The first time due to a complaint that there was a body of water there. In the trip, he found no lagoon or water body, and that is what he reported. As to the second visit, he stated that it was made due to a call that had reported they were cutting trees. He mentioned that when he went to the site he was able to verify that they were cutting trees, and asked Mr. Damjanac for the project forestry engineer to contact the SINAC office in Parrita.

Cristian Bogantes

108. Engineer Bogantes explained he is a forestry engineer and therefore it was not he who issued the technical criteria in any report on the wetland matter. Therefore, it stands out to me that Lic. Mora Viquez says that it was a total disaster for the prosecution that

engineer Bogantes did not give the classification of a wetland,⁵³ since it was not his area of expertise.

109. On the other hand, when the defense had an opportunity to interrogate Eng. Bogantes, they did not ask him a single question regarding the supposed attempt at bribery or the alleged link between that act and later technical reports that gave account of how a wetland and forest in the project were affected. What is more, Eng. Bogantes was asked whether he knew the defendants, and he replied that the only time he had seen Mr. Aven was when he came in person to the SINAC-MINAE office in Parrita to request the project records. None of this was denied by the defense, nor were any questions asked in this regard to Mr. Bogantes. Therefore the links that the defendants are now creating regarding the alleged solicitation of a bribe by engineer Bogantes and the fact that the SINAC-MINAE authorities proved that the Las Olas project was damaging the environment illegally simply lack any credibility.

Steve Bucelato

110. Mr. Bucelato is a neighbor of the project. He has no professional training in wetlands and/or forests, and therefore his testimony was not intended to prove this technical matter, which specialists had already weighed in on.
111. What Mr. Bucelato's testimony proved is that there was concern in the community regarding the damage to the environment that the project work was causing. To that end, he reported many episodes of altercations that occurred between neighbors of the area and the developers due to the cutting of trees. In particular, there was concrete evidence that the cutting of a Higueron tree was ordered, and Mr. Bucelato said he had seen a scene where the neighbors had reacted strongly to that felling.
112. In regards to this point, it's worth holding up here to comment on the adversarial of the arguments of the defendants, since during the trial, the defense said that that tree was not within Mr. Aven's property, but was on the property of the company Bosques Unidos de Esterillos Oestes (which I understand is a claimant in this Arbitration) and that that company had ordered its cutting, and takes responsibility for that. Nevertheless, in reading the witness statement of Mr. Damjanac, he himself now alleges that Mr. Aven offered the owner of the property his assistance to obtain a permit to cut that tree.⁵⁴ Nevertheless, this is completely false, since that permit was never processed with SINAC-MINAE.
113. Contrary to what Mr. Damjanac argued that the neighbors were thankful that the Higueron tree was cut, Mr. Bucelato reported having seen a strong

⁵³ Witness Statement of Mr. Néstor Morera Viquez, paragraph 42.

⁵⁴ Witness Statement of Mr. Jovan Dushan Damjanac, paragraph 146.

argument between the neighbors and Mr. Damjanac when that tree was cut.

Mónica Quesada Vargas

114. Mr. Aven mentions in his witness statement that the testimony of Mrs. Vargas Quesada, Environmental Manager for the municipality of Parrita, did not demonstrate the existence of a wetland.⁵⁵ That is true. Nevertheless, the Prosecution did not call Mrs. Vargas Quesada to render testimony on the existence of a wetland since, as she herself clarified during the interrogatory, the municipality has no competence to determine that matter, but SINAC-MINAE does. The only reason for the testimony of Mrs. Vargas was to demonstrate that she had responded to community complaints regarding the work being done in the area and knew the geographical location of the zone regarding which there was a conflict on the existence of a wetland.

Dionel Burgos Gonzáles

115. The testimony of Mr. Burgos González, employee of MINAE, was very important, and nevertheless neither Mr. Aven or Mr. Damjanac or Lic. Morera Viquez so much as mentioned it in their witness statements.

116. He explained in the arguments that he had visited the project site accompanied by Lic. Picado Cubillo, and that in that visit, samples were taken from lots and considered the amount of trees (standing and cut) with a diameter equal to or greater than 15 cm, which allowed them to determine that in that area of the property there was a forest as per regulations on the matter.

