

**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, GIACOMO A. BUSCEMI, DAVID A. JANNEY  
AND ROGER RAGUSO (United States of America) (Claimants)**

v

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

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**FIRST WITNESS STATEMENT  
OF ESTEBAN BERMUDEZ RODRIGUEZ**

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I, **ESTEBAN BERMUDEZ RODRIGUEZ**, of San José, Costa Rica, SAY as follows:

1. I make this statement in support of the Claimants' Memorial in these proceedings.
2. The matters contained in this witness statement are true to the best of my knowledge, information and belief. The facts and circumstances contained in this statement are within my own knowledge or derived from information and documents provided to me by those reporting to me, in which case I refer to the corresponding source of information.

3. I confirm that the Claimants' lawyers, Vinson & Elkins RLLP, have assisted me in preparing this statement, but I also confirm that its contents set out my evidence to the Tribunal in these proceedings.

## **Background**

4. I have a degree in biology from the University of Costa Rica, which I obtained in 2000.
5. I am employed by DEPPAT, a company that primarily provides environmental consulting services to investors in Costa Rica. DEPPAT's services generally include completing the necessary paperwork for a project to obtain the required environmental permits and supervising the project for compliance with environmental regulations.
6. DEPPAT is a family business. My father has been in this line of work for many years. He founded the company 25 years ago and although he is now semi-retired, he is still active in some projects. My brother also works there.
7. I have been working in this sector for around 15 years, all at DEPPAT. As part of my role within the company, I work on a lot of tourism projects, mostly in relation to hotels and residential properties. Environmental consulting is DEPPAT's primary focus, although we also prepare master planning and construction drawings for projects.
8. As part of my role at DEPPAT, I help to arrange applications for environmental permits. In so doing, I co-ordinate with all the experts who need to carry out studies to be presented to the various government institutions. This is a complex process, involving a lot of different steps for different institutions but I am comfortable navigating between the different agencies.
9. I also regularly act as Environmental Regent. An Environmental Regent is appointed on every project to ensure the project complies with any environmental undertakings detailed in the environmental permit. The

Environmental Regent's role is to inform SETENA, the National Environmental Technical Secretariat, of the results of its environmental monitoring of the project, its activity and any construction work. The Environmental Regent keeps a log of the project's compliance with any environmental requirements set by the authorities as part of the environmental permit. The Environmental Regent does this by conducting regular site visits and reports its findings to SETENA.

10. In order to qualify as Environmental Regent, you have to be a university graduate and register with SETENA. Once registered, you have to renew your registration every two years by presenting the list of projects you have worked on in the past year to demonstrate that you regularly take on the role and, presumably, have relatively recent experience as a result.
11. As a result of my role, I am very familiar with Costa Rican laws and regulations relating to the environment. Although I am not an expert on wetlands, I am a biologist and I have studied the regulations carefully so I know scientifically and legally what is considered to be a wetland under Costa Rican law.

### **The Environmental Agencies**

12. The main agencies that I deal with in my day-to-day role are SETENA and MINAE, the Ministry of the Environment and Energy. However, I also assist with matters before the TAA (the Environmental Administrative Tribunal), such as when there are issues with environmental permits, and I work with the different municipalities in order to secure the necessary permits from them.
13. SETENA is always involved in the environmental permitting process. However, not every project necessitates the involvement of MINAE. MINAE only gets involved when SETENA specifically requests its involvement. For example, if SETENA thinks there is a forest on a potential project site, it will instruct MINAE to prepare a report detailing its view on the issue. SETENA

uses MINAE as a local authority in the event that it needs specific information on a project.

14. Another agency I have dealings with is INTA, the National Institute for Innovation and Agricultural Technology Transfer – the top authority in soil use and soil protection. In the case of wetlands, INTA has a word in saying whether the soil in question is characteristic of a wetland.
15. Where it is proposed to build a residential or tourist development on agricultural land, a change of use report has to be obtained from INTA or a professional registered with INTA before approval will be given. As part of the reporting process INTA studies the soil, in particular its agricultural potential and the decision to issue the necessary permits is based on the findings of that report. I recall that in May, 2011, at the request of the criminal prosecutor, INTA carried out a study of the soil on the Las Olas project site to determine if there was wetland soil in the area of the alleged wetland. INTA's report concluded that there was no wetland soil on the Las Olas project site.<sup>1</sup>
16. In my experience, the different agencies involved in the environmental permitting process in Costa Rica sometimes take contradictory positions on important matters. It is not unusual to get a statement from one agency that contradicts a statement from another agency and you have to try and manage the situation in order to get the different agencies on the same page. It is usually through the process of presenting the relevant information and explaining the situation to the various agencies, that you can sometimes overcome the issues. However, the process can get complicated, as every agency has its own criteria for assessing information and its own procedures. For example, the agencies have different locations systems, and so with the mapping of a well or spring, for example, sometimes one institution has the location hundreds of meters away from the other.

