

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

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

v

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

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**SECOND WITNESS STATEMENT  
OF JOVAN DUSHAN DAMJANAC**

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I, **JOVAN DUSHAN DAMJANAC**, of Puerto San Luis, Tilaran, Guanacaste, Costa Rica, SAY as follows:

1. I am the same Jovan Dushan Damjanac that gave a witness statement on 27 November 2015 (my “**First Witness Statement**”). I make this second statement in support of the Claimants and their Reply Memorial in these proceedings.
2. The matters contained in this witness statement are true to the best of my knowledge, information and belief. The facts and circumstances contained in this statement are within my own knowledge or derived from information and documents provided to me by those reporting to me, in which case I refer to the corresponding source of information.
3. I confirm that the Claimants’ lawyers, Vinson & Elkins RLLP, have assisted me in preparing this statement, but I also confirm that its contents set out my evidence to the Tribunal in these proceedings.
4. I make this statement to address matters arising from the Respondent’s Counter Memorial dated 8 April 2016, as well as the Respondent’s evidence, expert reports, and witness statements referenced therein.

5. In my First Witness Statement, I have already set out the factual background of the Las Olas Project and my involvement in it, and I will not repeat that here. In this statement, to the extent that I am able, I provide further details of the Las Olas project and the administration of it, and respond to other discrete issues raised by the Respondent.
6. I have not attempted to address each and every issue raised and allegation made against the Claimants by the Respondent and about which I have direct knowledge. To the extent that I have not addressed a particular point, that should not be taken as an agreement by me to the Respondent's evidence on that point.
- I. Ms. Vargas' Statements regarding the Municipality's "Investigation" of Las Olas indicates that her accusations are based on conjecture.**
7. First, I wish to address certain statements and allegations made by Ms. Monica Vargas Quesada, the Environmental Manager of the Municipality of Parrita against the Claimants, and to respond to certain statements she has made about my actions. Ms. Vargas' witness statement contains baseless assertions regarding an alleged investigation conducted by the Municipality regarding the Las Olas project, about which the Claimants and I never received notice.
8. Ms. Vargas noted in her witness statement that she first learned of possible environmental issues at the Las Olas project site "*through a complaint from the community of Esterillos Oeste in relation to the landfill of a potential wetland.*"<sup>1</sup> Her initial statement is telling, and I wish to make explicit the source of her accusations against the Claimants and the Las Olas project.
9. In my First Witness Statement, I addressed the "*neighbor*" who complained about the Las Olas project to the Municipality, a man named Mr. Steve Bucelato.<sup>2</sup> It has become even clearer to me after reading her witness statement that the majority of accusations lodged by Ms. Vargas are founded on Mr. Bucelato's complaints and animus towards the Las Olas project.
10. As I stated in my First Witness Statement, Mr. Bucelato lives near the Las Olas property and he wanted to buy the property before David and the other investors bought it. After David and the other Claimants began to develop the Las Olas property, Mr. Bucelato, through threats and intimidation, actively sought to deter prospective buyers from looking at our development. As I previously mentioned, we tried to reason with Mr. Bucelato and asked him to leave us alone, but we were unsuccessful.
11. Mr. Bucelato accused us that the project was illegal, said he would "*shut down*" the project, and lodged personal physical threats against me and others. For instance, Mr. Bucelato told me: "*watch your back*" and "*I know some guys that will take care of you.*" We filed numerous complaints with the police regarding Mr. Bucelato's violent threats, and David eventually filed a

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<sup>1</sup> *Id.* at para. 10.

<sup>2</sup> See First Witness Statement of Jovan Damjanac, paras. 92-95.

defamation lawsuit against Mr. Bucelate for his campaign against Las Olas. Nothing has ever come of these complaints.

