



MEMORANDUM

PRIVATE AND CONFIDENTIAL

From: Manuel Ventura, FH Legal

To: David Aven/Project Las Olas, Puntarenas, Costa Rica

Subject: Possible Legal Action Against the Government of Costa Rica for Failing to Comply with Obligations under the Dominican Republic-Central American Free Trade Agreement (CAFTA)

Date: 27 September, 2012

Dear David:

Pursuant to your request here is my legal brief on the above listed subject matter that you may in turn make available to prospective law firms seek to represent you in this matter.

The following document provides a general exposition of the main facts and issues related to the *Las Olas* Project (the Project) that was to be developed in the province of Puntarenas, Costa Rica, in Central America. The information listed below is to be reviewed in order to determine the viability and/or possibility of taking legal action against the Government of Costa Rica based on its failure to fully comply with stipulations of the Dominican Republic-Central American Free Trade Agreement (CAFTA); all documents pertaining to the information stated below can be made available upon request.

The Treaty provision under CAFTA states in part the following:

“Investment: CAFTA-DR establishes rules to protect investors from one member country against unfair or discriminatory government actions when they make or attempt to make investments in another member country's territory. Investors enjoy six basic protections:



(1) Non-discriminatory treatment relative to domestic investors as well as investors of non-Parties;

(2) Limits on “performance requirements”;

(3) Free transfer of funds related to an investment;

(4) Protection from expropriation other than in conformity with customary international law;

(5) A “minimum standard of treatment” in conformity with customary international law;

(6) and the ability to hire key managerial personnel without regard to nationality.²

Further, the treaty provides for transparency and makes attempted bribery a crime in this provision:

Transparency: “Parties are obligated to make it a criminal offense to offer or accept a bribe in exchange for favorable government action in matters affecting international trade or investment.”

After reviewing the facts of this case it appears that the Government of Costa Rica has violated Paragraph 5 and 6 of the Treaty. Permits were issued only after all the inspections, impact studies, environmental approvals and all other requirements were conducted by the Government. It is important to understand that the Governments and the courts have given only SETENA the authority to issue project permits. However, they only do that once all other agencies weigh in and go through the check list that must be approved by all the other agencies of the Government. MINAET is the environmental agency and are required to submit an environmental report to SETENA, which states there are no wet lands and no forest. Without that favorable report, SETENA will not issue a permit. All of this work was done according to the laws of Costa Rica and SETENA issued the project permit on June 2, 2008.

David Aven, under the corporation, Inversiones Costco, along with the application and request to develop the property, submitted a master site plan and that was approved as well by SETENA.

Once David Aven received the SETENA approval, he then proceeded to subdivide the property according to the approved master site plan that included 288 individual lots, along with the roads, green areas and sewage treatment plants.



After the sub-division was completed and the lots were properly and legally registered in the national registry and recorded, David Aven then went to the municipality to get the necessary construction permits. The municipality then verified that the project had all the legal and necessary permission from the Government and then and only then did they issue the construction permits in September of 2010.

Six months later on February 14, 2011, MINAE then sent a letter to David Aven informing him they were shutting down the project due to wet land violations. This action was very odd and irregular for a couple of reason:

1. This appears to be an illegal notice, since only SETENA and the courts are the only agencies authorized to issue shut down notices for projects.
2. Just six months before MINAET issued a report in August of 2010 that stated there were no wet lands. There were no other reports or actions issued between August 2010 and February 2011, that would have changed or overturned the conclusions in the August 2010 MINAET report stating there were no wetlands.

So why did MINAET issue a number of reports to SETENA prior to the permit being issued also a number of other reports after the permit was issued, all stating there were no wet lands and then do a 180 degree turn and send a shut down notice in February of 2011 alleging wetlands. That's a question that will have to be asked at Trial, but coincidentally, Mr. Aven states that in August of 2010 he was asked for a bribe by a MINAET official in his office at Las Olas, and there were witnesses to that bribe attempt.

About the same time that MINAET issued their shut down notice, the Government of Costa Rica filed a criminal action against Mr. Aven for violating wet lands and then another agency of the Government also filed a shut down notice for wetlands. These assaults appeared to be a coordinated effort by various Government agencies to shut down the project. In fact, four different agencies of the Government, including the Municipality, launched assaults on the Las Olas project from different directions. Since I am not a big believer in coincidences, I would have to assume someone was coordinating those assaults. These assaults were made for the explicit purpose of shutting down the project after legal Government permits were issued. Government issued permits are in effect contracts by the Government with the recipient and the recipient should be able to rely and act upon those permits without fear that another Government agency would come along and invalidate them, which is what happened. The invalidation of these permits by the Government has caused a breach of a number of the Treaty provisions.

