

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

AND

UNDER THE DOMINICAN REPUBLIC - CENTRAL AMERICA – UNITED STATES
FREE TRADE AGREEMENT

BY AND 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

Respondent

SECOND WITNESS STATEMENT OF
LUIS GERARDO MARTÍNEZ ZÚÑIGA

October 28, 2016

I, **Luis Gerardo Martínez Zúñiga**, domiciled at Cartago, Costa Rica, declare that:

1. This is the second statement that I provide in the arbitration between David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shiolen, David A. Janney and Roger Raguso against the Republic of Costa Rica, which is developed in accordance with the Arbitration Regulation of the CNUDMI and the Free Trade Agreement between Central America, United States and the Dominican Republic (the "Arbitration").
2. I was requested to participate in the aforementioned Arbitration to explain my understanding regarding the procedures performed by the District Prosecutor's Office Agriculture and Environment Division (the "Prosecutor's Office") in regards to the investigation and accusation of Mr. David Richard Aven and Mr. Jovan Dushan Damjanac due to infringement of the Wildlife Conservation Law in the modality of draining and filling of wetlands and infraction of the Forestry Law in the modality of invasion of conservation areas and illegal exploitation of forestry products (the "Case").
3. Except for the cases in which I state otherwise, the facts and assertions contained in this witness statement come from and are true to the best of my knowledge. In the cases where the facts and assertions contained herein are not from my own knowledge, I have identified the sources of information on which I base the facts or from which the information I make reference to in this witness statement comes.
4. In the preparation of this witness statement, I have been assisted by the attorneys of Herbert Smith Freehills, with whom I have interchanged communications regarding my comments to the Reply Memorial submitted by the Claimants in the Arbitration and the witness statements of Mr. David Richard Aven, Mr. Néstor Morera Víquez and Mr. Manuel Ventura. I confirm that any and all the assertions and statements contained herein represent my knowledge of the facts with the mentioned exceptions.
5. In my first witness statement, I have already expressed my involvement with the Las Olas Project, so I will not repeat it here. In this statement, I answer several matters raised by the Claimants.

1. **INTRODUCTION**

6. I have read the Reply Memorial of the Claimants and I would like to make two specific clarifications.
7. First, I have noticed that in the Paragraphs 330 to 334, the Claimants express their opinions regarding the statements of each witness that testified within the first debate performed in the case against Mr. Aven and Mr. Damjanac. As explained by the Claimants, what was said by each witness is recorded in audio and video, and each party can come to its own conclusions in regards to whether what was said by each of them confirms the accusation or not. What I want to reiterate is that my opinions or those of the Claimants are irrelevant to this Case since,

eventually, a criminal judge of the judicial system of Costa Rica, and no other person, is whom can make a value judgment regarding these statements and who must decide if the accused committed the alleged crime.

8. Second, the Claimants accuse me of having behave in an “abusive”, “arbitrary”, “discriminatory” and “unfair and detrimental” manner against Mr. Aven:

“Considering the evidence submitted before the Court, the behavior of the authorities, and especially the main prosecutor, Mr. Martínez **was clearly abusive**, since there was no evidence to even verify the accusations, and, let alone the sentence of any of these people.”¹

“In general, the core of the complaint of the Claimants against Mr. Martínez in particular, and against the Prosecutor’s Office in general, is the **arbitrariness and the discrimination**.”²

“The purpose of describing the deficiencies in the arguments of the Prosecutor’s Office was to prove that Mr. Martínez considerably exceeded its competence as complainant and, by doing so, he treated Mr. Aven in a **manifestly unfair and detrimental manner**.”³

“Mr. Martínez tried to resolve this matter by means of a criminal trial to a real estate agent. When doing so, he presented a series of attending witnesses that had poor or non-existing qualifications to answer technical matters that were still object of analysis by the officers of environmental dependencies. **That is proven by an impertinent dismissal of the general principle of objectivity, and it is also another example of a disturbing tendency of animosity and prejudice against Mr. Aven** that underlies during the entire case before the present Court.”⁴

9. I reject each of the abusive and slanderous accusations made by the Claimants regarding my professional practice in the criminal case brought against Mr. Aven and Mr. Damjanac. At all times, I performed according to law, observing the demands of the precautionary principle. As I mentioned in my first witness statement, I had never seen the accused before, so I did not have and I do not have anything personal against them.

10. Third, I notice that the Claimants assert that they have obtained all the permits to develop their project:

“It is questionable that the Claimants obtained from the different competent entities of Costa Rica all the relevant permits to develop this project, and said permits were withdrawn shortly after the initiation of the project construction process.”⁵

11. This is completely false. The Claimants never had any single permit to cut trees, even though when they were granted the Environmental Viability, they were expressly warned that in case of cutting a tree, they had to process the corresponding permit before the MINAE office:

¹ Reply Memorial, paragraph 15.