12. As I have previously described, Mr. Bucelato had also complained to SETENA regarding Las Olas, alleging that there was a wetland in the Condominium Section of Las Olas. As a result, Mr. Polanco from SETENA visited the property, and found that there existed no wetland on the Condominium Section or the area next to it.<sup>3</sup> Mr. Bucelato's complaint with SETENA was dismissed.
13. As already noted in my First Witness Statement, we later learned from Mr. Martinez, the environmental prosecutor, that the Municipality's investigation was premised on Mr. Bucelato's allegations against the Las Olas project, because of his animus towards our presence and work.
14. Many of these baseless arguments initially made by Mr. Bucelato can now be found in Ms. Vargas' witness statement and the Municipal reports that she authored. Indeed, every time Ms. Vargas describes complaints of "neighbors" regarding the Las Olas property, she is doubtless referring to complaints by Mr. Bucelato.<sup>4</sup>
15. With this above overarching observation in mind, I will address specific accusations lodged by Ms. Vargas against me or the Claimants.

**A. Specific Accusations made by Ms. Vargas**

16. After the site reopened in 2010, I worked at the Las Olas office and was present there seven days a week (with few exceptions). No one from the Municipality came to our office requesting to inspect our property, as is required by municipal law, until immediately before we received the Shutdown Notice in May 2011.<sup>5</sup>
17. Notably, Ms. Vargas never came to the Las Olas office to request to inspect the property, despite the fact that she lives in Esterillos Oeste, near the Las Olas property line.
18. Ms. Vargas readily admits that "[her] site inspections were limited to a visual check from the property boundary."<sup>6</sup> She also admits that she "has no

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<sup>3</sup> See *id.* at 101-102.

<sup>4</sup> See *e.g.*, Witness Statement of Monica Vargas Quesada, paras. 13, 14, 24, 95, *etc.* At paragraphs 95 and 96, Ms. Vargas makes a self-serving description of Mr. Bucelato as a "person who felt helpless in the face of the environmental damage," and accuses the developers of Las Olas of "threaten[ing] and assault[ing]" him. This is an utterly false description of Mr. Bucelato, and a baseless accusation.

<sup>5</sup> On occasion, individuals came to the outside of our office at Las Olas to view the permits that we displayed on the office windows. We displayed permits on our windows to indicate to the public that we had the requisite approvals from the Costa Rican authorities to perform work on the property. I am not aware of the identities of individuals that came to the outside of the office that did not request to enter the property.

<sup>6</sup> See Witness Statement of Ms. Maria Vargas Quesada, para. 11.

*jurisdiction to determine the existence of a wetland or otherwise.*<sup>7</sup> Despite this, Ms. Vargas then catalogues in her witness statement (and the Municipality reports drafted by her) a litany of findings of “*fact*”<sup>8</sup> regarding a Municipality investigation and the alleged environmental damage caused by the Las Olas property. These findings of fact are not “facts” at all, but are unfounded speculation.

**1. No Notice of the Municipality’s Investigation**

19. Ms. Vargas has alleged that the Claimants were aware all times of the Municipality’s investigation and proceedings. As the person working at the Las Olas office, I can honestly say that I have never received a formal notice from the Municipality regarding their supposed “*investigation*” or “*proceeding*.”
20. In fact, the Mayor of Parrita had written to the Las Olas investors in 2012, stating that neither he nor any previous administration had *ever* initiated a complaint regarding what Ms. Vargas speaks of now.<sup>9</sup>
21. In order to form her allegation that “*it is absolutely false that the developers were not aware of the proceedings pending before the municipality,*” Ms. Vargas claims in Paragraph 85(3) of her statement that “*on May 11, 2011, by Note OIM No. 119-2011, the Manager of Urban and Social Development of the Municipality notified the Las Olas project regarding Resolution No. 839-2011 SETENA, requesting the cessation of work, and that Mr. Jovan Dushan Damjanac refused to receive it, and therefore it was necessary to request police presence.*”
22. This is an absurd allegation, and I was even more surprised to see my name included in a Municipality document stating that I received (or refused to receive) such notice in the presence of officers.<sup>10</sup>
23. I have never refused to sign for any documents or sign my acknowledgment of reports that I actually have received. In fact, I had specific instructions from Mr. Aven to accept any and all documents delivered to our office and immediately forward such documents to him.