117. In addition, Mr. Burgos testified under oath that during the visits made to the site, he spoke to neighbors of the area, who mentioned to him that they had lived in the area for over thirty years, and knew perfectly of the existence of the wetland. That in fact there were lizards in the swamp, but about two years ago, the owners of the Las Olas project had piled up dirt to fill in the wetland.

Minor Arce Solano

118. The testimony of Mr. Arce Solano, a witness brought forth by the defense, was also very clarifying. Mr. Arce Solano mentioned that he worked for the company DEPPAT and rendered services for the Las Olas project through that company. He clarified that the report he had prepared for the defendants did not intend to prove that there was no forest in the area in question, but rather was limited to criticizing the report from SINAC-MINAE that had determined the existence of a forest. That criticism was based on the fact that

⁵⁵ Witness Statement of David Aven, paragraph 213.

in his opinion the SINAC-MINAE report only considered one factor, which was the amount of trees, and not other factors which were also important.

119. On the other hand, he expressly recognized that there was an agroforestry system in the area. As to the counting of trees, he also accepted that in order to do so, he had counted the trees that were standing, and not those that had been cut. Sincerely, that in itself would be enough to discredit Mr. Arce's report.

c) Application of Article 336 of the Code of Criminal Procedure

120. When a hearing was convened for arguments, I had two open trials in different locations: Quepos and Guápiles, which are five hours apart. On the last day of the hearings in the case against Mr. Aven and Mr. Damjanac, the parties had to present their conclusions on the case. Nevertheless, since it was already midday and the Prosecutor's Office, the Attorney General and the Defense had to present conclusions, I estimated that it was not possible to end on that day, since my conclusions alone would require at least three hours.
121. The problem is that since I had two trials going at the same time, the following day I had to be in Guápiles first thing in the morning. There is about 240 kilometers by car between Quepos and Guápiles. In ideal conditions, it can take about 5 hours to arrive. For that reason, I asked the court to not schedule for the afternoon that day, but rather to suspend the trial for the ten days permitted by law, so I could go to Guápiles, and then the parties could present their conclusions. The trial had already been suspended many times for various reasons, and it was never an inconvenience.
122. On day eight of the suspension, they told me the judge was incapacitated and would return on the eleventh. I really do not agree with Lic. Morera Viquez that the judge was "lazy."⁵⁶ In my opinion, the judge had been very active during the entire trial, directing all interrogatories, asking questions of the witnesses, resolving procedural incidents, etc. He intended to return and continue the trial, but had health problems, which is fortuitous and regretful, and beyond the control of both parties.
123. Lic. Morera Viquez knows perfectly well that there was no agenda behind that regrettable situation. It is a fact that at that time the defense asked if there was a desire to continue on the eleventh. The reason why both the Attorney and I opposed this was that there is ample case law from which in cases where things have proceeded in that way and arrived at sentencing, it was annulled in appeals by a higher court due to a defect in procedure, since the procedural rule of article 336 of the Code of Criminal Procedure is that once ten days have passed, the arguments must be repeated by virtue of the principles of concentration, continuity and immediacy, which

⁵⁶ Witness Statement of Néstor Morera Viquez, paragraph 46.

are a part of the guaranteed due process in the legal ordinance of Costa Rica.⁵⁷ Neither the Prosecutor or I wanted to risk obtaining a favorable sentence (which is what we expected since during the trial the reported crimes were proven) and then have it annulled and we'd have to start again from zero.

124. The decision to not continue in those conditions had nothing to do with what the defendants and their counsel argue, about me wanting a second chance to present the case because I had committed critical errors, or that we intended to try the defendants twice.⁵⁸
125. On the contrary, we felt that the trial had gone very well, since each of the facts in both the complaint and in the civil lawsuit had been proven by documentary evidence and the witnesses taken to the courtroom, without the defense having any evidence that would refute the clear evidence that the defendants had affected a wetland and a forest. That is why we did not want to risk the sentence dictated being later annulled, and having to go back and begin the proceeding from the beginning. On the other hand, it's clear that both of the defendants have not been tried twice for the same facts since there was no firm sentence.

