

Exhibit RWE-001

Witness Statement of Gloria Solano Martínez

July 14, 2014

English Translation

[Translation]

**UNDER THE UNCITRAL ARBITRATION RULES (2010) AND CHAPTER 10,
SECTION B OF THE UNITED STATES – CENTRAL AMERICA – DOMINICAN
REPUBLIC FREE TRADE AGREEMENT**

*Spence International Investments, LLC, Bob F. Spence,
Joseph M. Holsten, Brenda K. Copher,
Ronald E. Copher, Brett E. Berkowitz,
Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion
(Claimants)*

v.

*Republic of Costa Rica.
(Respondent)*

ICSID Case No. UNCT/13/2

**Witness Statement of Gloria Solano Martínez
Public Prosecutor at the Office of the Attorney General for the Republic**

July 14, 2014

I. INTRODUCTION

1. My name is Gloria Solano Martínez. I have worked at the *Procuraduría General de la República* (“*Procuraduría*,” Costa Rica’s Office of the Attorney General) since August 2000: first, as an Attorney for the *Procuraduría*; since June 2006, as Deputy Attorney General (*Procuradora Adjunta*); and since February 2014, as Attorney General B (*Procuradora B*). I graduated from law school at the *Universidad Escuela Libre* in July 1999.

2. My responsibilities at the *Procuraduría* include preparing responses and submissions on behalf of the State on constitutional challenges filed before the Constitutional Chamber of the Supreme Court of Costa Rica. In that capacity, I have worked on preparing briefs and affidavits presented before the Constitutional Chamber regarding several constitutional challenges in connection with the Guanacaste *Las Baulas*

National Marine Park (hereinafter the “Park”). Among these actions, I have participated in one filed against the Zoning Regulations for the *Cabo Velas* District, Coastal Area, approved by the Municipality of Santa Cruz.

3. In this witness statement, I will explain issues regarding the *Las Baulas* National Marine Park boundaries, the nature of constitutional challenges in Costa Rica, and constitutional challenges filed against the zoning regulations issued by the Municipality of Santa Cruz—the Zoning Regulations for the *Cape Velas* District, Coastal Area—which confirmed the obligation of the State to maintain a protected area for leatherback turtles.

II. BOUNDARIES OF THE GUANACASTE *LAS BAULAS* NATIONAL MARINE PARK

4. Claimants in this case allege that the boundaries of the Guanacaste *Las Baulas* National Marine Park were unclear since it was created, and that Costa Rica expanded the Park boundaries through unconventional means.¹ This is incorrect. I will now describe the actions taken by the Republic of Costa Rica to identify and clarify the boundaries of the Guanacaste *Las Baulas* National Marine Park.

5. In 1987, the Tamarindo National Wildlife Refuge was created under Executive Decree No. 17566, and in 1990 it was confirmed under Law No. 7149. Later, in 1991, its category was upgraded to become the Guanacaste *Las Baulas* National Marine Park under Executive Decree No. 20518-MIRENEM. This Decree established that park boundaries would include an area comprised of “125 meters from the mean

¹ See Claimants’ Memorial on the Merits, April 25, 2014 (“Claimants’ Memorial on the Merits”), paras. 60-68, 75.

high-tide line,” which was equal to the 50-meter public area plus 75 meters in the Park area.² Finally, in 1995 the creation of the Park was upgraded a statute through the enactment of Law No. 7524 (hereinafter the “Park Creation Law”). This Law provides that park boundaries include a 125-meter area from the mean high-tide line “seaward,” but it set inland coordinates as reference points.³ At a minimum, it must be admitted that the Law had an internal contradiction that gave rise to ambiguity, which needed to be clarified by the competent authority. Therefore, Claimants’ argument that the addition of the term “seaward” implied that the Park was comprised of a sea area instead of land is incorrect.⁴

6. The *Procuraduría* clarified the boundaries of the Park through a legal opinion (*opinión*) issued in February 2004. Subsequently, in December 2005, the *Procuraduría* confirmed that legal opinion through a legally-binding interpretation (*dictamen*). The *opinión* and *dictamen* were issued pursuant to Article 2, Article 3, section b) and Article 4 of the Office of the Attorney General for the Republic Organic Law, Law No. 6,815 dated September 27, 1982, at the request of the Ministry of Energy and the Environment.