**2. Specific Allegations made by Ms. Vargas lack credibility or reliability.**

**a. “Cutting and Burning of Trees”**

24. At the outset of Ms. Vargas’ report, immediately after she explained that she had no competence to determine the existence of a wetland and that she did

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<sup>7</sup> *Id.* at para. 12.

<sup>8</sup> *Id.* at paras. 5-6.

<sup>9</sup> See C-\_\_\_ - December 4, 2012 letter from the Mayor of the Municipality of Parrita, Freddy Garro Arias, to David Richard Aven.

<sup>10</sup> See R-93.

not enter the property to inspect the land except when accompanied by MINAE officers, Ms. Vargas then repeated the allegations she made in “*Official Letter DeGA-049-2009*.”<sup>11</sup> In this letter, despite not having the competence to determine the existence of a wetland, Ms. Vargas wrote that the developers at Las Olas were “*apparently filling a wetland area,*” and that “*wetlands are observed*” on the land. She repeats these accusations throughout her witness statement.

25. Ms. Vargas then alleges that she revisited the site on January 10, 2010 and May 21, 2010 following more (baseless) claims by neighbors (*see* Mr. Bucelato’s complaints above), and that she issued three more reports on May 31, 2010 based on “*what the neighbors told [her]*” (*i.e.*, Mr. Bucelato),<sup>12</sup> and “*limited to a visual check from the property boundary.*”<sup>13</sup> There are inherent reliability and credibility issues with these reports.
26. In paragraph 14 of her Witness Statement, Ms. Vargas stated that “*according to what the neighbors told me,*” the “*cutting and burning of trees . . . took place during the weekends because public officials do not work those days.*”<sup>14</sup> This is a false (and strange) accusation based on secondhand, biased reports.
27. We were not cutting and burning trees—only maintaining our property by cutting “*Secate*” (a high grass that, according to our attorneys, is not protected vegetation under Costa Rica’s forestry laws). The grass grows 24 hours a day, 365 days of the year in Costa Rica.
28. In addition, Las Olas is located in a region where each year, large trees, branches, and wood debris blow down for natural reasons such as wind and storms, and are laying on the ground. We are required to keep the property safe and clear of debris, and the site had been closed, so we were cleaning the land of debris, already fallen trees, branches, and dead tree vegetation and dry grass. We were also cutting foot trails through overgrown cow pasture area in order to navigate the land. These activities are not illegal.
29. Moreover, the landscapers and grass cutters worked six days a week, every week, so I am unsure how to respond to the allegation made by the “*neighbors*” that the work took place during the weekends to hide the activities from public officials.
30. If Ms. Vargas had ever approached us and asked permission to access the property, or to conduct an actual investigation rather than relying on unreliable second-hand reports and her own (unsound) speculation based on viewing the property from the property border, we would have taken her on a tour and she would have realized that her accusations were unfounded regarding the cutting and burning of protected trees.

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<sup>11</sup> *See* R-26, “*Official Letter DeGA-049-2009*.”

<sup>12</sup> *See id.* at para. 14.

<sup>13</sup> *See id.* at para. 11.

<sup>14</sup> *See* Counter-Memorial, para. 188; First Witness Statement of Monica Vargas, para 14.