² Reply Memorial, paragraph 99.

³ Reply Memorial, paragraph 335.

⁴ Reply Memorial, paragraph 336.

⁵ Reply Memorial, paragraph 9.

- 7- Los estudios básicos realizados señalan una serie de recomendaciones que deben acatarse según lo indicado, como parte de los compromisos ambientales del proyecto. En caso de requerirse la eliminación de algún árbol, debe de tramitar el permiso correspondiente ante la oficina del MINAE.
- 8- Para cada impacto ambiental...

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12. Moreover, the Claimants never had any permit to affect wetlands, protected under the Articles 41 and 45 of the Environment Organic Law.

13. Next, I will make reference to other relevant points regarding the allegations of the Claimants that I consider necessary to clarify.

2. THE INVESTIGATION REGARDING THE FORGERY OF AUTHENTIC OR PUBLIC DOCUMENTS AND THE USE OF FORGED DOCUMENT

14. The Claimants show a complete ignorance regarding the operation of the criminal system of Costa Rica. The Prosecution, faced with the possibility of commission of a crime of public action, has the legal obligation to investigate. The crimes of forgery of a public document or use of forged document, for which Mr. Aven was accused, in the criminal complaint filed by Mr. Bucelato,⁷ are crimes of public action, and therefore, I was required to investigate them.

15. At this point, it is required to clarify the difference between the investigation conducted by the Prosecutor's Office during the first stage of the criminal process, which is the preliminary investigation, and the criminal accusation that may be one of the manners in which the investigation stage finalizes. The investigation stage may finalize with (1) the filing of a criminal accusation by the Prosecution or (2) the request of disallowance or dismissal of the case, which is simply a request made to the judge to file the case due to lack of sufficient criminal elements to bring a criminal accusation or because what was claimed is not a crime, it was not committed by the accused party or there is a justification or exculpation cause.⁸

16. I would like to emphasize that I never accused anyone of the forgery or for the use of the forged SINAC document (SINAC '67289RNVS-2009'). Mr. Aven insists that I '*filed criminal charges against him for forgery of this document*'.⁹ I would like to clarify that the Prosecution never filed criminal charges against Mr. Aven for forgery.

17. The criminal complaint, filed on February 2, 2011, with which it was initiated the investigation of Mr. Aven and Mr. Damjanac, requested the investigation of the "*counterfeiting and use of*

⁶ C-52.

⁷ C-110.

⁸ I have already explained this point in Paragraph 9 of my First Witness Statement.

⁹ Second Witness Statement of David Aven, Paragraph 119.

forged official documents” by the developers.¹⁰ In light of this complaint, the investigation was started, which was the first stage of the criminal proceeding.

18. On October 21, 2011, more than 8 months after becoming aware of the criminal complaint, I filed to the criminal judge a request of definitive dismissal for the crimes of public document forgery and disobedience to the authority in favor of Mr. Aven. At no time, Mr. Aven was accused for the crime of forgery and no “charges were pressed against him” as falsely asserted by the Claimants in their Reply Memorial.¹¹
19. On that same day, I also submitted the criminal accusation against Mr. Aven and Mr. Damjanac for the crimes of infringement of the Wildlife Conservation Law in the modality of draining and filling of wetlands and infringement of the Forestry Law in the modality of invasion of conservation areas and illegal exploitation of forestry products.¹² It was with the filing of the definitive dismissal and the criminal accusation that the investigation stage concluded in this case.
20. In the definitive dismissal request that I filed to the criminal judge, I detailed the investigation I had conducted and the reasons why it was not possible to prove that the accused David Aven was the author of the document forgery:

“Although there is accurate evidence that the document included in the file D1 -1362-07, on pages 255 to 258, titled “67389RNVS-2008, Refugio Nacional de Vida Silvestre Área de Conservación Esterillos Oeste”, the fact remains that up to date, despite the lack of certainty regarding the authorship of its drafting and use by the accused within the SETENA file, there is no reasonable possibility to include new elements of evidence to modify that doubt status and with the existing elements there is no sufficient ground to request the opening of the trail in a well-founded manner.

In regards to the forgery, it is important to mention that this legal representative interviewed Mr. Gabriel Francisco Quesada Avendaño, ID 1 -443-525, who to the present serves as Prosecutor of the Biologist Board of Costa Rica, and Mr. Ronald Gerardo Vargas Brenes, who currently serves as Institutional Coordinator of the Removiendo Barreras Project of the National System of Conservation Areas, which names are listed as the responsible people for having drafted the questioned document, and they categorically deny having drafted the document and, likewise, they reject that the signature appearing on said document is theirs; moreover, they deny knowing who drafted and used the document.

