

**IN AN ARBITRATION UNDER CHAPTER TEN OF THE DR-CAFTA AND THE
UNCITRAL ARBITRATION RULES (2010)**

**between
DAVID AVEN ET AL.
Claimants
and
THE REPUBLIC OF COSTA RICA
Respondent
Case No. UNCT/15/3
FINAL AWARD**

September 18, 2019

AVEN Analysis Part 3, AVEN Comment in Blue

(g) Were Wetlands and Forests Damaged at the Las Olas Project Site

580. There have been allegations and expert reports submitted by Respondent as to the existence of wetlands in other sites of the Las Olas Project, but also strong allegations to the contrary on the part of Claimants.

584. The report submitted by KECE contains aerial photographs that show (i) the wetland area in 2005, the area of activity and construction work carried out in 2009 and 2010 by Claimant and the situation of such area in 2016. There is no dispute among the Parties that such photographs show the area corresponding to easements 8 & 9 during the periods identified by the expert witness. Further, the KECE Report identifies the location of the bore holes made in their analysis, and it is precisely in those locations that they found the existence of wetlands that had been drained and filled.

First, it's utter nonsense that you can tell wetlands by aerial photos and neither SETENA or MINAE have stated that that. Secondly, there was no evidence by SETENA or INTA who took soil samples from that area that indicated wetlands. Thirdly, the say Martinez came Down to the project site to demarcate the wetlands, after he left. We had our backhoe dig holes at the exact spots never indicated yeah I'm too about 3M, and the holes are absolutely dry. Also, in easement 9 they were building a house and This is an incredibly amazing statement that has no basis in faxing evidence. This is exactly the same place that INTA was conducting their soil samples and they found a wetland. It is obvious that the arbitration panel but into the states false narratives hook line and sinker because they were convinced and David was a liar and a

criminal because VE attorney failed to produce the audio bribery recoding we said we had. swimming pool, we took photos of that pool and there's no water. We provided that video to the VE and tell them to use it as evidence that there were no wetlands there. It was introduced into evidence, and as usual, VE failed to use it as exculpatory evidence.

585 The Tribunal determines that such wetland was indeed impacted by works undertaken by Claimants, and that the reaction taken by Respondent as a consequence was merited under the laws of Costa Rica, which are not inconsistent with international law. Further, that the actions taken by the Respondent are not arbitrary nor in breach of the obligations under DR-CAFTA.

This is an incredibly amazing statement that has no basis in faxing evidence. This is exactly the same place that INTA was conducting their soil samples and they found a wetland. It is obvious that the arbitration panel but into the states false narratives hook line and sinker because they were convinced and David was a liar and a criminal because VE attorney failed to produce the audio bribery recording we said we had.

586. Forests were also impacted. This is clearly identified in the KECE Report aerial photographs that were attached to the Report comparing the forest canopy in 2005, 2010, 2011 and 2016.

587. As to whether a construction permit was secured where Wetland # 1 was located, the Tribunal concludes that the works performed in the easements 8 and 9, where Wetland #1 is located, were undertaken without a permit.

Again, absolutely no proof of this and we even had our contractor state he had gotten a permit. Just throwing all other evidence in the trash can, not SETENA, MINAE, TAA, MUNI. testifying to any of this and no opportunity for us to cross-examine them.

From 588 to 613 the ruling describes the two positions of Claimants and Respondent and then in paragraph 614 they say the following:

614. In response to the argument that there was no evidence of intent because Mr. Aven was acting under the presumed authority of SETENA's Environmental Viability Permits and construction permits, and therefore he lacked the intent required to have committed the crime Respondent points to the fact that Mr. Martínez's discretion "allowed him to decide that he had sufficient evidentiary elements to show Mr. Aven's intent to commit the crime", and that the record showed that there were a series of irregularities during the operation of the Las Olas Project that were documented which allowed a finding of intent on the part of Mr. Aven.