**b. “Earthworks”**

31. Ms. Vargas alleges at paragraph 16 of her statement that Mr. Aven was given notice by the Department of Urban and Social Development of the Municipality on June 14, 2010 that “*Las Olas did not have the necessary permits for the execution of earthworks and private streets conducted at Las Olas.*” According to Ms. Vargas, the notice asked us “*to immediately begin the respective proceedings before the National Institute of Housing and Urban Development (“INVU”).*”<sup>15</sup>
32. I am honestly at a loss as to how the Municipality operates, as it lodges complaints and reports that are at odds with other governmental agencies, and issues reports and notices without actually delivering them to the interested parties. This June 14, 2010 notice is one example of this.
33. First, although Mr. Aven will need to confirm this himself, we never received the notice mentioned at Respondent’s Exhibit 35, which is a document named “*OIM No. 114-2010.*” Unsurprisingly, Ms. Vargas can show no indication that we ever received notice through this document.
34. Second, we also were not engaged in any work on that date besides general clean-up such as planting and raking leaves and debris. I am unsure as to what Ms. Vargas describes as “*earthworks*” as there is no specific definition, but if raking leaves and debris qualifies, I suppose we were engaged in that limited activity.
35. Third, during the time in which this supposed notice was drafted, we were talking to the Mayor of Parrita regarding putting storm drains in the community, and also about our pending applications for construction permits for the Easements and Condominium sections of the project. The Mayor assured us that the permits were in process and were being issued, and told us that he thought the development would be a great economic boost for the community.
36. In terms of timeframe, this June 2010 notice is dated just two days before Ms. Vargas’ Second Report on Bucelato Allegations (C-70), and just one day before Ms. Vargas’ Complaint to TAA and MINAE (C-69). Both this notice and Ms. Vargas’ own reports are almost certainly based on Mr. Bucelato’s fabricated allegations. Moreover, both of Ms. Vargas’ reports go far beyond Ms. Vargas’ competence (as each declares that there are “*wetland areas*” being “*filled in*”).<sup>16</sup>

**c. “No Professional in Charge.”**

1. Ms. Vargas claims in paragraph 26 of her statement that the Las Olas project lacked any “*professional in charge.*” She references the Respondent’s Exhibit 56, which is a September 9, 2010 document from the Municipality to “*Gerardo Acuna Calderon,*” the Mayor of Parrita, claiming that the

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<sup>15</sup> First Witness Statement of Monica Vargas, para. 16; Exhibit R-35.

<sup>16</sup> See Memorial, para. 344; C-69; C-70.

Association of Engineers and Architects of Costa Rica (the “CFIA”) notified the Municipality that there was no professional in charge.

37. Although I have never heard this accusation before from the Municipality or from any other governmental agency regarding the Las Olas Project, let me be clear: *there has always been a professional in charge of the Las Olas Project*. We had an Environmental Regent, an officer-in-charge (Sebastian Vargas), and various engineers (including Mussio Madrigal, Manuel Calvo, *etc.*).
38. I have never seen any notification from any government authority regarding our alleged lack of a “*professional in charge,*” and I know of no subsequent action taken by the government authorities in regards to this.

**d. “Machinery Working on the Site” in January 2010**

39. Ms. Vargas makes an additional accusation on page 20 of her statement that she observed “*machinery working on the site*” in January 2010. I am not sure what “machinery” she is referring to, but it was not machinery for infrastructure or construction works.
40. January 2010 was the month in which we decided to reopen the site after it had been closed due to the housing downturn. Upon its reopening, we realized that there was a large amount of debris on the property, and we had to hire a clean-up crew to address this because we wished to show the property to potential buyers. The clean-up crew, however, did not actually start its work until late January or early February 2010.
41. Therefore, as per my recollection, I do not think it is possible that there was any heavy machinery working on the site as at January 2010, and any machinery on the site in February 2010 was related to clean-up of the site, not construction.