[...]

Likewise, the evidence gathered does not allow linking the accused David Aven to the introduction and use of said document within the SETENA file, since although it has been used for the benefit of the interest of the project he represents, with the purpose of discrediting the administrative complaints filed against Las Olas Residential Condominium, it is not possible to prove that said document has been filed before the SETENA by David Aven. The evidence gathered leans towards the theory that the document was filed before said institution by Edgardo Madrigal Mora, since said document

¹⁰ C-110.

¹¹ Reply Memorial, paragraph 7.

¹² C-142.

appears in the file along with the documentation submitted by him; however, there is no convincing evidence in that sense as to order the statement of elements to investigate said subject for the use of said document before the SETENA.

This legal representative interviewed Mrs Marlene Soto Díaz, document receptionist at SETENA and she disregards having received the forged document from the accused David Aven and she is not sure that the document was submitted by Edgardo Madrigal Mora and that the documentation received states the name of the person that filed it.”¹³

21. The request of the Prosecution to order the definitive dismissal for the crime of forgery and use of forged document was informed to Mr. Aven, by express order of the Judge, on October 21, 2011.¹⁴
22. I cannot really understand how the Claimants can assert that I did not investigate the forgery of the SINAC document. As I explained to the Criminal Judge, the Prosecution:
 - a) requested the seizure of the SETENA file assigned to the Las Olas Project to review it;
 - b) personally interviewed the alleged authors of the forged document at the SINAC offices;
 - c) personally interviewed the receptionist of SETENA, who was in charge of receiving any document submitted before the institution.
23. The criminal complaint, the criminal accusation and the request of definitive dismissal deny the accusations of the Claimants regarding the fact that I supposedly pressed criminal charges against Mr. Aven without any evidence.

3. **GATHERING OF EVIDENCE BY THE PROSECUTION**

24. Mr. Morera accused me of not having gathered sufficient evidence before pressing charges against Mr. Aven.¹⁵ In the Paragraph 64 of my first witness statement, I have already detailed all the evidence that the Prosecution had to initiate the criminal accusation against Mr. Aven, so I will not repeat it here. However, I will make reference to the three specific assertions of which Mr. Morera accuses me.

Not having interviewed the Environmental Manager

25. The Environmental Manager is an independent professional that provides environmental management services to the developer, which role is to simply supervise the development of a project. Since it is the developer, and not SETENA, who pays to the Environmental Manger for his

¹³ R-115, Request of definitive dismissal for the use of forged document and contempt of court, October 21, 2011.

¹⁴ R-351, Notification of the definitive dismissal request to David Aven, October 21, 2011.

¹⁵ Second Witness Statement of Néstor Morera, Paragraph 10.

services, usually the Environmental Managers may be biased in favor of the developer.

26. In the case of Las Olas Project, the partiality of the Environmental Manager was evident since he should have reported to SETENA the actions of the developers for the environmental damaged caused to the property. In any case, the representative of the Prosecutor's Office is who decides who has to be interviewed in a preliminary investigation, and if it does not consider that certain witness is of interest, it will not interview it.
27. Lastly, I do not understand why Mr. Morera accuses me of not having interviewed the Environmental Manager. If the information that he had regarding the development of Las Olas Project was so relevant, why he was not called as witness during the first debate? Moreover, why he was not offered as evidence at the moment of the questioning of the accused Mr. Aven and Mr. Damjanac so the Prosecution could interview him?

Having been based on witnesses without technical education

28. I completely reject this accusation of Mr. Morera. As I explained in my first witness statement, the Prosecution called Mr. Rolando Manfredi, Biologist, Mr. Christian Bogantes, Forestry Engineer, and Dionel Burgos González, Forestry Technician, all of them public servants of SINAC, as witnesses. Moreover, Mr. Jorge Gamboa, expert in wetlands and Coordinator of the National Program of Wetlands, testified and he could confirm from the technical point of view the existence of a palustrine wetlands at Las Olas Project site.¹⁶

Not having considered the evidence that Mr. Aven made reference to in his original statement

29. It is the Prosecutor who, exercising his punitive power, defines who he interviews and what evidence is gathered. If the defense was interested in presenting a specific piece of evidence, they should have processed it before the Prosecutor's Office. The evidence gather by the prosecutor is used to base its decision of accusing the accused party or the dismissal request of the cause to the judge. The Prosecutor shall gather evidence for said purposes in accordance with the Article 303 of the Criminal Procedure Code.¹⁷

4. **PRELIMINARY STATEMENT**

30. I have already referred to my first witness statement regarding the legal action called preliminary statement or special notification, so I will not repeat it here.¹⁸ However, I need to clarify again certain assertions made by Mr. Aven regarding what happened during this procedural diligence.