⁵⁷ The criminal courts of Costa Rica have annulled sentences for violating the rule in Article 336 for being contrary to the principles of continuity and immediacy of arguments, holding that it is irrelevant that the parties have agreed to resume the arguments in violation of article 336, and have in fact held that such annulment can be declared administratively by the superior court in the appeals or cassation stage. See for example, R-182, Resolution No. 2013-531, Cartago Court of Appeals in Criminal Sentencing (annulling the sentence of the lower court for having suspended the arguments for more than fifteen days in violation of the principle of continuity and concentration, even when the parties were in agreement on suspending the arguments); R-167, Resolution No. 684-1995, San José Criminal Cassation Court (“In the case of the principle of continuity of arguments, given its violation, the court cannot apply the principle of prejudice that may have caused the irregularity, nor can it admit the agreement between the parties, because suspending the arguments could then become void, given the arguments that the parties in the process could make for many reasons. Suspending the arguments in itself weakens the principle of continuity, so that if it exceeds ten days, even if by one day and despite a possible agreement, there is a clear interest in not weakening due process in any way, especially if it is a single person court, as already stated.”); R-170, Resolution No. 29-1999, Goicochea Court of Criminal Cassation (“In this court’s discretion, the maximum term of suspension of a hearing, ten days, was established in order to defend immediacy, because if it were greater, the memory of the judges and the parties could be affected so that the elements in trial used to resolve it would not be the best. Immediacy is a part of constitutional law of due process, as the Supreme Court of Justice has stated through the Constitutional Courtroom in the case of Arias Arguedas ... where any effect on such guarantee, as is the case of suspended arguments for a term greater than permitted, officially notified as in this case, imposes the use of annulment on the sentence and on the arguments that produced it, and ordering that the trial be forwarded, all in accordance with Article 39 of the Political Constitution.”); R-171, Resolution No. 129-1999, Goicochea Court of Criminal Cassation (“The law clearly establishes ten days to finalize the hearing if it is interrupted for any of the reasons established as exceptions (Arts. 361 KPH73 and 336 KPH96) and this is completely uncompromising. It is legal fiction from which it arises that in this space of time all of those involved in the dispute must concentrate on the basis that supports the adversarial. Those involved in the procedural relationship cannot ignore or settle a necessary formal condition, the guarantee of wholesome administration of justice, and especially of the fundamental rights of citizens.”).

⁵⁸ Witness statement of Néstor Morera Viquez, paragraph 46; Witness testimony of David Aven, paragraph 217; Witness testimony of Jovan Dushan Damjanac, paragraph 154.

d) Second arguments

126. In Quepos there is a single criminal judge, therefore a new appointment needs to be requested in the judge's schedule for the hearing, with plenty of anticipation. When we presented ourselves for a new hearing, the defense counsel told us that Mr. Aven would not go to the hearing because he had suffered an attempt on his physical identity and had decided to go to the United States. At that time, the defense asked about the possibility of him being present by videoconference, or for the hearing to be scheduled for another date when Mr. Aven would appear only if the court offered him protection under the witnesses and victim's protection program.
127. In the first place, we are all sympathetic with Mr. Aven's situation, as a person who says he suffered an apparent attempt and fears for his safety. Nevertheless, the Prosecution and I opposed the defense's requests for various reasons.
128. In the first place, under Costa Rican criminal procedural law, it is not possible to try a person in absence, even when they are participating by videoconference, since there is the principle of territoriality. Therefore, as Lic. Morera Viquez must have known, that possibility simply does not exist in Costa Rican criminal law.
129. Secondly, the defense did not claim or bring any evidence that determined if the supposed attempt was directly related to the court process against Mr. Aven, for violation of the forestry act, since it could well be due to other aspects of a personal or corporate nature.
130. Lastly, applying the protection in the light of the witnesses and victims' protection program could have been processed by Mr. Aven before the OIJ or the Prosecution that was processing the complaint in which Mr. Aven was presumably the victim of an attempt. It is simply not possible for the court of the case in which Mr. Aven is a defendant to grant such protection. Nevertheless, Lic. Morera Viquez confirmed that no measure of this kind had even been requested from the court that was investigating the supposed attempt against Mr. Aven. And a year had transpired since the supposed attempt (15 April 2013) and the date of the second case (20 January 2014) it was completely expected that Mr. Aven would anticipate that he had to present himself in Costa Rica to face trial and ask the judge of the case in which he was a victim for the protection deemed necessary. The judge on the case deemed that the absence of such a request meant that Mr. Aven could not excuse himself due to not having protection, and had to present himself in court.
131. Given the unjustified absence of Mr. Aven, the judge declared a default judgment on the defendant, and issued an arrest warrant. That procedure is standard for any defendant that flees the country during a criminal case against them, pursuant to Articles 89 and 90 of the Costa Rican Code of Criminal Procedure. No exceptions can be made in this regard, and in

any case there was no justified reason to allow an exception in this case.