**e. “Collapse of a Rainwater Line”**

42. Likewise, in Paragraph 85(4) of her statement, Ms. Vargas again accuses Las Olas of foul play in regards to the collapse of a rainwater line flowing between Las Olas and the town in August 2010. This accusation has no basis in reality.
43. There was indeed a collapsed rainwater line, but the collapse had *nothing* to do with the Las Olas developers constructing in excess of what had been presented in plans (as Ms. Vargas alleges in her witness statement).
44. The Municipality has, for years, had poor infrastructure to deal with rain on the public roads near our property, especially rainwater that would run downhill. In 2010, the Municipality (and not Las Olas) installed a storm drain and rainwater line, but they had not constructed the catch basin large enough to deal with the volume of rainwater that came on occasion. As a result, the rainwater line collapsed.
45. After learning that the rainwater line had collapsed, I telephoned the Mayor of Parrita to discuss what should be done about the issue. During this conversation, the Mayor noted that the Municipality was responsible for the

rainwater line because the Municipality had built it (and not Mr. Aven or the other Las Olas developers). Thereafter, the Municipality sent its workers to fix the rainwater line, and we donated the additional materials and storm drains to help them fix the line and enlarge the catch basin.

46. The subsequent allegation that I refused to be notified or sign acknowledgment of this episode is also false, as is her unsubstantiated statement that our attorney advised that we should withhold documentation regarding this issue. It should be noted that the Municipality Inspection Report that Ms. Vargas references in her statement (issued 11 August 2011) was issued after Las Olas and the Municipality were having ongoing disputes regarding the lawfulness of the shutdown of the Project, and its statements do not fairly capture the interactions that I had (if any) with the authorities at that time.<sup>17</sup>

## **II. The Respondent's Allegations in its Counter Memorial are also false.**

### **A. The allegation that “*the Construction Permit for the Condominium Section was not lawfully obtained.*”**

47. At paragraph 175 of the Counter Memorial, the Respondent accuses the Claimants that, despite the Municipality's issuance of a construction permit for the Condominium section on September 7, 2010, the construction permit was “*not lawfully obtained.*” This accusation is wrong.
48. As we have mentioned time and again, we used local companies, experts, and attorneys to file all of our permit applications with the appropriate governmental agencies. Upon review of our documentation, the permits would be issued, or the government would revert back to our attorneys for more information. My understanding is that if the government had wanted to review or revoke a permit once it had been issued, the government was required to file an administrative action through a “*lesividad*” process. No administrative action that I know of was ever filed to nullify the issuance of the construction permit for the Condominium sections.
49. This indicates the Costa Rican authorities' utter disregard for their own laws and procedures, and their willingness to deprive necessary safeguards and procedures to Mr. Aven and the other Claimants. Unsurprisingly, the first time I heard this argument regarding the Condominium construction permit from the Costa Rican authorities was in their Counter Memorial. To be clear, we have *never* received notice from the governmental authorities regarding this.

### **B. The allegation regarding the “*backhoe.*”**

50. Similarly, the Respondent cited an inspection carried out on May 13, 2011, taking a photo of a backhoe, and includes photographs to that effect.<sup>18</sup> By reference to the photograph alone, the Respondent stated “[c]ertainly, *these works do not constitute “maintenance works” but show the disregard of Costa*

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<sup>17</sup> See R-111.

<sup>18</sup> Counter-Memorial, para. 346; Exhibit R-270.



*Rican law and of its authorities.*” This conclusory statement does not mean anything, because it does not even specify what works we were performing at that time—making it impossible to respond.

51. The pictures in the referenced report at R-270 appear to be of valid construction and infrastructure works done prior to that report. I do not believe that we built roads after receiving the shutdown notice, and we have reports from our engineers around that time confirming that all works were suspended.<sup>19</sup> We also have Esteban Bermudez from DEPPAT confirming in his statement that his “bi-monthly reports between April and November 2011 show [that] there were no construction works on the site at that time—only minor maintenance works on the already constructed roads and access routes to prevent adverse environmental effects.”<sup>20</sup> Moreover, the prosecutor in the criminal case dropped all charges alleging that we were engaged in works after the Shutdown Notice.
52. In any case, I recall that after the Shutdown Notice, the backhoe was located on the property but performing works related only to the maintenance of the property, and this does not run afoul of the environmental laws of the Respondent.