¹⁶ C-272.

¹⁷ R-421, Criminal Procedure Code.

¹⁸ See Paragraph 26 and subsequent paragraphs of the First Witness Statement of Luis Martínez.

31. Mr. Aven complains because the interpreter assigned for his statement was “deficient.”¹⁹ Here, Mr. Aven incurs in two contradictions. First, Mr. Aven states that during the questioning he declared everything and submitted all the documents proving that the project was fully authorized.²⁰ It is not possible to make said assertion and, at the same time, say that the interpreter was “deficient”, since it was precisely him the channel used to express his statements.
32. Second, if Mr. Aven does not speak Spanish, I do not speak English and the interpreter was “deficient”, how is it possible that the questioning was so long? In fact, during the criminal action against him, Mr. Aven never mentioned such a lie or filed any legal action against the manner in which the questioning was performed.
33. Moreover, I want to emphatically deny that I have forced Mr. Aven to sign the Statement of the Accused after the questioning. There are three witnesses that were present during this act and who can confirm that I never forced Mr. Aven to sign any kind of document. They are the interpreter, the defense attorney that was with him at that time and the assistant of the Prosecutor’s Office that participated transcribing what Mr. Aven told to the interpreter.
34. With this accusation, Mr. Aven contradicts himself again since, on the one hand, he states that I forced him to sign his statement.²¹ But, after, he uses the statement to suggest that it was not necessary that Prosecutor assigned to his complaint against Mr. Bogantes would request him to appear to testify:

“It was not necessary for me to provide any other statement, since I had already provided a sworn statement before the prosecutor [Luis Martínez]”²²

35. If the translation was deficient and he was forced to sign, why does he suggest that the Prosecutor’s Office of Probity, Transparency and Anticorruption should have used that same statement of the questioning to investigate Mr. Bogantes?

5. **ARTICLE 336 OF THE CRIMINAL PROCEDURE CODE**

36. One more time, I have to clarify that it is false that I considered to apply the 10-day rule to have a new opportunity to perform the debate since I believed that I had lost in the first trial. The State Attorney General as well as the Prosecution denied agreeing on the waive of the term with the purpose of avoiding the annulment of all the proceeding in the appeal stage.
37. Mr. Morera makes reference to 3 specific decisions that contradict the decisions referred to in my first witness statement. One of them is from the year 1999 and it answers a

¹⁹ Second Witness Statement of David Aven, Paragraph 109.

²⁰ Second Witness Statement of David Aven, Paragraph 108.

²¹ Second Witness Statement of David Aven, Paragraph 111.

²² Second Witness Statement of David Aven, Paragraph 126.

mandatory legal enquiry of constitutionality of the Constitutional Court,²³ the other decision is from the year 2000 of the Second Judicial Circuit of San Jose²⁴ and other decision is from 2011 of the Third Court of the Supreme Court of Justice.²⁵ The decisions from 1999 and 2000 indicate that there would not be infringement of the due process if the parties agree to waive the term of 10 days. However, in any of the cases, there was in fact a suspension of the debate of more than 10 days, which is the basic factual supposition for the application of the regulation of the Article 336 of the Criminal Procedure Code.²⁶

38. The decisions that I have mentioned in my first witness statement are from 1995, 1999 and 2013.²⁷ So, it is evident that the criminal courts have used different criteria in regards to the application of the Article 336 of the Criminal Procedure Code. In such cases, the administrator of justice may validly apply one criterion or the other until the Third Court (specialized in criminal matters) does not unify the conflicting criteria. It must be noted that the decision of the Third Court that was mentioned by Mr. Morera has not unified the conflicting criteria of the lower courts.²⁸
39. However, the fact that the Prosecution and the State Attorney General based their decision of not extending the current debate on jurisprudence of the criminal courts shows that the decision was analyzed, grounded and not a capricious decision as suggested by the Claimants.

6. THE COMPETENCE OF THE CRIMINAL JUSTICE IN ENVIRONMENTAL CRIMES

40. Mr. Morera files a pretentious legal argument to attack the competence of the Prosecution to investigate the commission of environmental crimes involving "technical notions and criteria."²⁹ Before the existence of possible crimes the criminal competence is unquestionable; as I have mentioned in my first witness statement, all the environmental crimes are of public action and, therefore, the Prosecutor is required to investigate and the criminal courts have the competence to hear the accusations filed by the Prosecution.
41. I completely disagree with the legal opinion that Mr. Morera tries to argue. There is nothing more inaccurate than asserting that the analysis regarding the ecosystems does not naturally belong to the

²³ C-231, Constitutional Court of the Supreme Court of Justice, Decision 05200-99.

