

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

----- x
 In the Matter of Arbitration :
 Between: :
 :
 DAVID AVEN, et al., :
 : UNCITRAL Case No.
 Claimants, : UNCT/15/3
 :
 and :
 :
 THE REPUBLIC OF COSTA RICA, :
 :
 Respondent. :

----- x Volume 2

HEARING ON JURISDICTION AND MERITS

December 6, 2016

The World Bank
700 18th Street, N.W.
J Building
Conference Room JB 1-080
Washington, D.C.

The hearing in the above-entitled matter came on,
pursuant to notice, at 9:05 a.m., before:

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MR. C. MARK BAKER, Co-Arbitrator

PROF. PEDRO NIKKEN, Co-Arbitrator

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MS. SUSANNE SCHWALB
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P R O C E E D I N G S

1
2 PRESIDENT SIQUEIROS: Good morning. If the
3 Parties, Interpreters, and Court Reporters are ready,
4 then we will proceed.

5 I welcome everyone, once again, to the second
6 day of the hearing of the case David R. Aven, et al.,
7 vs. the Republic of Costa Rica.

8 And before we commence with the examination
9 of the first witness in this case, I would ask the
10 Claimant and Respondent whether there's any procedural
11 issues you would like to address before we commence.

12 MR. BURN: Yes, sir. There were just a
13 couple of relatively small matters to bring to your
14 attention. You'll recall that we had some document
15 issues that were raised yesterday, and the Respondent
16 quite reasonably needed an opportunity to consider
17 those matters relating to three documents.

18 I think I'm right in reporting consensus on
19 the submission or replacement of certain documents.
20 So, those can come in. We're happy to provide copies
21 of those now or at the first break we can leave copies
22 on your desks. As you wish, sir.

1 We can also at the same time provide the file
2 of additional legal authorities to which Dr. Weiler
3 referred at the same time.

4 And there was a matter which--

5 PRESIDENT SIQUEIROS: Could we just ask
6 Respondent to confirm for the record--

7 MR. BURN: Sure.

8 PRESIDENT SIQUEIROS: --that he's in
9 agreement.

10 MR. LEATHLEY: Yes, sir. We do. And there's
11 one document that I'm happy to explain what that will
12 be with one of the documents in a moment.

13 PRESIDENT SIQUEIROS: Okay.

14 MR. BURN: The other matter relates to some
15 translations that we sent over to the Respondent last
16 night. They haven't had the chance, I think, to check
17 whether the translations are right or not. It's
18 basically just tidying up existing translations. We
19 realized a couple of documents weren't translated
20 perfectly.

21 We sent over the revised translations. I
22 think we have to wait for the Respondent, but I defer

1 to Mr. Leathley on this to check our revised
2 translations. And--and once that's completed, then
3 we'll be in a position to deal with those documents
4 too.

5 PRESIDENT SIQUEIROS: Thank you. Perhaps you
6 could distribute these, then, on the first break.

7 MR. BURN: Thank you.

8 There is one other matter, sir. And there's
9 not agreement on this.

10 You will recall that under the procedural
11 orders, and governing this hearing, the stipulation is
12 that witnesses of fact are--other than those who are
13 parties to the action, are sequestered in that they
14 may not be in the room or reading transcripts or
15 watching online until they have appeared to give
16 evidence.

17 PRESIDENT SIQUEIROS: With one exception
18 also, which was Mr. Jurado during the examination of
19 Mr. Ortiz.

20 MR. BURN: Correct. And we wish to put--make
21 the suggestion that there is, it would be right and
22 appropriate that further exception be made in respect

1 to Mr. Manuel Ventura, who you will recall is a
2 witness in the proceedings but has not been called to
3 give oral testimony in these proceedings. He is here.
4 If--and I put the point this morning to Mr. Leathley,
5 and he's taken instructions. And the view from the
6 Respondent's side is that they can't consent to any
7 variation of it. The Procedural Order is the
8 procedure order, and they interpret it in that way.

9 We would say that the Procedure Order is
10 actually silent on this particular point, and we would
11 invite the Tribunal to use its discretion to
12 stipulate, a sensible matter, that Mr. Ventura is able
13 to attend.