### **III. The Condition of the Las Olas Property and its surroundings at present.**

#### **A. The Costa Rican authorities are failing to safeguard Las Olas from squatters and trespassers, choosing *not* to enforce their laws.**

53. Due to the Respondent’s wrongful actions taken against Las Olas, it is subject to hordes of squatters who illegally trespass on the property and around 360 shacks (or similar structures). The squatters are not necessarily indigent individuals, and many are individuals who trespass on the property on weekends for leisure activities. There are, however, approximately 19 individuals who live on the property without authorization permanently (although many more trespass onto the land in addition to these 19 individuals), and these squatters and trespassers are organized and dangerous.
54. These trespassers cause substantial damage to the property, including stealing water and electricity, creating waste and sewage, and destroying wildlife. They also engage in drug use and (possibly) drug trafficking, and have engaged in violent conduct. The trespassers pose a substantial threat to the well-being of Las Olas, despite the substantial efforts that the Claimants have made in securing the property.
55. The Claimants and I have reported and filed repeated complaints regarding trespassers on the property with the local authorities during the past year. Despite receiving assurances that the authorities will help remove the squatters from the property, when the authorities do come to the property, they refuse to

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<sup>19</sup> See C-\_\_\_\_\_, “Minuta 8” engineering report of 16 May 2011.

<sup>20</sup> See Second Witness Statement of Esteban Bermudez Rodriguez, at para. 19.

remove these individuals from our land, even as they threaten violence or attempt to cause harm to us.

56. Recently, we received a notice from the Ministry of Security telling us that they would act on our complaints and remove the squatters from our property, but no action has been taken as of yet.<sup>21</sup>

**B. The Las Olas Project is Treated Differently than other Development Projects in the Immediate Vicinity.**

57. It is hypocritical that Ms. Vargas, the Municipality, and other Costa Rican government authorities pursue environmental charges against the Las Olas project, where from my perspective, it appears as though similar projects in the area have proceeded without the type of intervention by government authorities occasioned on Las Olas.
58. I have recently visited a site in Playa Bejuco, named Project Malaga or “Residencias Malaga,” developed by a company named “Rock Constructions Incorporated” a/k/a “Rock Constructions & Development S.A.”<sup>22</sup> This particular project is approximately three or four miles south of the Las Olas project site. I believe that the property was purchased and developed within the past few years, as discussed further below.
59. During the last few years, we have observed a marked change in the land in the vicinity of Bejuco, not far from Las Olas. From even a rough look of satellite photographs and Google Earth images from August 15, 2002, the area that comprises Project Malaga (or “Malaga FC”) in the photograph appears to be similar to the land in nearby Las Olas. If you look at the above shot taken in August of 2002 you will see two lakes and an estuary. If you look at other Google SAT photos taken later, you notice that the lakes and estuary have been filled in and houses built over them.



<sup>21</sup> See C-\_\_\_ July 4, 2016 notice from the Ministry of Security.

<sup>22</sup> For Rock Constructions’ official website for Project Malaga in Bejuco, see <http://www.myhomecostarica.com/index.php#intro> and <http://www.rc.cr/>.