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<sup>1</sup> Exhibit C124, INTA Report on Las Olas Project Confirming No Wetlands, May 5, 2011

17. I have been asked to comment on whether environmental permits sometimes get revoked based on a change of position. Generally speaking, once an agency has taken an official position, it would not change that position. SETENA's change of position in this case is unusual in that respect. That being said, I have worked on several big projects where politics played a part and as a result there was a change in institutional direction. In those cases, everything was proceeding normally and then suddenly something came up that allegedly had not been done correctly and that was used by the relevant agency to stop the project. For example, the current government has a policy of not giving priority to private hydroelectric projects and that has contributed to an increase in this type of project being rejected by SETENA.
18. I have also been asked to comment on the existence of corruption within SETENA and the other agencies I deal with. There used to be a lot of corruption at SETENA, a fact that was widely reported around ten years ago when a number of cases went public. However, there have not been any reports of corruption at SETENA for four or five years now. However, in my experience there is still a lot of corruption in the municipalities, as was reported, by way of example, in a recent newspaper article entitled "*Contralora Marta Acosta: 'Nos preocupa mucho eventual infiltración del narcotráfico en municipalidades'*" in which it was reported that the public comptroller had expressed grave concern over corruption within the municipalities.<sup>2</sup>

### **My Role in the Las Olas project**

19. I cannot at present recall how DEPPAT came into contact with David Aven.
20. I had two principal roles on the Las Olas project. I helped Mr. Aven apply for the Environmental Viability (the environmental permit administered by SETENA) for the beach club and hotel on the concession and I acted as Environmental Regent for the main project site, also known as the

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<sup>2</sup> Exhibit C179, La Nación Article on Corruption, November 9, 2015

condominium section. At the outset, DEPPAT was also retained as the Environmental Regent for the concession but Mr. Aven hired someone else to do that job before we had begun our work.

21. Before I proceed, I will just explain the different sections of the Las Olas site. There were three main sections: to the south near the beach was the concession, where the hotel and beach club were to be built. DEPPAT helped obtain the Environmental Viability from SETENA for this section and was initially named as Environmental Regent, although no inspections took place and no reports were prepared, as explained above. DEPPAT was replaced as Environmental Regent for the concession in September, 2010.
22. Next, there was the main part of the site, which we referred to as the condominium section because that was where the condominiums were to be constructed. DEPPAT was not involved in obtaining the Environmental Viability for this part of the site but DEPPAT did act as Environmental Regent, carrying out all the necessary inspections and observations.
23. Finally, there were the easements to the west of the project site running off the public road which connects the main highway with the beach concession.
24. I became involved as Environmental Regent on the condominium section of the Las Olas site in 2010. As part of this role, I looked at all the condominium properties on site, except those abutting the public road that were not located on the main project site and were not covered by SETENA's Environmental Viability.
25. Initially, I reviewed the SETENA file, as I would normally do. SETENA's file lists all the environmental measures that must be complied with and I check them all off, one by one. I go to the site and verify that each of the required actions has been taken. I did this for the Las Olas project and reported to SETENA every two months.

26. When conducting a Las Olas site visit, I would normally start on the road and work my way around the site to see where the work was being done. During that process, I took notes and would then return to the Las Olas site office and make notes in the official environmental log book. Although I did not keep copies of the notes I took while walking around the site, I do have the environmental log book and have provided the Claimants' lawyers with a copy.<sup>3</sup>
27. I would then return to my office, develop my report and send it to the client (in this case Mr. Aven) for comment before submitting it to SETENA. Clients sometimes ask to me to change slightly the wording of a report but I am under no obligation to do so and I would never submit a report if I did not agree with its contents. I cannot recall Mr. Aven ever asking me to make any changes.
28. Over the course of my role as Environmental Regent for the condominium section of the project, I submitted thirteen reports to SETENA, starting with the period June to July, 2010, right after works commenced. The last report I submitted to SETENA in my role as Environmental Regent for the condominium section was in July, 2012.<sup>4</sup>
29. As is clear from my reports, at no time during my reporting did I observe any irregularities. Each report would run through the list of requirements set out by SETENA in the Environmental Liability and note whether they had been complied with or not. I would also make recommendations for implementation during the next two month period and note the likely upcoming activity. My reports were often accompanied by photographs I took on site.
30. In reality, because of the relative infancy of the project and the fact that construction works did not advance much between 2010 and 2012 as a result of SETENA's ongoing investigation, most of SETENA's requirements and my recommendations for implementation were not yet applicable.