7. In the *opinión* OJ-015-2004, dated February 10, 2004, the *Procuraduría* interpreted the Park Creation Law, Article 1, to mean that it covers the strip of land extending a 125-meter distance from the mean high-tide line.⁵ The *Procuraduría* issued

² See Executive Decree No. 20518-MINEREM, July 9, 1991, Art. 1 [Exhibit C-1b].

³ See Law Creating the *Las Baulas* National Park, Law No. 7,524, July 10, 1995, Art. 1 [Exhibit C-1e].

⁴ See Claimants’ Memorial on the Merits at para. 68.

⁵ See Legal Opinion of the *Procuraduría* on the *Las Baulas* National Park Law, OJ-015-2004, February 10, 2004, p. 19 [Exhibit C-1t].

that report in response to a request submitted by the Ministry of Energy and the Environment in an official letter numbered DM-821-2003 dated May 5, 2003. In that letter, the Minister asked the *Procuraduría* about its understanding regarding the correct interpretation of the Park Creation Act, Article 1.⁶ According to the Minister of Energy and the Environment, the term “seaward” in that article creates confusion that questions the lawmaker’s true intention, and is inconsistent with the provisions of the rest of the Act. The Ministry of Energy and the Environment understood that the “seaward” reference in Article 1 was a mistake, and the correct term should be “inland.”

8. In its *opinión*, the *Procuraduría* clarified the confusion caused by the term “seaward” used in Article 1 of the Act, which defines Park boundaries. It explained, based on the Park Creation bill and the rest of the provisions in the Law, that a mistake was made when drafting Article 1 by using the term “seaward.” It stated that an interpretation of Park Creation Law, Article 1, to understand that the 125-meter strip extends *seaward* instead *inland* is contrary to constitutional principles and values (specifically Article 50, which provides a right to a healthy, ecologically-balanced environment) and to the purpose for which the Park was created, which is to protect the natural habitat in the beaches where the leatherback sea turtles most frequently nest and spawn, including, for example, Playa Grande and Playa Langosta.

9. Excluding those beaches from the boundaries of the Park (that is, excluding the 125-meter strip of land) is inconsistent with the purposes of the Act whereby the Park was created. This Act explicitly states the need to exert control over

⁶ See Legal Opinion of the *Procuraduría* on the *Las Baulas* National Park Law, OJ-015-2004, February 10, 2004, p. 1 [Exhibit C-1t].

urban development for tourism on those beaches to prevent light pollution, which so negatively affects leatherback sea turtles' (an endangered species) nesting and spawning.

10. According to the legal opinion, when faced with one interpretation that excludes leatherback sea turtles' nesting and spawning beaches from the Park and another interpretation that includes them, the correct interpretation is evidently the one that includes them. This is based on (a) the purpose of the Act, which is to protect leatherback sea turtles' nesting and spawning sites; (b) the constitutional principle in Article 50, under which the State is obligated to protect the right to a healthy, ecologically-balanced environment; and (c) provisions in the Inter-American Convention for the Protection and Conservation of Sea Turtles, Article IV, enacted in Costa Rica by Law No. 7,906.

11. The *Procuraduría* concluded, based on the foregoing, that the term "seaward" in the Park Creation Law, Article 1, is a mistake and, therefore, that term is inapplicable.

12. In Opinion C-444-2005 dated December 23, 2005, the *Procuraduría* reaffirmed its *opinión* on the interpretation of Park Creation Law, Article 1. That interpretation was reinforced by stating that Executive Decree No. 20518-MIRENEM, dated June 5, 1991, published in Official Gazette No. 129, dated July 9, 1991, whereby the Park was originally established, included within its boundaries a 125-meter strip of land from the regular high-tide line (50-meter maritime-terrestrial area plus a 75-meter

strip).⁷ Under the Office of the Attorney General for the Republic Organic Law, this opinion issued by the Public Prosecution is legally binding and, therefore, obligatory.⁸

13. Further, it is important to point out that under the Organic Environmental Act, Article 38, the surface area of protected wilderness areas cannot be reduced, except pursuant to a National Statute based on technical studies.⁹ The Constitutional Division of the Supreme Court of Costa Rica has ratified this on several occasions, and has said that the extension of a protected wild area may not be reduced if such reduction implied harming the environment or leaving it unprotected. For instance, the Division has stated that:

[I]f the Legislature passed a law that sets forth specific requirements in order to create a protected wild area for the purpose of establishing whether the resulting impact is justified, it is logical that certain requirements (such as conducting technical environmental studies) must be met before the protected area can be reduced or eliminated, to ensure that any such reduction or elimination does not violate Article 50 of the Constitution.¹⁰

In the specific case of the Park, this means that if Executive Decree No. 20518-MIRENEM, which originally established the Park in 1991, included the 125-meter strip of land, it cannot be interpreted that by using the term “seaward,” the Park Creation Law, Article 1, reduced the extension of the protected area by eliminating the 125-meter strip of land. The Park Law was not intended to reduce the Park surface area, which was

⁷ See *Procuraduría General de la República*, Binding Legal Opinion C-444-2005, December 23, 2005, p. 19 [Exhibit C-1g].