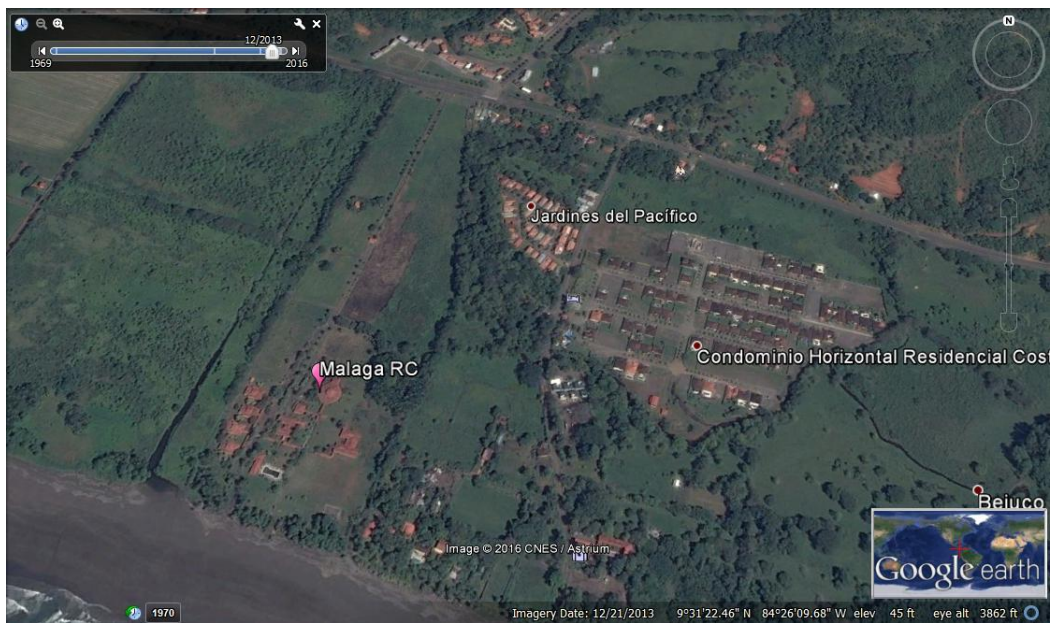


60. After Rock Constructions began to develop the property, by January 30, 2012, the natural landscape of the land changed dramatically, as did the land of the surrounding areas of “Jardines del Pacifico” and “Condominio Horizontal Residencial Costa del Sol.”





61. A color satellite image from 2013 confirms the 2012 satellite photographs, indicating further alterations of the land.





62. Since 2013, Rock Constructions has engaged in a heavy infrastructure, high-density project about one-third of the size of the Las Olas project, in a low lying property area that is likely to have been drained. Satellite images of the resulting development (below) indicate the scale of the project—approximately 400 units exist at present, with 100 more units forthcoming.





63. Project Malaga, to my knowledge, has not received any of the arbitrary treatment from local Municipal authorities in relation to suspending development or prosecuting its developers.
64. During my visit to Project Malaga in June 2016, I spoke to a Mr. David Litwin, who is the onsite project coordinator of Project Malaga and an engineer employed with Rock Constructions. He told me that they are about 90% “sold out” on the existing units, and that they will begin construction of new beachfront high-rise buildings shortly.
65. Mr. Litwin expressed that they have been pricing their units at approximately \$1800-\$2000 per square meter for each of the houses, which includes the land. Their houses are, on average, 55 x 95 square meters, although the houses nearer to the beach are more expensive. They have larger units available for sale as well.
66. In comparison, our lots are two-to-three times as large as the typical Project Malaga unit, and many of the Las Olas units have beach views—in stark contrast to the majority of Project Malaga’s units. In addition, our land has ocean winds that cool the property, making the property more attractive for living, whereas the vast majority of Project Malaga is populated by concrete and roadways, which magnifies heat. Finally, Las Olas is designed with

underground utilities, which affords another premium in the price of the land at Las Olas as opposed to Project Malaga.

67. This is all to say that there is a high demand for homes in the immediate vicinity of Las Olas, and that no other development has received the kind of treatment by the Costa Rican authorities that the Los Olas foreign investors have during this time period. This is despite the fact that, from a “visual check from the property boundary” (as Ms. Vargas repeatedly conducted on Las Olas), there is not material visual differentiation between Project Malaga and Las Olas.
68. I am confident that the Las Olas project would have been highly successful had it not been wrongfully targeted by the Costa Rican authorities.

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

Signed.....

Jovan Damjanac

Date.....