

# Case of David Aven et al against Costa Rica: resolution in favor of Costa Rica

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September 21, 2018

On September 18, the arbitration award (see full text in Spanish) in the case of David Aven and others against Costa Rica (Case No. UNCT / 15/3) was released. This is a case against Costa Rica brought in 2014 before a court sponsored by the International Center for Settlement of Disputes between Foreign Investors and the State (better known as ICSID).



The arbitration request is related to a condominium project in the Central Pacific (Esterillos Beach), in which the plaintiffs demanded, based on some provisions of the Free Trade Agreement (FTA), the initial payment of more than 70 million USD to Costa Rica for compensation (point 61 of the arbitration request), as its project has been halted due to restrictions in Costa Rican legislation on environmental matters.

The detail of the long procedure followed since January 2014 can be seen in this link of the Ita law investment arbitration specialized site.

In its decision, the Court examines the performance of the various Costa Rican authorities in environmental matters: in this regard, it is recommended to read several parts of the sentence that show some things that communities and activists very often suspect when reviewing some files of questionable megaprojects . For example, in paragraph 116 it can be read that both parties "distanced themselves from the origin" of a document (sic.):

116. On March 27, 2008, just days before the statement from the SINAC mentioned above confirming that the Condominium Sector was not within an ASP was issued, a SINAC Report No. 67389RNVS-2008 was presented to SETENA as part of the Las Olas Project file<sup>54</sup> which has been referred to during the procedure as the "Forged Document". Both the Claimants and the Respondent have distanced themselves from its origin, and many discussions have arisen between them as to who had motives for preparing and presenting it, but the Tribunal is still unclear who actually produced it. This document, presumably signed by Gabriel Quesada Avendaño (a SINAC biologist) and Ronald Vargas (SINAC Director), which established that the criteria followed by the Las Olas Project for the protection of the environment met the requirements of SINAC, reached the conclusion that the Project "does not constitute an obvious threat in the Esterillos Oeste biological corridor nor does it in any way undermine the biodiversity of the Local National Wildlife Refuge." It was confirmed that this document was a forgery - although this was not until November 2010. In the meantime, it seems that SETENA trusted the document «.

In paragraphs 127-129, it is read how celere the performance of a municipal entity in Costa Rica can sometimes be when it comes to projects of a certain size:

«127. That is why Ms. Vargas filed a complaint on June 15, 2010 with the Administrative Environmental Tribunal ("TAA"), a division of the Ministry of the Environment, requesting an investigation of the Las Olas Project in view of (i ) concerns about whether wetlands were being filled in; (ii) the construction of paved streets and (iii) the fact that "vegetation had been cut down and burned.

128. The following day, June 16, 2010, Ms. Vargas informed SINAC about her findings and previous reports issued regarding the Las Olas Project.

129. Interestingly, the same day that Ms. Vargas publicly announced her concerns, the Municipality issued seven construction permits for the Easement Sector of the Las Olas Project. A few days later, on June 22, 2010, DEPPAT — the Environmental Regent hired by Mr. Aven — presented an earthworks plan and a planned works program with respect to the Easement Sector. "

In paragraph 181, the ICSID-sponsored arbitral tribunal reads that the actions of various public entities of the Costa Rican State raise some questions:

«181. As emerges from the description of the facts supra, many questions arise from confusing and complex facts, and apparently contradictory or incongruous reports, resolutions and measures by the Costa Rican authorities, which this Court will analyze below. Some of these questions are: were there wetlands and forests at the Las Olas Project site? What is the body in

charge of determining the existence of wetlands? Is it a different organism from the forest? What is the body responsible for issuing an environmental viability permit? What are the investor's rights after receiving a permit? Who has the authority to revoke? Lastly, what is the relationship between the municipal and central governments regarding the granting of permits for the development of real estate? »

In its final decision, the arbitral tribunal dismisses the claims of the plaintiff group of investors, not without showing that Costa Rica failed to apply its own legislation when it detected inconsistencies. In paragraphs 762-763 it is read that:

762. .... Costa Rica also presented before this Tribunal some illegal assumptions of the Claimants with respect to the Concession and the development of the Las Olas Project itself, but the State failed to apply domestic law to these situations. Furthermore, the complexity of environmental law and the number of bodies empowered to enforce it may explain the contradictions mentioned above, although they may also mislead people dealing with issues of an environmental nature. All this confusion has been, to some extent, an invitation to litigate.

763. The Claimants, on the other hand, lacked transparency in their development of Las Olas. They acted to prevent the display of terrain features that could disrupt their business. They omitted the disclosure of the Protti Report (paragraph 111 supra) and also subdivided the land to avoid the requirement to file a D1 Application to obtain a VA permit for easements (section X.D.1 (f) supra). These kinds of actions not only undermined the Claimants' argument, but obscured their understanding.

The arbitral tribunal obliges the claimants to pay Costa Rica more than US \$ 1 million as a cost penalty (see page 263 of the arbitration award).

Recently, another similar sum of money was reported that is owed to Costa Rica by a group of Swiss shareholders of the Mexican company Gaz Z, following an arbitration decision also favorable to Costa Rica adopted by an ICSID arbitral tribunal in in 2017 (see CRhoy note and University Weekly note). –

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