It appears there is a direct violation of paragraph 4 and 5 of the treaty. Further there could be a human right violation by the Government of Costa Rica due to their action of charging Mr. Aven with a crime. Mr. Aven broke no law and was at all times acting upon legal permits



that were issued by the Government. Therefore, there were no grounds for the Government to file a criminal action against Mr. Aven. This is a small community and once the Government filed this criminal action against Mr. Aven and shut down the project, they in effect, and in a defacto way, expropriated the property and bankrupt the project. They also exposed Mr. Aven and the development to a number of law suits that could be filed by buyers of lots in the project and now could not build the home they had planned to build.

Once the master site plan was approved, and Mr. Aven got the property sub-divided according to the site plan, it locked the property in for that specific use and it could not be changed and used for anything else. Further, once Mr. Aven had a criminal action filed against him, his reputation was ruined and it would be impossible for him to continue to do business in Costa Rica. Even if this matter were dropped by the Government tomorrow, you cannot un-ring a bell.

The Treaty as well as International law requires that foreign investors be afforded legal protections, financial protections and personal protections. Without those three guarantees it is impossible to do business or even live in a country. Mr. Aven had legal Government issued permits, yet six months after he started the infrastructure work, the Government of Costa Rica, invalidated those permits and stopped the project. The Costa Rica Government failed to provide the above protections and therefore, in my opinion, has breached the provisions in the CAFTA Treaty and that has caused irreparable damaged to the investors in the Las Olas project.

A. Background

The Project, led by American investors, was a real estate development in the Central Pacific coast of Costa Rica, in an area called *Esterillos Oeste*. The property for the Project was purchased in 2001 and the permitting process started in 2007; the property was valued at approximately 12 million US dollars in 2010 by a local appraisal. The main environmental permit required by Costa Rican law, and, necessary for construction to begin, was obtained in June of 2008 at the SETENA agency (*Secretaría Técnica Nacional Ambiental*). Construction permits were obtained from the local Municipality of Parrita (the Municipality) in September of 2010.

Since 2009, public officials, from either the Municipality or the central Costa Rican Government, have taken actions against the Project or its representatives, resulting in it being shut down on a permanent basis since 2011. The actions varied from administrative claims to criminal complaints. At present, the Project is still shut down, with standing orders from the Criminal Court of Parrita and the Environmental Administrative Tribunal (*Tribunal Ambiental Administrativo*, or, TAA) that no work should be made on the site.



B. *Permitting Process*

The permitting process in Costa Rica can be highly complex. The main permit is obtained from SETENA and is called *Viabilidad Ambiental* (Environmental Viability). In order to obtain such permit, a highly detailed environmental impact study or environmental management plan must be submitted for its review. The Project successfully obtained its Environmental Viability permit in June of 2008 and local officials from the Environmental Ministry (*Ministerio de Ambiente, Energía y Telecomunicaciones, MINAET*) determined that there were no wetlands or forest areas in the Project site.

Due the financial crisis in 2008, Las Olas shut down operations in September 2008, like virtually all other developers. However, at the end of 2009, conditions began improving and in January of 2010 Las Olas again reopened for business. Jovan Damjanac was hired as sales manager and went to operate the sales office located on the Las Olas property. At the same time David Aven through project manager and project attorney, Sebastian Vargas, commenced the necessary work to get the construction permits for the project from the municipality. During the first three quarters of 2010 Mr. Damjanac was having good success selling lots and Mr. Aven and Mr. Vargas was having good success getting all the various things together that was necessary in obtaining the construction permits. Those permits were issued by the municipality in September of 2010.

However, during that same time a local foreign resident, by the name of Steve Bucelato, who lived in Esterillos Oeste and who was a competitor, started filing claims at SETENA, with MINAE and at the local *Ombudsman (Defensoría de los Habitantes)* office in San José, alleging that the Project was draining wetlands and illegally cutting down forest areas. On September 1, SETENA issued a legal resolution dismissing his claims, indicating that there were no wetlands in the area where the project was to be developed. MINAE also issued a report in August of 2010 which also stated that there were not wet lands.

