

Exhibit RWE-005

Witness Statement of Clara Agudelo

December 22, 2014

English Translation

UNDER THE UNCITRAL ARBITRATION RULES AND 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)*

vs.

*Republic of Costa Rica.
(Respondent)*

ICSID Case No. UNCT/13/2

**Witness Statement of Clara Luz Agudelo Arango
Head of SENARA’s Water Management Unit**

December 22, 2014

I. INTRODUCTION

1. My name is Clara Luz Agudelo Arango. I have worked at the National Groundwater, Irrigation and Drainage Service [*Servicio Nacional de Aguas Subterranas, Riego y Avenamiento* (“SENARA”)] since 2003. Currently, I hold the position of Head of the Water Management Unit. I graduated as a Geologist in 1997 from EAFIT University in Colombia and received a Masters of Science in Hydrogeology in 2001 from the University of Costa Rica.

2. My responsibilities at SENARA include the development of hydrogeological studies, defining and controlling Water Management processes, and controlling and supervising different processes requested by private companies in Costa Rica. In this role, I developed the 2009, 2013 and 2014 studies relating to the Huacas-Tamarindo aquifer.

3. In this witness statement, I will answer some of the arguments presented by Claimants and their expert, Mr. Federico Peralta, in their Reply on the Merits, relating to the availability of water in the Guanacaste area and the vulnerability of water resources. In particular,

Claimants and Mr. Peralta allege that it is not true that the availability of water in the area of Playa Grande is limited, as that the National Institute of Aqueducts and Sewage System of Costa Rica [*Instituto Nacional de Aguas y Alcantarillados de Costa Rica* (“AyA”)], has stated that there is availability of the resource for the next 20 years.¹ Claimants also allege that Respondent has exaggerated its statements about the limitations that the vulnerability of water resources imposed on construction in the area of Playa Grande.² Forthwith, I will explain the limitations that exist in the area of Playa Grande with respect to the availability of water and the vulnerability of the resource.

II. THE AVAILABILITY OF WATER IN THE AREA OF GUANACASTE

4. In their written Reply, Claimants have alleged that their properties have sufficient water for the construction that they have planned. In particular, Claimants allege that: (i) the 2003 SENARA study did not conclude that there would not be sufficient water available for new developments in the area of Guanacaste;³ (ii) recent SENARA studies on the availability of water have shown that the only area of the Huacas-Tamarindo Aquifer which is in a state of over-exploitation is Playa Grande;⁴ (iii) in any case, studies on the availability of water conducted by SENARA have no effect on the possibility of owners to obtain new construction permits;⁵ and (iv) the institutions responsible for the distribution of water to their properties have certified that there is sufficient water for the next 20 years.⁶ Claimants’ arguments are confusing.

5. First, Claimants allege that the 2003 study prepared by SENARA concluded that

¹ See Federico Peralta’s Expert Report, September 29, 2014 (“Peralta Report”), para. 12; see also Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, October 2, 2014 (“Claimants’ Reply”), para. 110.

² See Peralta Report, para. 13; see also Claimants’ Reply, para. 114.

³ See Claimants’ Reply, para. 106.

⁴ See Peralta Report, para. 12.

⁵ See Claimants’ Reply, paras. 104-105.

⁶ See Peralta Report, para. 12; see also Claimants’ Reply, para. 110.

there were no restrictions on the use of water resources.⁷ This is not correct - in fact, it concluded quite the opposite. In this study, SENARA concluded that the availability of water in the area of the Huacas Tamarindo Aquifer in Santa Cruz, Guanacaste is limited in its ability to support new developments. This is because it was determined that the replenishment and extraction values through wells were practically the same. Specifically, SENARA concluded that there were “current and future problems with the water resource.”⁸ The study showed that development in the area was affecting and would affect the availability of water in the future. For the foregoing reasons, SENARA established a restriction on the drilling of new wells in the Huacas Tamarindo aquifer.

6. However, Claimants allege that in this report SENARA concluded that the replenishment volume in the aquifer (6,906,384 m³/year) was greater to the extraction volume (6,501,024 m³/year), and that, therefore, in 2003 there were no over-exploitation problems of the available resource.⁹ Claimants’ conclusion is incorrect. The difference between the two values is immaterial and does not imply that there is an excess of water in the aquifer. The mentioned volumes only represented an intake variable and an output variable of the resource. That is, the volumes described do not consider discharge or output items from the aquifer system that are additional to the extraction. Thus, the determined extraction is not equivalent to the total system of outputs. At that time, the system outputs were greater than the one described above. This document does not consider the natural output flow; that is, the demand to maintain the balance in the coastal strip of land in order to maintain the balance between salt sea water and fresh water. Increasing the extraction puts the aquifer at risk due to possible intrusion of salt water. This would prevent the use of the aquifer for salinization, there would be a loss of the system’s ability to recover, and the

⁷ See Claimants’ Reply, para. 106.