This absolutely false and not according to Costa Rica Law. As stated SETENA Determination Resolutions become a law that requires everyone to obey. I was charged with another crime of not obey the April 2011 SETENA shut down notice. Buy I prove that I did not receive proper notice and Martinez said it was faxed to me and not hand delivered as required. Yet, Martinez was required to comply with all the other SETENA Resolutions and not one has

“discretion” not to obey SETENA Resolutions findings. The judges don’t say where Martinez gets the right to not comply with a Costa Rica Law. They also don't say "series of irregularities" were that showed i had intent. Again, between VE not presenting evidence to prove this wrong and the panel having made up their mind to rule against me because I was made to look like a liar by my own attorney's, they rule against me on every major decision.

617. As described previously, when the new trial was set for December 2013, and counsel to Mr. Aven advised that his client would not be attending the hearing because Mr. Aven had left the country of fear for his life, a trial hearing was re-scheduled for January 13, 2014. The Court then issued the INTERPOL Red Notice since Mr. Aven did not appear to face trial.

The Judges now go off the rails with the above. I testified in my witness statement and at the trial that I couldn’t appear at the second trial because I had an operation and was under doctors care and couldn’t make it. I got letters from my doctor and sent them to Manuel Ventura and he filed them with the court. They are simple miss quoting the facts and evidence in there March towards ruling against me in every way because think I lying about everything and don't believe anything I say and it’s no surprise when you get to para 620 that the Judges say the following:

620. The Tribunal has examined the allegations and the record of the criminal case, and believes that the Prosecutor (Mr. Martínez) had sufficient elements under the laws of Costa Rica to file charges against Messrs. Aven and Damjanac. These were initially based on the SINAC January 2011 report containing its conclusions and recommendations after its multiple visits to the Las Olas Project site in December 2010, which were later confirmed by SINAC. The Prosecutor then commenced his own investigation and gathered evidence through interviews with SINAC and Municipality officials, personal visits to the site, including interviews with workmen carrying out construction work and Mr. Aven, neighbors’ complaints, and reports issued by different agencies to determine the existence of wetlands, and the damages to the ecosystem in the Las Olas Project.

Then the Judges say this and seem to contradict what they said in the above paragraph.

622. Whether or not the conduct of Mr. Aven could be considered as a “continued crime” or not, and whether the evidence gathered by Mr. Martinez was sufficient to proceed into trial, is not for this Tribunal to determine. This is an issue that would need to be decided by the criminal judge taking knowledge of the case in Costa Rica. At the time, the criminal judge had access to arguments and evidence from both the prosecution and the defense to weigh whether there were elements, including intent to commit the crime, i.e., refilling the wetland. And based on that evidence and arguments, he determined that the matter should proceed to trial.

See if you can figure out the distinction of what they say in para 620 when they say they believed Martinez “had sufficient elements under the laws of Costa Rica to file charges against Messrs. Aven and Damjanac”, and then in Para 622 and say they don’t have don’t

have enough information and they have to get a court to make that ruling. The only we went they're saying missing sense at all based upon the facts and evidence, is that they're going out of their way to find for the Respondent because they think I'm a liar. Here it is again.

If they (the Judges) have a gut feeling that the claimants are really to blame for their own situation, or if they just don't like the claimants' personality, **they will find a way to have them lose. The lesson, accordingly, is to make sure they like us. The second lesson is the same..." (Dr. Weiler**

629. There have also been allegations to the effect that the Prosecutor, Mr. Martinez, was not open to settling the case in a manner satisfactory to the parties involved. Both Claimants and Respondent acknowledged that prior to the trial there was a settlement offer. Mr. Morera, the attorney engaged by Mr. Aven, further indicated that even the judge overseeing the case promoted the idea, when in Mr. Morera's belief this is not normal or the ordinary course during the trial stage. But this was not pursued, primarily because Mr. Aven was not interested. During his cross-examination at the December Hearing, Mr. Morera indicated "And at that moment [Mr. Aven] said he was not interested because it was already a matter of-- a personal thing, a matter of pride to wipe out his name, to clean his name before he, his family, and his investors and the society because David Aven was already an investor and with other investments in Costa Rica with other businesses"

This is not what Mr. Morea said and he will also provide testimony for us. They are twisting what Mr. Morea said. He said the time for a settlement was before you go to trial, but that the state was the one that wasn't interested. I was interested in clearing my name and part of that settlement at court was my understanding that I would have to plead guilty to a crime I didn't commit and I did not want to do that. So again, just going overboard to find against every little thing, It's not every about showing any kind of balance here, I'm guilty of lying and committing one crime after the other.