⁸ See Office of the Attorney General for the Republic Organic Law, Law No. 6,815, September 27, 1982, Art. 2 [Exhibit C-1o].

⁹ See Organic Law of the Environment, Law No. 7554, October 4, 1995, Art. 38 [Exhibit R-004].

¹⁰ Supreme Court of Justice, Constitutional Chamber, Resolution No. 2010-014772, September 1, 2010, pp.7-8 (citing Judgment of the Supreme Court of Justice, Constitutional Chamber, Vote No. 7294, October 13, 1998) [Exhibit R-005].

established by Decree in 1991. If the Law were interpreted to reduce the national park without any required technical studies having been performed, the Law would be unconstitutional. As a result, it would have to be removed from Costa Rican legislation as it would be contrary to the Constitution.

III. THE LAND BOUNDARIES OF THE NATIONAL PARK HAVE BEEN CONFIRMED BY THE SUPREME COURT OF COSTA RICA

14. The Constitutional Chamber of the Supreme Court of Costa Rica has confirmed the inclusion of the 125 meters of maritime-terrestrial area several times. As an example, I will refer here to the decision issued by the Chamber on May 23, 2008 regarding Park boundaries.¹¹ I refer to this decision in particular because I participated in the proceedings as Deputy Attorney General. However, I will start by explaining the nature of constitutional challenges in Costa Rica, which led to the May 23, 2008 decision which I will discuss later.

A. CONSTITUTIONAL CHALLENGES UNDER COSTA RICAN LAW

15. In Costa Rica, a constitutional challenge is one of the main mechanisms for controlling the constitutionality of regulations of any sort and of the acts subject to Public Law, as well as the consistency between domestic legislation and International or Community Law.¹² A constitutional challenge is admissible in the following cases, among others: (i) against statutes and other general provisions which violate any constitutional principle or provision;¹³ (ii) where any substantial process or requirement

¹¹ See Supreme Court of Justice, Constitutional Chamber, Resolution No. 2008-008713, May 23, 2008, p. 11 [Exhibit C-1h].

¹² See Law on Constitutional Jurisdiction, Law No. 7,135, October 1989 (“Constitutional Jurisdiction Law”), Art. 2(b) [Exhibit R-006].

¹³ See Constitutional Jurisdiction Law at Art. 73(a) [Exhibit R-006].

has been violated in the drafting of statutes or legislative agreements;¹⁴ (iii) where any statute or general provision is contrary to a treaty or international convention;¹⁵ (iv) where a constitutional principle or rule has been violated in the execution, passing or ratification of international treaties or conventions, or in their contents or effects;¹⁶ and (v) against inactivity, omissions and abstentions from public authorities.¹⁷

16. Constitutional challenges fall within constitutional jurisdiction, which is under the purview of the Constitutional Chamber of the Supreme Court of Justice. The Constitutional Chamber is comprised of seven regular judges and twelve alternative judges, all of whom are elected by the Legislature as provided under the Constitution.¹⁸

17. In order to file a constitutional challenge in cases where there is a direct or individual injury, the claimant must invoke the unconstitutionality within the context of a pending, unresolved case whether before administrative authorities or judicial courts of Costa Rica (i.e. prior to final judgment being entered), including Contentious Administrative authorities or the constitutional jurisdiction itself.¹⁹ The courts and organs before which administrative remedies may be exhausted will only enter a final decision on pending cases once the Constitutional Chamber has issued a ruling on the constitutional challenge.

¹⁴ See Constitutional Jurisdiction Law at Art. 73(c) [Exhibit R-006].

¹⁵ See Constitutional Jurisdiction Law at Art. 73(d) [Exhibit R-006].

¹⁶ See Constitutional Jurisdiction Law at Art. 73(e) [Exhibit R-006].

¹⁷ See Constitutional Jurisdiction Law at Art. 73(f) [Exhibit R-006].