2.4. Sentence and appeals in regards to the offenses committed by Mr. Damjanac

132. In the second trial, there was an inspection with the judge, where she could see for herself that the tree stumps had been cut. At this second trial, Mr. Damjanac transferred the authorship of the felling of trees to David Aven. Witness Melvin José González Benavides, former employee of the defendants, accused David Aven as the person who had given the order to cut the trees.
133. The criminal judge issued a sentence in favor of Jovan Damjanac, but we appealed the sentence, both the Prosecutor’s Office and the Attorney General, and a superior court annulled it. The appeal in this case against Mr. Damjanac was done because I consider that a crime was committed against the environment, for which he must be convicted.
134. We are waiting for a date to be set for new arguments, which was set for July 4 to 6 of 2016.
135. Even if Mr. Damjanac takes away the importance of the facts he is being accused of, we who understand something of environmental matters know that affecting the environment is of interest not only to the present generations but to future ones, and for this reason States, in this case Costa Rica, should not limit their efforts in seeking to repair damages to the environment and punishing those responsible.

3. REGARDING THE IMPRESSIONS OF LIC. MORERA VÍQUEZ

136. When Mr. Morera introduces his experience in matters of criminal litigation, he states that penalties for the illegal felling of trees can include “expropriation of the land for a give number of years.”⁵⁹ This is completely false, the penalties are established in the various crimes contained in the Forestry Act, the Wildlife Conservation Act, the Maritime Land Zone Act, the Mining Act, and others.
137. I also wanted to defend myself regarding the false allegations made by Mr. Morera that the criminal investigation was motivated by “political purposes.”⁶⁰ There was never political pressure in this case. The only politician that appears in this case is former minister Zumbado, who appears as a witness for the claimants. I don’t know him in person, and deny any type of political interference in the prosecution against the defendants.

⁵⁹ Witness Statement of Néstor Morera Viquez, paragraph 51.

⁶⁰ Witness Statement of Néstor Morera Viquez, paragraph 29.

138. Mr. Morera's⁶¹ observations regarding my actions during the trial, especially on what evidence I should have offered in trial, my person as the prosecutor assigned to the case, are subjective and disrespectful to the job of the prosecutor's office.
139. Regarding my not having "made an effort in good faith to reach a settlement," it is not up to the prosecution to make an effort to reach a settlement, but in the various procedural stages, we promoted time in search of alternative solutions, which were rejected by Mr. Aven, for reasons known only to him and his attorney. The same Mr. Morera admits that Mr. Aven is the one who "did not want to reach a settlement as a matter of pride."⁶²
140. Regarding beginning the investigation despite that the case "was not brought up by the community," a complaint by the neighbors was not required, all crimes investigated in this case are publicly prosecuted. As I mentioned previously, complaints can even be anonymous and it is the prosecutor's obligation to investigate the presumed commission of a crime.
141. Finally, in regards to offering additional witnesses in court, this was due to an unfounded rejection that dragged on since the preliminary hearing, and not a last-minute tactic, as Mr. Morera insinuates.⁶³ All of the additional witnesses we tried to include during the arguments were offered in the beginning of the process and not accepted by the judge of the intermediate stage. That is, at this time, we did not even know if the witnesses offered to the judge during the first arguments were going to be "good or bad." It was not a strategy because "we were losing the case," but his testimony was necessary for the judge to hear the criminal facts first-hand.

⁶¹ Witness Statement of Néstor Morera Viquez, paragraph 55–56.

⁶² Witness Statement of Néstor Morera Viquez, paragraph 27.

⁶³ Witness Statement of Néstor Morera Viquez, paragraph 44.

4. DECLARATION OF TRUTH

I, **Luis Gerardo Martínez Zúñiga**, confirm the contents of this witness statement and declare that the contents and affirmations therein are true.

Signed, [signature]

8 April 2016