²⁴ C-234, Court of Criminal Appeals in Cassation of Goicoechea, Decision 2000-147.

²⁵ C-253, Third Court of the Supreme Court of Justice, Decision 2011-00036.

²⁶ See, C-231, ("In the proceeding, it is alleged the violation of the due process, since in the debate it was resolved a **suspension for two days**, based on "the agreement of both parties", cause of action that was not stipulated for the purpose in the Article 361 of the Criminal Procedure Code"; C-234, ("The aforementioned indicated that the trial was only suspended for nine days and the Court of merit **did not exceed the ten days** that authorizes the Article 361 of the Criminal Procedure Code.")

²⁷ In the same sense see, R-357, Decision 209-97 (The Court of Criminal Appeals in Cassation override the judgement given by the lower court due to the infringement of the Article 361 of the Criminal Procedure Code).

²⁸ C-253, Third Court of the Supreme Court of Justice, Decision 2011-00036.

²⁹ Second Witness Statement of Néstor Morera, Paragraph 12.

criminal court and that they must be performed at the civil or administrative court. The criminal descriptions of the Forestry Law enable to understand, with crystalline clarity, that said analysis is of the nature of the criminal court; without it being exclusive of that court, naturally.

42. For example, when reading the criminal description of the crimes of opening roads in the woods, change of land use or draining of wetlands, it can be clearly determined the competence of the criminal courts to decide over those cases even if they include technical criteria that shall be determined by a judge:

Wetlands draining crime:

Article 98.- It shall be sentenced to imprisonment from one (1) to three (3) years, who, without prior authorization of the National System of Conservation Areas, drains, dries, refills or eliminates lakes, non-artificial ponds and other wetlands, declared as such or not.³⁰

Crime of opening road in the woods:

Article 62.- It shall be sentenced to imprisonment from one to three years who builds roads or paths in the woods or uses equipment or machinery to cut, extract or transport against the provisions of the management plan of the State Forestry Administration.³¹

Crime of change of land use:

Article 61.- It shall be sentenced to imprisonment from one to three months who:

c) Performs activities that imply change in the land use, against the provisions of the Article 19 of this law. In the previous cases, the products shall be confiscated and remanded to the custody of the competent legal authority.³²

43. The opinion of Mr. Morera regarding the fact that the technical notion should be only resolved in a civil and administrative proceeding fully questions the existence of the criminal jurisdiction to judge environmental crimes. Moreover, it leads us to question, how could a criminal judge punish or acquit an accused if he does not analyze these technical notions?

44. In this same argumentative line, Mr. Aven is surprised that I have not initiated a "process of injury" before the SETENA to request the annulment of the Environmental Viability:

"I am not able to understand the reason why Costa Rica, when Mr. Martínez carried out his criminal investigation, has not requested an injurious audience if his objective was to challenge the award of such permits."³³

45. First, it is not my responsibility to start any process of injury; that is contentious-administrative matter. My role is the criminal prosecution before the possible commission of crimes. This present case did not strictly have the environmental viability of

³⁰ C-220, Wildlife Conservation Law.

³¹ C-170, Forestry Law.

³² C-170, Forestry Law.

³³ Second Witness Statement of David Aven, Paragraph 53

SETENA, which is not even a permit but a requirement in accordance with the Article 17 of the Environment Organic Law.

46. Second, the criminal case law has clearly indicated the criminal competence to issue a resolution regarding the crimes described by the Forestry Law without depending on the administrative courts:

“Throughout its remedy, the defense insists on the fact that this case should have been handled through the administrative proceedings in order to establish a process before the National Environmental Technical Secretary (SETENA), since this is the competent body to hear and determine if there was an environmental damage. As it is accepted by the defense, the legal nature of that administrative proceeding to which it makes reference, as well as the SETENA competence, is diverse and independent to the legal role of the court of justice to hear and issue a resolution regarding the possible commission of the crimes stipulated in the Forestry Law. In this sense, it is required to clarify that this administrative proceeding, which omission is questioned, is intended to investigate the facts that may cause the affectation of the environment, with the purpose of taking urgent measures of protection, establishing responsibilities for it, imposing administrative penalties and, even, establishing the repairing and compensation obligations attributable to the subject that may result responsible for the damage. The aforementioned does not mean under any circumstances that in a case where it is committed any of the crimes described in the Forestry Law (where it is generally affected the environment) the administrative proceeding has to be exhausted before said body as a prior procedural requirement for the courts of justice to hear the case. Said demand is not imposed by the Environment Organic Law and also it would not make any sense since, as it was explained, the purpose of said proceeding has a diverse nature.”³⁴ (emphasis mine)

47. Clearly, the Claimants are not completely aware of how the Criminal System of Costa Rica works in regards to crimes against the environment.