¹⁸ See Constitutional Jurisdiction Law at Art. 4 [Exhibit R-006].

¹⁹ See Constitutional Jurisdiction Law at Art. 75 [Exhibit R-006].

18. The *Procuraduría* represents the State in constitutional challenges by conducting an analysis of the arguments raised by the claimant, legislation, case law and legal literature, in order to advise the Constitutional Chamber on the matter submitted to their judgment.²⁰

19. The Constitutional Chamber holds an oral hearing for the claimant, other appearing parties and the *Procuraduría* to reach conclusions prior to the judgment.²¹ The Chamber must decide on the constitutional challenges within a maximum term of one month from the hearing.²²

20. Any judgment rendering the challenged provision or act unconstitutional is declaratory and retroactive to the date of entry into force of the provision or act, has *res judicata* effect, and removes the provision or act from the legal system.²³ The judgment must also annul any other provisions in the unconstitutional law or rule, any other law or rule that needs to be annulled because of a connection or as a consequence, and the challenged acts of application.²⁴ Constitutional jurisdiction precedents and case law are binding *erga omnes*, except on the Constitutional Division.²⁵

21. A declaration of unconstitutionality issued by the Constitutional Chamber has *res judicata* effect. The consequence of such a declaration is the *erga omnes* annulment of the provision that was rendered unconstitutional; in other words, that

²⁰ See Constitutional Jurisdiction Act at Arts. 81, 85 and 90 [Exhibit R-006].

²¹ See Constitutional Jurisdiction Act at Arts. 10 and 85 [Exhibit R-006].

²² See Constitutional Jurisdiction Act at Art. 86 [Exhibit R-006].

²³ See Constitutional Jurisdiction Act at Arts. 88 and 91 [Exhibit R-006].

²⁴ See Constitutional Jurisdiction Act at Art. 89 [Exhibit R-006].

²⁵ See Constitutional Jurisdiction Act at Art. 13 [Exhibit R-006].

provision is removed from the legal system because it is contrary to the Constitution. On the other hand, under the Constitutional Jurisdiction Act, Article 88, judgments that deny claims of unconstitutionality do not have *res judicata* effect. Where a claim is denied, nothing bars a subsequent constitutional challenge against the same provision. That is, a claim of unconstitutionality may be filed against provisions or acts previously declared constitutional in a different case or process.

B. CONSTITUTIONAL CHALLENGE OF THE ZONING REGULATIONS FOR THE CABO VELAS DISTRICT, COASTAL AREA

22. On July 10, 2006, *The Leatherback Trust*, a non-governmental organization with activities in the area, filed a constitutional challenge against the *Zoning Regulations for the Cape Velas District, Coastal Area* (“Zoning Regulations”) issued by the Municipality of Santa Cruz and published in Official Gazette No. 127, dated July 3, 2006.²⁶ These Zoning Regulations provided for the use of plots of land located within the Park, although the Municipality had no jurisdiction over the area, given that it was a National Park. The applicant argued that the Zoning Regulations are contrary to the Park Creation Law and to the binding interpretation of that Law issued by *Procuraduría*. More specifically, the applicant argued the following:²⁷

- The Regulations disregarded the existence of the Park and the authority of the Ministry of Energy and the Environment (MINAE) to manage the protected areas, as they included the plots of land located in the Park within its territorial scope of application.
- The Regulations encroached upon the right to a healthy, ecologically-balanced environment (Article 50 of the Constitution), as they undermine

²⁶ See Supreme Court of Justice, Constitutional Chamber, Resolution No. 2008-008713, May 23, 2008, p. 1 [Exhibit C-1h].

²⁷ See Supreme Court of Justice, Constitutional Chamber, Resolution No. 2008-008713, May 23, 2008, pp. 1-3 [Exhibit C-1h].

the *baula* turtles' ecological balance by endangering an important nesting beach.

- Mass construction would destroy the great scenic beauty protected by the Park – a duty of protection enshrined in Article 89 of the Constitution.
- The Regulations are contrary to international instruments approved by the Costa Rican State whose purpose is to protect the global flora and fauna, which, in turn, implies a violation of Article 7 of the Constitution.
- The Regulations breach the provisions of the Protection, Conservation and Recovery of Sea Turtle Population Law (Article 4), the National Park Service Act (Articles 8 and 12); the Organic Environmental Law (Articles 35, 42, 43 and 52); the Forest Law (Article 19); the Biodiversity Act; constitutional case law regarding the protection of the right to a healthy, ecologically-balanced environment and the duty of the State to guarantee, defend and preserve such right; and the hierarchical superiority of international instruments and treaties and the precautionary principle.