14 The alternative is that he has to leave the
15 room for no real pragmatic purpose for the next two to
16 three days. Which even those witnesses who will be
17 appearing do not suffer from because they have been
18 called and will go through the process of oral
19 testimony.

20 So, we would say it's sensible, it's
21 pragmatic, it's kind of implicit in the procedure
22 orders that stand that somebody who has not been

1 called to give oral testimony should be given enough
2 leeway just to be in the room.

3 PRESIDENT SIQUEIROS: Okay.

4 Mr. Leathley, would you care to comment?

5 MR. LEATHLEY: Thank you, sir. Yes.

6 This is for us just a strict compliance
7 point, sir. Because first it will start maybe with
8 Mr. Ventura, and we don't know where it will stop.

9 We believe that when any fact witness
10 testifies--and the temperature has been turned up by
11 the Claimants in this case. We think that any witness
12 should be able to testify in the sanctuary of this
13 room and know that they have no other eyes glaring
14 down on them. We have no way of knowing what the
15 relationships may be.

16 Some of these people have interacted over a
17 number of years, and there seems to be a lot of
18 animosity.

19 So, we would say just, first of all, a strict
20 compliance of the Procedure Order. And, secondly, we
21 think it's necessary for you to have unimpaired
22 testimony. And we would suggest that even if it's a

1 modicum of impairment, that that could in some way
2 impact.

3 Just one--also, one point of clarification,
4 if I can, sir.

5 The point--and I apologize if this is my pure
6 oversight in relationship to Procedure Order Number 5,
7 but I wanted to get the Tribunal's clarification on
8 the attendance in the hearing of those who are the
9 Claimants because, of course, a number of them will be
10 testifying today.

11 So, that certainly was my anticipation. And
12 apologies if I've misread the Procedure Order. But my
13 anticipation that, for example, Mr. Aven would not be
14 allowed to be in the hearing room today during the
15 testimony of other witnesses.

16 PRESIDENT SIQUEIROS: Is this Mr. David Aven
17 that you're referring to?

18 MR. LEATHLEY: Yes, there's also
19 Mr. Shioleno.

20 To be honest--so we would hope that this room
21 is only filled with the Tribunal, the necessary
22 support that we have, counsel, and the experts. Of

1 course, the public, we understand, are entitled to
2 attend. We would respectfully ask for you to police
3 who is in the room at any given time.

4 But we do think it's important that if the
5 sequestration is to have any meaning, that Mr. Aven,
6 Mr. Shiolen, other of the Claimants not participate
7 during the fact stage--during the fact witness
8 testimony for either side.

9 PRESIDENT SIQUEIROS: Why don't you allow
10 the--well, are you--do you wish to comment something
11 before we confer?

12 MR. BURN: Well, yes, sir. I mean, frankly,
13 the points that Mr. Leathley raised--raises now, that
14 ship has sailed. I mean, Paragraph 28 of Procedure
15 Order Number 5 is unambiguous. I don't, frankly, see
16 how it can be misread. It is clear. The words say,
17 "Witnesses other than parties to this arbitration will
18 be excluded from the hearing room."

19 MR. LEATHLEY: I'm sorry. That's not the
20 full sentence.

21 MR. BURN: All right. "From this hearing
22 room until they have provided their testimony in

1 full." Witnesses other than the parties to this
2 arbitration, Mr. Leathley. It's pretty clear. I
3 don't think I really need to belabor this point.

4 If they wish to make an application to vary
5 Procedure Order Number 5, they're welcome to do so.
6 There is no reason to do so. There is a very good
7 reason to adopt the balance that is set out in
8 Procedure Order Number 5 already. The Tribunal
9 clearly considered the point, has drawn the
10 arrangements accordingly. That's the appropriate way
11 to proceed.

12 And as far as Mr. Ventura is concerned, we
13 reiterate, he's--it's going to achieve nothing to
14 exclude him from the room. The idea that he's somehow
15 going to intimidate somebody is a difficult one to
16 make, shall we say.