7. SETTLEMENT AGREEMENT

48. The Claimants accuse me of being the responsible for the negotiations with Mr. Aven have not reached a settlement agreement.³⁵ I would like to clarify that it is not the obligation of the Prosecution to propose alternative measures to the accused or to insist during the criminal action on reaching a settlement agreement.

49. In the first place, Mr. Morera accuses me of not explaining “*how could it look that the attorneys of Mr. Aven wanted to negotiate a settlement agreement.*”³⁶ My statement is a recount of the facts that I am aware of, if I made that assertion it is because it was my assessment during the negotiation as well as in the conversations I had with the attorneys, who told me that it was the accused who did not want to negotiate, despite they were advising him to do so. Even, there were steps to negotiate based on a plan proposing a compensation in another sector of the property related to the draining of the wetland.

³⁴ R-358, Decision 2002-979, Court of Criminal Appeals in Cassation, December 5, 2002.

³⁵ Reply Memorial, paragraphs 330-331.

³⁶ Second Witness Statement of Néstor Morera, Paragraph 24.

50. On the other hand, Mr. Aven states that I never had an initiative to negotiate and that there is no evidence regarding my intentions to negotiate, but just the Repairing Plan submitted by the accused.³⁷ At this point, I would like to make reference to the questioning to Mr. Aven during the criminal action. In that first contact, it was recorded in writing the warning regarding the fact that if he wanted to reach an agreement, it was the accused who had to make the proposal to the Prosecution. It is not an obligation of the Prosecution to go after each accused and his lawyer to know if they want to reach an agreement.
51. In the Statement of the Accused, voluntarily signed by Mr. Aven after the questioning, it is proven the invitation made by the Prosecution to reach an agreement:
- “Based on the procedural regulation and following the Resolution number 31-2006 of the General Prosecution of the Republic, it is informed that in case the legal requirements are met, it could be applied the settlement, the comprehensive repair of the damage or the suspension of the proceeding. The accused and its defense are also informed regarding the possibility of application of the summary trial with the reduction of a third of the minimum sentence, for which in this procedure you are given a term of 10 days to accept it, after the expiration of said term, your application shall not be accepted.”³⁸ (emphasis mine).
52. Additionally, I would like to emphasize the contradiction in the statement of Mr. Aven and Mr. Morera regarding my alleged resistance to reach an agreement with the accused. On the one hand, Mr. Aven accuses me of never informed him about the wish to negotiate.³⁹ And, on the other hand, Mr. Morera admits that the Prosecutor’s Office proposed a plan to Mr. Aven as an alternative measure, which was rejected by Mr. Aven due to “pride reasons”.⁴⁰ The truth is that the Prosecution was always open to negotiate and that possibility was informed to the accused, at least in two occasions, as opposed to what Mr. Aven states.
53. The first occasion was during the questioning, which record has been submitted as evidence within this arbitration,⁴¹ and the second occasion occurred during the proposal referred to by Mr. Morera in Paragraph 27 of his second witness statement.
54. Clearly, Mr. Morera distorts the proposal made by the Prosecutor’s Office to Mr. Aven when he states that said plan would prevent Mr. Aven from developing the project. That is not true; the plan only inhibited the development of the area where, up to the moment, the existence of woods and wetlands was known.
55. Finally, I would like to clarify that the valid interlocutor and direct representative of the victim in environmental matter is the State Attorney General, the Prosecutor’s Office provides its criteria but it is the victim, represented by the State, who decides the best form to repair any environmental damage caused.

³⁷ Second Witness Statement of David Aven, Paragraph 106.

³⁸ R-90, Statement of Mr. Aven, May 6, 2011.

³⁹ Second Witness Statement of David Aven, Paragraph 106.

⁴⁰ Second Witness Statement of Néstor Morera, Paragraph 27.