⁸ See SENARA, Hydrological Study on the Huacas-Tamarindo Aquifer, May 2003, p. 36 [Exhibit R-046].

⁹ See Claimants’ Reply, para. 106.

eventual loss of private use or supply wells. Therefore, on the basis of the data obtained, it could be concluded that the aquifer was in a state of balance, whereby it was necessary and urgent to take the necessary measures to prevent its overexploitation.

7. Second, it is also not true, as suggested by Mr. Peralta, that recent SENARA studies concluded that the only sector of the aquifer being overexploited was Playa Grande.¹⁰ The study conducted in 2013 found low availability in areas other than Playa Grande. However, due to the balance's fragility, the restriction for new drilling is still maintained in the area. Following the emergency declaration issued by the President of the Republic in the Guanacaste Province due to the effects of the drought, SENARA conducted an assessment of the information generated between 2013 and 2014 to update and review the monitoring data of the Huacas Tamarindo Aquifer wells. This monitoring system has been in force from 2002. I performed that assessment, and it concluded that all of the aquifer is in a state of water stress or overexploitation as a consequence of the drought that has lasted four years. This study was delivered to the management on Monday, December 15, 2014 for approval. Water stress and possible overexploitation are mainly due to the fact that the area has experienced a longer drought period than anyone expected, a condition that was not contemplated in the 2013 study. This study was conducted under the existing rules using mean values of precipitation and replenishment to calculate water balance.¹¹ For this reason, the study did not consider periods of minimum or maximum precipitation, or prolonged periods of drought.

8. Third, it is not correct to say, as Claimants allege, that the studies conducted by SENARA do not affect the possibility of obtaining permits to carry out construction in the area.¹²

¹⁰ See Peralta Report, para. 12.

¹¹ See Hydrogeological Methodologies, Agreement 60-2012 MINAE, June 12 2014 [Exhibit R-119].

¹² See Claimants' Reply, paras. 104-105.

The recommendations issued by SENARA must be followed by the institutions responsible for the administration and distribution of water in Costa Rica, such as the National Institute of Aqueducts and Sewage of Costa Rica (“AyA”), the Municipalities and the Administrative Associations of Aqueduct and Sewage Systems [Asociaciones Administradoras de Sistemas de Acueductos y Alcantarillados Sanitarios (“ASADAS”)], and private companies, pursuant to the provisions set forth by the Law Creating SENARA.¹³ In addition, in case drilling a new well should be required in the area, the express authorization of SENARA must be obtained. SENARA is a mandatory consultative entity whose criterion is binding, pursuant to the provisions set forth in the Law Creating SENARA.¹⁴

9. Finally, Claimants allege that there is enough water in the Guanacaste area for the next 20 years to support the construction that they might eventually do on their properties.¹⁵ This assertion is also not correct. Although there may be availability of water in other Guanacaste areas, this cannot be said for the Huacas Tamarindo Aquifer, due to the conditions of water stress, overexploitation and the new well drilling restriction. Claimants refer to three letters as the bases for their claim.¹⁶ The letters refer to the availability of water for “the current demand and its vegetative growth.”¹⁷ This means that if you want to develop more than the normal growth of the population, such as, for example, the construction of a hotel or any other type of building, there is not sufficient availability of water for the next 20 years. For there to be sufficient availability for non-vegetative growth, new wells would have to be drilled, an activity that is strictly restricted in

¹³ See Law Creating SENARA No. 6877, July 18, 1983 (“Law Creating SENARA”), Art. 2 [Exhibit R-120].

¹⁴ See Law Creating SENARA, Art. 3 [Exhibit R-120].

¹⁵ See Peralta Report, para. 12; See also Claimants’ Reply, para. 110.

¹⁶ See ASADA of Playa Grande Note. General availability of Water and AyA Note on the availability of water, Letter SGG-2014-1240, 30 September 2014 [Exhibit C-103].

¹⁷ See ASADA of Playa Grande Note. General availability of Water and AyA Note on the availability of water, Letter SGG-2014-1240, 30 September 2014 [Exhibit C-103].

the area, as previously mentioned.