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<sup>3</sup> Exhibit C106, Bermudez Environmental Log Book, January 29, 2011 to July 31, 2012

<sup>4</sup> Exhibits C68; C74; C87; C94; C109; C120; C130; C136; C140; C147; C150; C151; C153, DEPPAT SETENA updates, from June-July 2010 through June-July 2012

31. It is clear from my reports that I never noted anything untoward with regards to tree felling or wetlands on the project site. In my early reports I noted that *“cutting had been restricted to grasses, underbrush and thin trees that do not need a cutting permit”* and that activities had been *“restricted to weeding and topographic demarcation to outline the first section of the roadway.”*<sup>5</sup>
32. My only observations with regard to tree felling were to note:
- a. In my December, 2010 report, that in the event that trees of more than 15 centimetres in diameter needed to be cut, a written query would need to be sent to the local MINAE office in Parrita to verify whether a permit would be needed;<sup>6</sup> and
  - b. In my February, 2011 report, that some individual trees had been found and that the developers were considering retaining them for landscaping. If that was not possible, they were going to be cut down and I recommended arranging a visit by a forestry engineering professional to determine whether an application needed to be filed for a permit to cut those trees.<sup>7</sup> The trees in question were Fig, Guanacaste and Cedar located in pasture and scrub brush areas. So far as I can recall, no permits were applied for because no trees with a diameter greater than 15 centimetres were felled.
33. After that, I continued to note in my reports that for future works, permits for cutting trees alongside the road would be needed if the developers decided to cut those trees, but as the construction works had been halted as a result of SETENA’s investigation, the need for permits never arose.
34. After the problems with the project’s Environmental Viability started, in early 2011, I advised Mr. Aven on a few matters and arranged for some experts to carry out reviews, in particular INGEOFOR (a Costa Rican environmental

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<sup>5</sup> Exhibit C68, DEPPAT SETENA update, June-July 2010, June 2010; Exhibit C74, DEPPAT SETENA update, August-September 2010, August 2010

<sup>6</sup> Exhibit C94, DEPPAT SETENA update, December 2010-January 2011, December 2010

<sup>7</sup> Exhibit C109, DEPPAT SETENA update, February-March 2011, February 2011

consultancy) and Minor Arce Solano, a forestry expert. Both concluded that there was no forest on the Las Olas project site.

## Site Visits and Site Conditions

35. Throughout my site visits, I never saw any evidence of environmental damage being caused or anything to suggest that the site was at risk of environmental harm, as is evident from my reports.
36. I first visited the condominium section of the Las Olas project in my role as Environmental Regent in around June, 2010, when I came to inspect it. I knew the property already as I had been involved in preparing the paperwork for the environmental permit for the concession in late 2005 or early 2006.
37. At the time, there were internal roads at the centre of the property but nothing else had been constructed so far as I can recall. My general impression of the site was that it was relatively easy to develop. It had previously been home to a cattle ranch. There were not many trees on the property. One section of the land, on the eastern side of the site, seemed like pasture land that hadn't been cleared for some time, which had resulted in the vegetation starting to grow. The rest of the property was pasture land that was subject to regular clearing of grown pasture and shrubs. It did not appear to me to be a forest but I did order an inspection by Mr. Arce, at the time - just to be sure. Mr. Arce prepared a report in September, 2010 in which he concluded that there was no forest on site and that a simple permit could be obtained from the local MINAE office, should the developers wish to fell any trees with a diameter greater than 15 centimetres.
38. The only thing on site that was protected was the creek and that was factored into the architectural design which left it blank. From the outset, there were some areas of the site – where the easements were located - where the soil was wet and it was apparent there were problems with drainage of the storm water. This is evident from my reports, in which I continually note the presence of rainwater and make recommendations to avoid erosion caused by surface water runoff. I believed that the problem with the drainage was due to heavy rains and the fact that when the public road was constructed, the municipality built a ditch which prevented the water from following the natural flow of the land.

### **The Wetlands Issue**

39. The question of whether the site contained a wetland did not come up prior to issuance of the SETENA Environmental Viability. If SETENA was concerned as to the potential existence of a wetland on the project site, I would have expected this issue to have been raised at the time the developers applied for the Environmental Viability, at which point the professionals would have appointed someone to determine whether there was a wetland on the site before the Environmental Viability was issued. That is the usual way in which these matters proceed.
  
40. Under the relevant Costa Rican regulation,<sup>8</sup> the existence of a wetland has to be determined scientifically, by reference to four specified criteria regarding the drainage, the type of soil, the vegetation and the wildlife. If all four of those criteria are met, then there is a wetland. It is not a question of observing just one of the criteria - all four of them need to be met before an area of land can be classified as a wetland.
  