17 It's going to achieve nothing to exclude him,
18 and we would invite the Tribunal to accept his
19 presence in the room.

20 PRESIDENT SIQUEIROS: Okay. Let us then
21 confer.

22 (Tribunal conferring.)

1 PRESIDENT SIQUEIROS: The Tribunal believes
2 that Procedure Order is indeed clear with respect to
3 witnesses of fact who are parties to the arbitration,
4 and there is no restriction on they being present
5 while other witnesses are being examined.

6 On the question of Mr. Ventura, if he has not
7 yet--if he has not been called to be examined during
8 this hearing, then there should be no restriction for
9 him to be present in the hearing room during the
10 examination of other witnesses.

11 We would ask, however, Mr. Ventura to conduct
12 himself in a professional manner and do not disclose
13 to other witnesses who have not yet been examined the
14 contents of the testimony of the other witnesses who
15 have or are being examined because precisely that is
16 the objective on sequestration of a witness.

17 The Tribunal takes note that anyone wishing
18 to avoid the principle of sequestration could simply
19 go online and check the live webcast of this hearing.
20 But the objective, I think, here is for the parties to
21 conduct themselves in a manner which would attempt to
22 follow the objectives of this principle during

1 examination of witnesses.

2 MR. BURN: Thank you, sir.

3 Just to be clear, on our side we have
4 instructed non-Party witnesses not to watch the
5 proceedings online and not to receive copies of the
6 transcript during the hearing.

7 PRESIDENT SIQUEIROS: I appreciate that, and
8 that's precisely what we would expect of the parties.

9 MR. LEATHLEY: So, there is one follow-up
10 point, if Mr. Burn is finished with any preliminary
11 matters this morning, and that is a knockon-effect. .

12 The C-295 document you have heard referenced
13 yesterday. We would like to admit that to the record,
14 so we will be giving a new copy of that with a proper
15 cover sheet. We believe that the reference will be
16 R-521. We'll confirm. But if we can distribute that
17 during the course of the morning as well.

18 There's two other requests. And I have to
19 confess I haven't raised these with Mr. Burn, so he
20 may want to take time to consider. And they're in
21 relation to the bios that we would like to admit to
22 the record for Mr. Morera and Mr. Ortiz.

1 These bios would only come from their public
2 websites, so we hope their content would not be in
3 dispute. But we're happy to print a copy, share it
4 with Mr. Burn, and then we can hopefully submit that
5 to you later.

6 MR. BURN: Perfectly happy to proceed in that
7 manner, but we just want to check the documents. But
8 in principle, there is no difficulty on our side.

9 PRESIDENT SIQUEIROS: Okay. Thank you.

10 So, we may proceed. If you wish to call
11 Mr. David Janney.

12 MR. BURN: That's correct, sir. We'll
13 just--we'll bring him forward now.

14 Can I just ask Mr. Leathley if the
15 cross-examination bundles that he's going to be using
16 with respect to Mr. Janney first, but the witnesses
17 generally, includes the Witness Statements of
18 Mr. Janney?

19 It does. Okay. That's fine. Thank you.

20 MR. LEATHLEY: And just for the record,
21 Ms. Bouchenaki will be conducting the
22 cross-examination for the part of the Respondent.

1 DAVID JANNEY, CLAIMANTS' WITNESS, CALLED

2 PRESIDENT SIQUEIROS: Okay. Mr. Janney, good
3 morning.

4 THE WITNESS: Good morning.

5 PRESIDENT SIQUEIROS: As you know, you--your
6 testimony has been offered by Claimants in this
7 arbitration. The procedure will be that you
8 will--there will be a short examination on the part of
9 Mr. Burn or his team, and that will be followed by a
10 cross-examination by the team of Respondent, after
11 which there will be a follow-up by your counsel
12 limited exclusively to issues that were raised during
13 cross-examination.

14 If you have any question, if you don't
15 understand a particular question, feel free to ask for
16 clarification of that as you wish.

17 THE WITNESS: Yes, sir. Thank you.

18 PRESIDENT SIQUEIROS: The Tribunal may at any
19 time also request that you answer any questions during
20 the examination, cross-examination, or afterwards.