Notwithstanding, allegations of the use of a false document were sent to SETENA by MINAET officials and the Municipality of Parrita; the allegations claimed that the Project falsely stipulated that there were no wetlands or forests in the area. These claims resulted in SETENA ordering a temporary stopover of all work related to the Project by formally serving an injunction on its representatives in early 2011. The Project successfully demonstrated to SETENA that no use of a false document had been made and the injunction was lifted in November, 2011. Moreover, independent reports retained by the Project verified that there were no forest areas and/or wetlands.



C. *Criminal Complaint*

When Mr. Bucelato complaints were dismissed by SETENA and MINAE, Mr. Bucelato then filed a criminal complaint against David Aven and Jovan Damjanac, representatives of the Project. The criminal complaint basically stated what his other complaints had stated, that the Project was illegally draining existing wetlands and cutting down forest areas and purports to obtain damages from the accused. The Prosecutor and the Government of Costa Rica attorney (*Procuraduría General de la República*, or, PGR) filed an injunction against the Project and succeeded in having a Judge order a full cessation of activities; the order is currently still in place. In this action David Aven was sued criminally for violating wet lands and Jovan Damjanac was sued criminally as well for the cutting of a forest. There are numerous reports that have been done both by the Government and by private companies that states there are neither wet lands nor a forest. Even though efforts were made to obtain a clarification from the Court, limiting the scope of the injunction, it was not granted.

From the very beginning, Mr. Aven fully co-operated with the Government Attorney. During the investigative period, in March or 2011, Mr. Aven was called upon to give a statement to the Government attorney at his office. Even though he was advised by his attorney, not to give any statement, since he had been charged criminally, Mr. Aven insisted that he had nothing to hide, had done nothing wrong and insisted that he give a statement where he would present relevant testimony and documents to the Government attorney in the belief that once the Government attorney saw this evidence he would dismiss the charges. During his testimony Mr. Aven provided relevant testimony and documents some of which included:

1. The many reports stating that there were no wet lands.
2. All permits for the project showing that at all times Mr. Aven was acting under lawful permits issued by the Government of Costa Rica. Therefore, there was no basis for him to be charged criminally for violating wet lands.
3. Testimony that the charge of a wet lands included property not owned by the Las Olas project, but rather was owned by other people.
4. A compliant that Mr. Aven filed against a MINAET official stating that this official asked Mr. Aven for a bribe in August of 2010. Mr. Aven told the official that this was illegal and that Mr. Aven did not intend to violate the law.
5. Testimony showing that the alleged forged document was in fact not forged at all, but came from the MINAET office since it was a document referenced in a MIANET letter as one that they had in their files along with about 14 other documents.

At this point in time, this was just an investigation and the Government after hearing Mr. Aven's statement, and getting the relevant documents that demonstrated that no crime had been committed because no law was broken, the Government failed to do the right thing and dismiss



the charges and put an end to this matter. The Government instead did the exact opposite and filed formal criminal charges against Mr. Aven for violating wet lands.

Subsequently, in November of 2011, the Government filed a motion for an injunction to stop the project. Mr. Aven, through his attorney objected to this through the pleadings, but the injunction was granted.

In a preliminary hearing held on June 19, 2012, the purpose of which was twofold, one to present evidence that would be used at trial and two, present evidence showing that this case should not go to trial. At the time I was acting as Mr. Aven's translator and he had blown up all relevant documents and permits as exhibits and went through each permit and showed it to the judge. The evidence clearly showed that there were no wet lands and no crime. Mr. Aven stated that he thought that before someone could be charged with a crime a law would have to be broken and he asked the judge and the Government attorney to tell him what law he broke, since at all times he was acting under legal permits the Government issued. They did not reply.

Despite clear and convincing evidence that the Project was fully permitted, that several inspections by Government officials determined that there were no wetlands, and that SETENA had officially maintained the viability of the Project, the case was elevated to trial and will be heard in early December, 2012. Concretely, a four hour hearing was conducted in a crowded office –not a courtroom- in the Courthouse of Parrita, located in the city of Quepos, Puntarenas, and, even though the defendants submitted substantial evidence demonstrating their compliance with existing laws, the Judge summarily dismissed the Defense's claims and ordered the case to proceed to trial.