41. The alleged wetland area at Las Olas is for the most part located in the area of the easements, and not within the condominium or concession sections of the site and therefore DEPPAT's area of responsibility as Environmental Regent. From looking at a map of the project site however, I think that part of the alleged wetland would be within the condominium section of the site. That small section was filled in around 2011, I believe.

### **Problems at Las Olas**

42. I first heard about the problems at Las Olas when a complaint was filed in July, 2010 that a large number of trees had been illegally cut down. Mr. Aven asked me to attend the Las Olas project site when the subsequent inspections took place. Although I did not attend the first inspection, I attended the second

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<sup>8</sup> Exhibit C64, SINAC Guidelines for the Identification and Classification of Wetlands, April 16, 2010

inspection in or around April, 2011 with the prosecutor and a large number of MINAE employees. During that inspection, we walked around the area where there was alleged to be a forest to see if there was any evidence of trees. Mr. Aven asked the MINAE officials to show him the 400 trees that had allegedly been cut down. The MINAE official in charge of the inspection showed us only small trees, of around eight centimetres in diameter. I do not recall walking around any areas where there was allegedly a wetland.

43. At around this time, in late 2010 or early 2011, I undertook a review of the SETENA file for the project to try and understand what was going on. Sebastian Vargas, a lawyer who worked for Mr. Aven brought the bulk of the documents to my office for me to review. During my review, I noticed a reference in a letter to a SINAC Inspection Report dated July 16, 2011. I had not seen reference to this Report before and, as a result, I brought the letter and the reference to the missing Report to Mr. Aven's attention and suggested that we obtain a copy.
44. When Mr. Aven was first accused of cutting down a forest, he asked me to obtain a forestry report for the property, outlining any concerns and commenting on the accuracy of the MINAE report on which the accusations were based. I contacted Mr Arce, a forestry engineer, who reviewed MINAE's report and attended and inspected the property. Mr. Arce gave his conclusions to Mr. Aven. I recall that Mr. Arce concluded that there was no forest in the areas that MINAE had studied.
45. Later in 2011, Mr. Aven asked for a complete forestry survey to be carried out, as Mr. Arce's report had been confined to commenting on the accuracy of MINAE's report. Mr. Arce recommended a study following a scientific methodology and contacted INGEOFOR, who carried out a detailed survey of the site and concluded that there was no forest on site.<sup>9</sup>

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<sup>9</sup> Exhibit C148, INGEOFOR Report on Las Olas project, December 2011

46. At Mr. Aven's request, I wrote two letters to SINAC, the National System of Conservation Areas, which is a branch of MINAE. The first letter, sent on March 22, 2011, summarised my views on the various agencies' reports and their inconsistencies and inaccuracies.<sup>10</sup> I explained that the existing Environmental Viability and previous government inspections had concluded that there were no wetlands on the condominium section of the project site and that no trees had been cut down for which a permit was required. I never received a response to my letter.
47. The second letter, which I sent on June, 8 2012, summarised three years of inspections of the project site.<sup>11</sup> I mentioned that three separate institutions – SETENA, INTA and ACOPAC (the Central Pacific Conservation Area, the local MINAE office) – had commissioned reports, all of which had categorically concluded there were no wetlands on the project site.
48. Of particular importance is the July, 2010 ACOPAC report,<sup>12</sup> which was commissioned by the Municipality as a result of the complaint to look specifically at the question of whether there was a wetland at Las Olas. The July, 2010 ACOPAC Report, which is signed by Roland Manfredi as the officer in charge of "*wetlands and research*" at ACOPAC, concludes on the basis of a site visit and a review of all previous reports, that there is no wetland on site as the requisite "*topographical and ecological characteristics and vegetation profile and soil*" are not present.

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<sup>10</sup> Exhibit C118, DEPPAT Letter to SINAC, March 22, 2011

<sup>11</sup> Exhibit C155, DEPPAT Letter to SINAC, June 8, 2012

<sup>12</sup> Exhibit C72, July 2010 SINAC Report Confirming No Wetlands, July 16, 2010

## Criminal Proceedings

49. I have been asked to comment on the ongoing criminal proceedings against Mr Aven and Mr Damjanac. The fact that criminal proceedings were brought surprised me as there were no major environmental problems on the property at the time. Sometimes in Costa Rica, these types of things happen - people sabotage projects - and it is clear from people working in this field that the easiest way to do this is to come up with an environmental issue, since it will attract a lot of press and public attention. It is usual for the prosecutor to go after the project developer, as opposed to the agencies responsible for environmental permitting or the Environmental Regent.

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

Signed   
Esteban Bermúdez Rodríguez

Dated 11/11/2015