630. Thus, the Tribunal believes that there is no evidence that the Prosecutor or the judicial system in Costa Rica acted or failed to take actions that are not in accordance with its internal laws.

Think about the above statement. It was a Costa Rica law that the Prosecutor was required to comply with SETENA Resolution that became law once SETENA issued their Resolution. So how is it in internal accordance with Costa Rica law when the Prosecutor intentionally refused to comply with Costa Rica Law. I might as well have had no one representing me since VE Attorneys didn't push back on any of this nonsense.

632. On the subject of the first of the other two allegations dealing with actions or inaction taken by the authorities in Costa Rica, Claimants have taken the position that the Municipality and other authorities took action against the Las Olas Project based on accusations found in the complaints submitted by Mr. Bucelato, which accusations were unsubstantiated, baseless accusations 597 expressed because of a "personal vendetta" of Mr. Bucelato- who meddled through a "campaign" to cancel the Las Olas Project.

633. As has been argued by Respondent in the case, under the laws of Costa Rica individuals have the right to submit complaints in respect to environmental projects , and authorities have the duty to investigate and take action. Thus, the fact that the Municipality, the Defensoría de los Habitantes and other authorities took action based on those complaints was justified under applicable laws, and the principle of citizen participation recognized by Costa Rican administrative courts. Besides, the complaints were supported. There were allegations related to the felling of trees and the construction works in wetlands areas, which have been evidenced to have occurred. Further, the Tribunal noted that it was not only Mr. Bucelato who filed complaints, but their various other neighbors in Esterillos Oeste also signed the various complaints.

Let's unpack what they said above. Think about this amazing statement

"As has been argued by Respondent in the case, under the laws of Costa Rica individuals have the right to submit complaints in respect to environmental projects". You see they continue keeping ignoring the elephant in the room SETENA? Their resolutions are laws that have to be complied with, by all including Bucelato, the Prosecutor and yes even the neighbors who supposedly signed petitions; and I will add even the Judges who seem to be very sensitive for Costa Rica Law to be followed.

Also they say this, "Tribunal noted that it was not only Mr. Bucelato who filed complaints, but their various other neighbors in Esterillos Oeste also signed the various complaints." Well I just sent you an email of about 200 people in the town that signed a petition in favor of the project, but the VE attorneys never showed it to anyone or mentioned it even though it was put into evidence.

634. The argument of Claimants that the investigation by Mr. Martinez of the criminal complaint filed by Mr. Bucelato against Mr. Aven on the grounds of damages to the wetlands and forest, as well as the forgery of official documents, was unjustified and that he could have sought a higher burden of proof and examine the background of prior complaints made by Mr. Bucelato, is equally without merit. It is a matter of record that Mr. Martinez found no evidence that Mr. Aven had prepared the alleged Forged Document, and this supports the position of Respondent as to his independence and investigation. It is clear to the Tribunal that there was a reciprocal animosity among Mr. Aven and Mr. Bucelato. Mr. Aven himself filed criminal charges for defamation against Mr. Bucelato in October of 2009 , which charges were not subsequently supported, ratified or followed.

Again just wrong on the fact. I did not follow up on my lawsuit against Bucelato, because criminal charges were filed against me. Further, the judges say correctly that "It is a matter of record that Mr. Martinez found no evidence that Mr. Aven had prepared the alleged Forged Document" However, they fail to state that before that happened they sent that document to SETENA claiming that we forged it and it was the document that SETENA relied on in granting us the EV permit in 2008. Based upon that lie, SETENA shut the project down. But it took 7 months to get that wrong righted. Then when the prosecutor found out that SETENA was

reversing themselves, he Immediately filed his Criminal charges against me Within days of SETENA resending their shutdown notice.