23. The *Procuraduría* provided a response to the notice given by the Constitutional Chamber to submit a brief in connection with the constitutional challenge filed. In this brief, the *Procuraduría* recommended a decision in favor of the applicant, based on the following arguments:²⁸

- The municipal regulations could not include the 75 meters area adjacent to the public area (50 meters), since by that time this strip was already part of the *Las Baulas* National Marine Park and was being managed by MINAE.
- As stated in the municipal regulations and the cadastral map published in the Official Gazette, the regulations cover the 75 meters that are included in the Park; therefore, such inclusion in these municipal regulations violates the Maritime-Terrestrial Area Law, Article 73 and the Organic Environmental Law, Article 32.
- Including the protected area in the territorial scope of the municipal regulations implies that the Park is reduced and left unprotected as a result; the duty to protect the Park is enshrined in the Constitution, international agreements approved by the Costa Rican State and the obligations arising therefrom.

²⁸ See generally, Supreme Court of Justice, Constitutional Chamber, Resolution No. 2008-008713, May 23, 2008, pp. 4-6 [Exhibit C-1h].

- Issuance of the zoning regulations is contrary to several international treaties entered into by Costa Rica, including the Inter-American Convention for the Protection and Conservation of Sea Turtles; the Convention for the Conservation of Biodiversity and the Protection of Wilderness Areas in Central America; the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere; the Convention on Biological Diversity, and the Convention concerning the Protection of the World Cultural and Natural Heritage.

24. In decision number 08-8713 dated May 23, 2008, the Constitutional Division ruled in favor of the applicant and annulled the Zoning Regulations issued by the Municipal Council of Santa Cruz. This judgment is declaratory and retroactive to the date of entry into force of the annulled Regulations, without prejudice to rights acquired in good faith. In its May 23, 2008 decision, the Chamber stated as follows:²⁹

- While the Maritime-Terrestrial Area Act, Article 3, vests the Municipalities with the power to manage the Maritime-Terrestrial Area, Executive Branch authorities may, in the exercise of their powers and duties, recover management of the area in the name of the State to protect a clear national interest, such as that enshrined in Article 50 of the Constitution.
- The Park boundaries defined in Executive Decree No. 20518-MIRENEM cannot be amended or eliminated pursuant to a subsequent Law, unless a decision is issued based on univocal scientific and technical criteria, in compliance with statutory requirements under Organic Environmental Law, Article 38.
- The Park does cover a 125-meter strip of land; thus, the interpretation of the Park Creation Law, Article 1, made by the *Procuraduría* is correct.
- The Municipality of Santa Cruz has extended its jurisdiction, given that the municipal zoning regulations cover areas that have been declared a national park.
- The Park has a very clear purpose: to protect spawning area of the leatherback turtle as needed to ensure perpetuity of the leatherback turtle colony, as well as other natural resources.

²⁹ See generally, Supreme Court of Justice, Constitutional Chamber, Resolution No. 2008-008713, May 23, 2008, pp. 7-21 [Exhibit C-1h].

- Pursuant to the international commitment undertaken by Costa Rica to protect sea turtle habitats, and according to the precautionary principle and the obligatory nature of environmental law, the maritime-terrestrial area must be included as a necessary area for the protection of the sea turtles that use that area during the stages of their life cycle.

25. To summarize, the Constitutional Chamber agrees with the interpretation of the Park boundaries made by the *Procuraduría*.³⁰ The Chamber established that the Park created in 1991 covers a 125-meter strip of land — not of sea.³¹ In addition, in this judgment the Chamber expressly reaffirms that the Costa Rican State has an obligation to maintain the protected area needed by the leatherback sea turtles.

³⁰ See Supreme Court of Justice, Constitutional Chamber, Resolution No. 2008-008713, May 23, 2008, p. 11 [Exhibit C-1h].

³¹ Supreme Court of Justice, Constitutional Chamber, Resolution No. 2008-008713, May 23, 2008, p. 11 [Exhibit C-1h]. This interpretation has also been adopted by the Constitutional Chamber in Resolution No. 2005-014289, October 19, 2005 [Exhibit C-1v].

[Translation]

The facts contained in this statement are true to the best of my knowledge and belief.

[signature]

Gloria Solano

Date: July 14, 2014