10. In any case, even if there had been water available for Claimants' land, the essential issue that limits the development in these areas is the vulnerability of contaminating the water resource in the area. This issue will be explained in the next section.

III. THE VULNERABILITY OF WATER RESOURCES IN THE GUANACASTE AREA

11. Since 2009, the levels of vulnerability of the Huacas-Tamarindo Aquifer have been determined.¹⁸ Vulnerability measures the risk of contamination of the water in the area. The Huacas-Tamarindo Aquifer is very shallow, especially in the areas closest to the coast. For this reason, it has a level of vulnerability that is classified as extreme.¹⁹ A series of regulations that are defined in the vulnerability matrix are applied to that map. The matrix determines the type of development that is allowed, depending on the level of vulnerability indicated on the map.²⁰

12. Claimants have alleged that Costa Rica has exaggerated the limitations imposed by the vulnerability map and the matrix to the development of constructions in Playa Grande.²¹ This is not true, as the vulnerability matrix does provide such limitations. In the areas that have been identified as being of extreme vulnerability, any type of development is strictly prohibited due to the high risk of contamination. In the areas that have been identified as high vulnerability, some degree of development is allowed with the application of regulations.²²

¹⁸ See Study of Vulnerability Maps of the Huacas-Tamarindo, January 2009 [Exhibit R-058].

¹⁹ See SENARA, Vulnerability Map of the Huacas-Tamarindo Aquifer, 2013 [Exhibit R-050]; see also SENARA, Vulnerability Map of the Huacas-Tamarindo Aquifer, December 2008 [Exhibit R-049].

²⁰ See SENARA, Criteria Matrix for the Use Criteria in Accordance with the Vulnerability of Aquifers to Contamination, September 2006 [Exhibit R-047].

²¹ See Claimants' Reply, para. 144; see also Study of Vulnerability Map of the Huacas-Tamarindo Aquifer, January 2009 [Exhibit R-058].

²² See SENARA, Matrix of Land Use Criteria in Accordance with the Vulnerability of Aquifers to Contamination,

13. In the 2009 study, SENARA determined that the area of Playa Grande was of extreme vulnerability. For this reason, all types of construction are prohibited in the area.²³ In their Reply, Claimants allege that although the whole area has been classified as having “extreme vulnerability,” SENARA allows the owners to conduct a specific study for each lot to determine its specific level of vulnerability.²⁴ While this is true, I must make it clear that each study must be reviewed and approved individually by SENARA. Once SENARA receives the information required of the property owners, the entity studies it and determines whether it is feasible to decrease the level of vulnerability from “extreme” to “high” or to the appropriate level. There is no guarantee that the review by SENARA will be favorable for the owner of the lot. In certain cases, SENARA has maintained the level of vulnerability as “extreme.” Likewise, there are also cases of lots in the area of Playa Ventanas, in which the owners have requested a “high” level of vulnerability, but SENARA has concluded that these are areas of “extreme” vulnerability based on the specific studies submitted by the owners.

14. In his report, Mr. Peralta refers to some studies that were conducted regarding the area of Playa Grande, which allegedly show that the level of vulnerability of the area should be reduced from “extreme” to “high.”²⁵ These studies must be submitted to SENARA for review. Without the assessment and opinion of SENARA, these are not applicable. The party interested in presenting a hydrogeological study for on-site assessment of the condition of a specific lot must

2006 [Exhibit R-047].

²³ Although the vulnerability map of the Huacas- Tamarindo Aquifer does not include Playa Ventanas, this does not mean that new construction in the area need not be approved beforehand. In 2009, it was recommended that each lot that was to be built within the Canton should conduct a detailed hydrogeological study to determine the level of vulnerability. This request must be approved by SENARA. *See* Letter from SENARA to SETENA, DIGH -038-09, February 13, 2009 [Exhibit R-031]; *see also* S SENARA, Terms of Reference for the Execution of Hydrogeological Studies, February 2012 [Exhibit R-118].

²⁴ *See* Peralta Report, para. 19.

²⁵ *See* Peralta Report, paras. 19-20.

comply with the terms of reference set forth by SENARA.²⁶ In addition, although the level of vulnerability of some properties can be modified, it does not imply that such a change is applicable to the whole Playa Grande sector.

²⁶ See SENARA, Terms of Reference for the Execution of Hydrogeological Studies, February 2012 [Exhibit R-118]; see also SENARA, Regulation for the Provision of Services, Regulation 510, January 9, 2008 [Exhibit R-153].

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

[signature]

Clara Agudelo

Date: December 22, 2014