635. Regarding the alleged inaction on the part of the prosecutor's office to take action on the filing of a criminal complaint against the alleged bribes solicited by Mr. Bogantes, the Tribunal also finds that there are no merits to the allegations on "abuse of authority" expressed by Claimants. Although the solicitation of bribes is indeed a punishable crime in Costa Rica, and should not be tolerated under any jurisdiction, there is no corroborating evidence to the fact that there was such a solicitation except for the statement made by Mr. Damjanac. Even though in their Notice of Arbitration, Claimants stated that "The Investors have in their possession a tape recording of the solicitation of this bribe", such supposed tape recording was never produced as evidence during the arbitration. There is also no evidence that there was retributory action against Claimants for having failed to comply and pay the bribe. Quite the contrary; the Tribunal notes that one day before the date of the alleged bribe solicitation (on August 29 or 30, 2010), Mr. Bogantes had responded to Defensoría de los Habitantes, as head of the Subregional Office for Aguirre and Parrita of SINAC, confirming that, based on the SINAC Report of July 2010, there were no wetlands in the Las Olas Project site.

Here's the big one and you can see how clear they are about why their ruling against us in every way. However, of course it's perfectly alright that they never produced Mr. Bogantes to state he didn't ask us for a bribe? They hid him and Mr. Picardo, his boss from the proceedings and just testified in their absence.

XI. DAMAGES

A. The Claimants' Position on Damages

637. In their Post-Hearing Brief, Claimants indicate that their claims can be categorized into four categories: frustration of legitimate expectations, violations of the prohibition against arbitrariness, abuses of delegated public authority, and failures to observe due process 603, and then attempt to argue that their damages have been incurred as provided under Article 10.16 (1)(a)(ii) of the DR-CAFTA which places a burden on the Claimants to demonstrate that they, or the Enterprises upon whose behalf they have also claimed, have "incurred loss or damage by reason of, or arising out of..." the breaches they have proved under Articles 10.5 or 10.7.

It's a travesty that the Judges spent anytime even looking at damages because they knew they weren't going to find for liability so I'm just skipping this entirely.

747. The Tribunal therefore concludes that the Counterclaim filled in by the Respondent does not meet the requirements of Articles 21 and 20 of the UNCITRAL Arbitration Rules and should be dismissed.

WOW this was a surprise they dismissed Costa Rica's counter claim.

XIII. COSTS

a. The Claimants' Cost Submissions

748. In its submission on costs 704 , the Claimants argued that the Respondent should bear the total arbitration costs incurred by Claimants, including legal fees and expenses totaling US\$8,856,433.53 Dollars, broken down as follows: (a) US\$5,276,096.55 in respect of Vinson & Elkins' fees and disbursements; (b) US\$563,937.71 in respect of Mr. Weiler's fees; (c) US\$535,033.24 in respect of Batalla's fees; (d) US\$76,581.51 in respect of witness costs and expenses; (e) US\$1,299,784.52 in respect of expert fees and expenses; and (f) US\$ 1,105,000.00 in respect of advances towards Tribunal and ICSID administrative fees. In addition, Claimants seek the Tribunal to order the Respondent to pay interest at 8% per annum on all sums awarded in respect of costs, from the date of the Award until payment is received by the Claimants.

This is interesting so I put it in so you can see how VE ripped us on the bill in going over budget by 8.8 million.

B. The Respondent's Cost Submissions

750. In its submission on costs 707 , the Respondent submits that the Claimants should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling US\$2,461,747.58 Dollars, broken down as follows: (a) US\$899,914.00 for advances towards Tribunal and ICSID fees; (b) US\$230,000.00 for Credibility Consulting LLC (Mr. Tim Hart); (c) US\$295,000 for Kevin Erwin Consulting Ecologist (Mr. Kevin Erwin); (d) US\$17,080.00 for Green Roots Consultants S.A. (Drs. Johan M Perret and B.K. Singh); (e) US\$6,300.00 for Siel Siel Asesores Ambientales (Ms. Priscilla Vargas); (f) US\$970,000.00 for Herbert Smith Freehills New York LLP fees, and (g) US\$43,543.58 on account of allowances and costs of the witnesses and representatives of the government of Respondent. Respondent also requests that Claimants pay any interest at a reasonable commercial rate applicable from the date of the award is rendered until the date costs are paid in full.