⁴¹ R-90, Statement of Mr. Aven, May 6, 2011

8. **OTHER INACCURACIES OF MR NÉSTOR MORERA**

56. First of all, I reject the consideration of Mr. Morera about whether it was appropriate or not that I would initiate a criminal accusation against Mr. Aven. The truth is that the evidence in possession implied the possibility of crime commission and that went through the examination of an intermediate stage judge, who analyzed that probability and agreed with the Prosecution on the fact that said case had sufficient grounds to process the filed criminal accusation.
57. The certainty about the commission of a crime is defined by a Trial Court and in that stage it was not possible to develop it within the trial against Mr. Aven. The debate stage that occurred in regards to Mr. Damjanac was annulled so, likewise, it has not been a court decision regarding the criminal accusation filed in this Case.
58. Secondly, Mr. Morera implies that considering that as Mr. Aven and Mr. Damjanac had not been accused with any crime in Costa Rica before the criminal action against them, they would have not been imposed with any prison sentences.⁴² The crimes that Mr. Aven and Mr. Damjanac are accused of have prison sentences and only after performing the debate, in case of conviction, the Judge decides if they are granted with the conditionally executed benefit of not going to prison. Not having previous convictions is a requirement but it is not a guarantee that said benefit shall be granted.
59. Lastly, Mr. Morera states that the precautionary principle does not imply, by itself, the presentation of criminal charges due to the principle of subsidiarity.⁴³ The possible existence of a possible crime imposes the obligation of disclose the case at criminal court. In this case, there was possibility of crime commission and that was sufficient for the criminal court to be competent.

9. **THE FORGED DOCUMENT OF SINAC**

60. Now, Mr. Aven and the Claimants accuse me of not having found an alleged note that would prove that the Forged Document of SINAC was submitted by Mr. Bucelato at SETENA. I have never seen such note in the SETENA file or in the file of the Prosecutor's Office.
61. I reiterate that I interviewed the receptionist of SETENA and she was not able to tell who submitted said note, so it was impossible to accused the person who drafted it or the one who used it. Moreover, the investigated illegal use was related to the use it to benefit the project. Therefore, it should be asked, what interest may Mr. Bucelato have in benefit the Las Olas Project if he has always been its detractor? If it is accepted that Mr. Bucelato presented it before SETENA, the only rational explanation would be that he presented it to disclose its falseness, since for those same purposes, he filed it to the

⁴² Second Witness Statement of Néstor Morera, Paragraph 7.

⁴³ Second Witness Statement of Néstor Morera, Paragraph 9.

Prosecutor's Office and asked me to investigate it. Or, would it be that the presentation of the document before this Prosecutor's Office has also to be considered criminal?

62. Moreover, from the review of the SETENA file, all the documents received at SETENA are sealed on the front page of the official letter or the document received. Surprisingly, the alleged note mentioned by the Claimants was already drafted with a freehand disclaimer, with no official seal or a signature indicated its receipt, on the opposite face to the last page of the document.

10. **THE ACCUSATIONS OF MR AVEN**

63. Mr. Aven uses many pages of his second witness statement to make groundless and false accusations regarding my professional performance and my participation in the Case. I will make reference to those that I consider more relevant, without accepting as true his personal allegations and opinions.

64. First, Mr. Aven accuses me of not having considered the conclusions of the Report of the INTA.⁴⁴ On the contrary, the Prosecution did review the report submitted by the INTA. For the purposes of its assessment, the Prosecution considered that although Mr. Cubero was specifically enquired about soils, on his own initiative or for any reason I am not aware of, in his report, he expressed opinions that exceeded the request and his competence. Moreover, the report issued by the National Program of Wetlands, competent entity to determine the existence of wetlands in Costa Rica, had already confirmed the existence and affectation of a palustrine wetland in the site of the Project.

65. Second, Mr. Aven denies being notified of the initiation of a new debate for January of 2014.⁴⁵ That is completely false. In the criminal file, the notification to Mr. Aven through e-mail is recorded, as well as the notification to his attorney, Mr. Morera on October 16, 2013.⁴⁶ Moreover, if Mr. Aven was "never" notified of the debate by the court, how is it possible that Mr. Morera then informed to the Judge in writing that Mr. Aven was not able to attend to the new debate?⁴⁷

66. Third, Mr. Aven accuses me of having illegitimately withheld the SINAC Report of July of 2010.⁴⁸ I want to clarify that during the questioning, it was made available to the accused the evidence that we had at that time. If at that time Mr. Aven or his attorney did not examine it, it was under their responsibility.

⁴⁴ Second Witness Statement of David Aven, Paragraph 105.

⁴⁵ Second Witness Statement of David Aven, Paragraph 107.

⁴⁶ R-350, Notification about the new debate to David Aven, October 16, 2013.

⁴⁷ R-144, Letter of Mr. Néstor Morera to the criminal court notifying that David Aven was not attending to the hearing, December 20, 2013.

⁴⁸ Second Witness Statement of David Aven, Paragraph 128.

67. Fourth, regarding the visit I made to the site, Mr. Aven accuses me of not having contacted him or his advisors to “*request them a meeting to visit the site and discuss it.*”⁴⁹ The visit to the site was made in accordance with the Article 185 of the Criminal Procedure Code:

“Inspection and search of the place of the incident.- When it is required to inspect places or things due to the existence of sufficient reasons to suspect that there will be found traces of crime or due to presuming that, in certain place, it is hidden the accused or any evader, the place shall be searched.