Since January of 2011 there were a number of times that the Government could have stopped their action based upon the evidence. They failed to do that. The Government attorney also failed to follow up on the alleged bribery attempt by a MINAET official and also failed to follow up on the alleged forged document charge. At the June 19, 2012 hearing, the Government attorney did drop that charge against Mr. Aven and another one claiming he failed to follow a stop work order by the Government.

D. TAA Complaint

Since 2009, Mónica Vargas, an employee of the Municipality of Parrita's environmental staff, started filing complaints with the TAA; the claims were made in her official capacity as an employee of the Municipality, even though she was never formally authorized to pursue them. In a meeting recently held at the municipal office, Jovan Damjanac attendee and was told specifically by the municipality that Ms. Vargas acted improperly and without their authorization



or consent. Later, in 2011, MINAET officials and local residents filed separate complaints at the TAA; the three complaints have all been consolidated and are being treated as a one case. The complaints filed at the TAA argue that the Project is draining existing wetlands and illegally cutting down forest areas. TAA has not formally served the representatives of the Project and they were casually made aware of the case by chance. Moreover, TAA ordered another injunction and shut down of the Project, in April 2011 indicating that environmental damages were taking place, even though there is no work being done on the site.

Both the criminal complaint and the TAA case are based on revised new documents from MINAET officials who are now claiming that there are wetlands where the Project is to be developed. Although during the time from 2007 until 2011 they claimed there were no wetlands. These new documents are in clear contradiction with all previous studies, field reports, independent investigations and fly in the face of the legally issued permits by the Government of Costa Rica.

Consequences of Government Actions

The results of these actions by the Government, local municipalities, and its agencies, have resulted in damages deriving from lost profits amounting to nearly thirty million US dollars. In what appears to be a concerted effort on the part of MINAET officials, TAA, the Municipality of Parrita, the Government of Costa Rica attorney, and the Prosecutor's office. The Project has been completely overrun with administrative and judicial actions that have stopped practically any sort of construction and all sales. Without sales there is no way to keep the project solvent. Additionally, the claims have resulted from activist groups that take full advantage of existing administrative procedures in order to delay construction and/or stop the permitting process. On top of the Las Olas investor's rights being damaged, the rights of approximately 30 other investors, who have purchased lots in the development in anticipation of building homes, have been affected. Until this day those buyers have not been notified by the Government about their actions against the property and their injunctions against the property. Therefore, these buyers could also seek redress under the CAFTA Treaty as well.

E. Conclusions

Do to the above stated facts it is my opinion that the Government of Costa Rica, through its agencies, have breached the CAFTA treaty provisions and therefore has breached the CAFTA Treaty. The treaty provides for a letter be sent to the Government whereby they are put on notice that the investors intend to files a law suit under the CAFTA Treaty and will seek full damages for said breach of contract. The Government will then have 90 days to decide if they want to try to settle the matter of proceed to court. Knowing the Costa Rica Government



mentality, it is hard for me to conceive that they will settle the matter and therefore proceeding to an arbitration trial in Washington DC is likely to happen.

One final comment. Costa Rica is known for its corruption, it's going on all the time. Trial after trial takes place and former President's have even been tried and convicted for taking bribes. So when rich foreigners come into the country with a lot of money and these government functionaries who are working for approval agencies see all this money being thrown around, the temptation often is too great not to want to get their hands on some of this money one way or the other. Unfortunately, the court system here is not up to the task on a lower level to deal with all of this in an effective way, as demonstrated by what has transpired thus far. However, when this gets channeled upward, the judges get better and better.

Two Germans just were just awarded 4 million dollars by an arbitration panel in Washington DC via an investment treaty that Costa Rica had with Germany. This was for a small piece of property, not a project.

The CAFTA Treaty is new and this lawsuit will probably be the first high profile case Costa Rica has ever seen. The damage claim in this law suit could very well approach 30 plus million and could include defamation and slander, although those may be harder to get. A claim could also be made under the transparency clause since Mr. Aven was asked for a bribe and the argument could be made that his refusal to pay was the reason for his problems and the wrath that came down upon him. A successful outcome, which I am convinced is very likely, could very well shock the Government into respecting permits that they issue and stop the blatant attempt by Government bureaucrats to shake down the wealth investors who come here to invest. It could very well be a landmark case that would garner national and possibly worldwide attention.

Please feel free to inquire as to specific details listed in this document. Considering the complexity of the case, only the main elements have been listed so as to clearly identify the main legal issues that are to be considered.

Sincerely,

Manuel E. Ventura

Partner