Costa Rica spent about ¼ less than Claimants and won. What's does that tell you.

762. The complexity of the issues may be considered as another potential factor of particular "circumstances of the case". The Tribunal thinks that the issues that were submitted to its judgment, although showing some technical complexity, by themselves are not especially complex from a legal point of view. The complexity of this case arises rather from the actions and omissions of the parties than from the litigated issues. The Tribunal already has observed above (Section VI. Background, above) it is clear that there are inconsistencies in documents and contradictions among various Costa Rica's authorities during the period comprised between the dates Claimants decided to make the investment and the time at which injunction

was issued and criminal charges were brought against Mr. Aven and the Marketing and Sales Director, Mr. Damjanac. Costa Rica also brought before this Tribunal some alleged wrongdoings of Claimants regarding the Concession and the development of Las Olas itself, but the State omitted the application of domestic law to such situations. Moreover, the complexity of environmental legislation and the number of agencies enabled to apply it can explain the contradictions mentioned above, but also can misguide the people dealing with environmental issues. All this confusion has been, to some extent, an invitation to litigate.

Now look at the above amazing statement. Now, look at the above amazing statement. "The Tribunal thinks that the issues that were submitted to its judgment, although showing some technical complexity, by themselves are not especially complex from a legal point of view. The complexity of this case arises rather from the actions and omissions of the parties than from the litigated issues." "The Tribunal already has observed above (Section VI. Background, above) it is clear that there are inconsistencies in documents and contradictions among various Costa Rica's authorities". The Tribunal doesn't talk about the Inconsistencies in the Conflicting and contradicting reports that the various Environmental agencies issued. They don't talk about the fact that they just seem to gloss over the elephant in the room, SETENA and ignore the fact their resolutions Have the force of law behind them. So who's responsible for these inconsistencies? There is a principle in the law that if an agreement is drafted by one party and there is a dispute, it's held against the drafting party, however, In this case, all the agreement were drafted by Costa Rica, but the dispute was held against us. Look at what they do, they go right back in the next paragraph and slam us for legally subdividing the lots according to Costa Rica Law and the Protti report that says nothing about there being a wetland, and then don't get a statement from Protti to explain their report.

763. The Claimants on the other hand lacked transparency in their development of Las Olas. They acted in order to avoid showing the features of the land that could disturb their business. They omitted the disclosure of the Protti Report (paragraph 111, above) and also fragmented the land in order to avoid the requirement of submitting a D1 Application to secure an EV permit for the easements (section X.D.1.(f), above). Such kind of actions not only undermined the Claimants' case, but also darkened its understanding.

What that last sentence mean? "Such kind of actions not only undermined the Claimants' case, but also darkened its understanding." If you have any light on that statement please share it with me. Then they go right into paragraph 746 and slam what they call our "economic weakness"?

764. Finally, the economic weakness of the unsuccessful investor may be taken into account when dealing with the apportionment of costs, on the general basis of considerations of access to justice. This issue is especially taken into consideration by the Tribunal, as the Claimants do not appear to be wealthy institutional investors, and have likely already risked a substantial amount of their own patrimony in attempting to develop the Las Olas Project.

Another amazing statement. There was no debt on the project and was self-funding. When the crash came in 2008, we were able to put the project in hibernation and wait till thing started picking up. Anyone that had that on their project in 2008 went bankrupt. We survived the financial crisis in 2008, only to be bankrupted by a corrupt Government in 2011 and then again by an incompetent law firm in 2016. We need to ensure we don't have a repeat of performance in this next go round. That's why we're working hard to get you as much information to you so you can get your arms around the malpractice issues in our case. I hope what I have sent you thus far is formulating that in your minds as you become more and more familiar with the facts and evidence of our Nightmare on Elm Street, in this case in Costa Rica on Pura Vida street.

Any question about Part 1, 2 or 3 in this report, please get back to me.

David Aven

PS: Let me end with our tag line once again.

If they (the Judges) have a gut feeling that the claimants are really to blame for their own situation, or if they just don't like the claimants' personality, **they will find a way to have them lose. The lesson, accordingly, is to make sure they like us. The second lesson is the same...** (Dr. Weiler