Through the inspection, it shall be proven the state of the people, places, things, traces and other existing material effects that may result useful to investigate the fact or individualize its perpetrator or accomplices.

The representative of the Prosecution shall be in charge of performing the diligence, except otherwise provided.

There shall be invited to participate in the inspection the people residing in the place or that are in the place when the inspection is performed or, in their absence, the person in charge or any person of legal age. Relatives of the first shall be preferred.”⁵⁰

68. It would be naive to demand notifying the possible perpetrators of a crime that the place where a crime took place will be inspected since there would not be any possibility to find traces or the perpetrators of the crime, in case of execution acts.

69. Lastly, I will refer to the participation of the Judiciary Investigation Bureau (OIJ), which Mr. Aven describes as “inexistent”. Mr. Aven states that:

“What evidence was available proving that it was me who ordered the [draining of the wetland] that did not exist? Nobody appeared during my criminal trial and testified against me regarding any of the mentioned aspects, especially any officer of the OIJ, as mentioned by Mr. Martínez. These are simply more false accusations of Mr. Martínez during his witness statement.”⁵¹

70. Nothing is further from the truth. I do not understand how the Claimants and Mr. Aven incur in all those pages to repeat and give opinions regarding the statement of each of the witnesses convenient to them, while ignoring those who are not. The Prosecution called the OIJ investigator that made the authoring report that I referred to in my first witness statement.

71. Said report is part of the criminal file assigned to the Case and in this report, Mr. Jorge Issac Barrantes Villa, Judiciary Investigator of the Judiciary Investigation Bureau (OIJ) narrated the illegal cutting of trees that he witnessed when he examined the property of the Las Olas Project on October 6, 2011, and he attached several pictures of the damages caused to the ecosystem by the Claimants.⁵²

72. Mr. Jorge Issac Barrantes Villa was called to testify by the Prosecution on December 6, 2012 during the first debate. His statement is

⁴⁹ Second Witness Statement of David Aven, Paragraph 130.

⁵⁰ R-421, Criminal Procedure Code.

⁵¹ Second Witness Statement of David Aven, Paragraph 135.

⁵² R-353, Audit report of the Judiciary Investigation Bureau (OIJ), October 6, 2011.

recorded in the annex C-272 filed to this arbitration by the Claimants along with his Reply Memorial.

11. **THE INTERNATIONAL ARREST WARRANT**

73. Mr. Aven accuses me personally of having issued an arrest warrant against him and of reporting him to the INTERPOL.⁵³ This is false. The Judge of the Criminal Court of Puntarenas, assigned to the case against Mr. Aven, was the authority that issued the arrest order against Mr. Aven at the request of the Prosecution.⁵⁴ The arrest warrant was sent to the Office of Technical Advisory and International Relations (OATRI), specialized entity of the Prosecutor's Office of the Republic of Costa Rica. I reiterate that I was not involved in the extradition process of Mr. Aven or in the red notice request before the INTERPOL.

74. What I do know is that the international arrest warrant issued by the criminal judge was because Mr. Aven did not appear at the trial to which he was call and, even today, he refuses to appear. The purpose of the arrest warrant was that Mr. Aven would face justice and that does not depend on his supposed innocence or not.

12. **MY ALLEGED COMMUNICATIONS WITH MR VENTURA**

75. Mr. Ventura makes reference to two letters, one of November 2, 2015 and another of December 9, 2015, where I was supposedly informed about the situation of the illegal occupants in the property of the project.⁵⁵ I would like to clarify that I have not spoken again with Mr. Ventura since the trial with Mr. Aven and Mr. Damjanac. He has never given me any letter. I am not even sure that I can recognize Mr. Ventura if I see him again.

76. I have reviewed the two letters mentioned by Mr. Ventura and I can confirm that I never received them. The faxes attached herein do not belong to my office. Mr. Ventura or the Claimants have not submitted a copy confirming the receipt of those letters by me or my office.

77. The truth is that I never received those letters as addressee, and I consider as an act of bad faith Mr. Ventura saying that I did receive them.

⁵³ Second Witness Statement of David Aven, Paragraph 107.

⁵⁴ R-150, International Arrest Warrant, May 25, 2014.

⁵⁵ Second Witness Statement of Manuel Ventura, Paragraphs 13 and 17.

STATEMENT OF TRUTH

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

Signed,

A handwritten signature in black ink, appearing to read 'Luis Gerardo Martínez Zúñiga', is written over a horizontal line. The signature is somewhat stylized and includes a large initial 'L'.

October 28, 2016