21 THE WITNESS: Okay.

22 PRESIDENT SIQUEIROS: So, don't be surprised

1 if any one of us does ask you a question.

2 THE WITNESS: Okay.

3 PRESIDENT SIQUEIROS: There is a statement
4 that should be in front of you that we would ask you
5 to read for the record.

6 THE WITNESS: "I solemnly declare upon my
7 honor and conscience that I shall speak the truth, the
8 whole truth, and nothing but the truth."

9 PRESIDENT SIQUEIROS: Okay. Thank you,
10 Mr. Janney.

11 DIRECT EXAMINATION

12 BY MR. BURN:

13 Q. Thank you, sir.

14 Mr. Janney, you have a file in front of you
15 with various documents.

16 A. Yes, sir.

17 Q. If you open the file, at the top it should
18 appear a copy of your first statement. Can you just
19 check that document, just that document, flick through
20 it just to make sure you're happy that that is indeed
21 a copy of your statement.

22 A. It is.

1 Q. Thank you.

2 And are there any changes you wish to make to
3 this first statement?

4 A. No, I don't believe so.

5 Q. Thank you.

6 On the last page of that document, which is
7 at page 14, could you confirm whether or not that is
8 your signature?

9 A. It is.

10 Q. Thank you.

11 I just need to go through the same process in
12 the--your second statement, which you should find
13 behind a white tab. I think you may be looking at the
14 Spanish version of your first statement.

15 Okay. So, you have a document which should
16 have the title "Second Witness Statement of David
17 Janney." Do you have that?

18 A. I do.

19 Q. Can you go through the same process for this
20 document. Just quickly check that this looks like
21 your second statement.

22 A. It is.

1 Q. Thank you.

2 Are there any changes or amendments you wish
3 to make to this second statement?

4 A. I don't believe so.

5 Q. Could you just go to that last page which is
6 on page 4. Is that your signature--

7 A. It is.

8 Q. --Mr. Janney?

9 A. Yes.

10 Q. Thank you.

11 MR. BURN: We have no further questions for
12 Mr. Janney at this stage. Thank you.

13 PRESIDENT SIQUEIROS: Thank you.

14 CROSS-EXAMINATION

15 BY MS. BOUCHENAKI:

16 Q. Mr. Janney, good morning.

17 A. Good morning.

18 Q. You explain in Paragraph 3--sorry--13 of your
19 first Witness Statement that, along with Mr. Aven, you
20 found and made the decision to develop the Las Olas
21 property; correct?

22 This should be some--a fact that you

1 testified to, so you should be able to confirm the
2 correctness of this statement--

3 A. Right.

4 Q. --fairly quickly.

5 A. So, please repeat the statement as you said
6 it.

7 Q. That you made the decision to develop the Las
8 Olas property with Mr. Aven during the trip to Costa
9 Rica.

10 A. I helped him find the property. The decision
11 in the end was his decision. But, yes, I was in
12 agreement with him on that.

13 Q. Okay. And you state in Paragraph 8 of your
14 First Witness Statement that at the time of the
15 investment, you were the president and the founder of
16 a Christian charity named World Hope--

17 A. That was--

18 Q. --of which you are the president?

19 A. That is correct.

20 Q. And also a pastor of the Orlando Baptist
21 Church?

22 A. At that time?

1 Q. Mm-hum.

2 A. Yes.

3 Q. Now, in Paragraphs 13 and 14, you indicate
4 that the trip during which you identified the Las Olas
5 property with Mr. Aven was a trip that you were doing
6 for your charity, World Hope; is that correct?

7 A. It was not for World Hope, but it was
8 missions work, yes.

9 Q. So, it was for another charity?

10 A. It was within the context of the missions
11 work of our church.

12 Q. Okay. So, it was within the context of your
13 work with the Orlando Baptist Church?

14 A. Baptist Church, yes.

15 Q. And is it appropriate for you to be scouting
16 for business ventures while on a mission trip for your
17 church?

18 A. Is it--is it appropriate?

19 Q. Yes.

20 A. Yeah, I think it--I don't think there would
21 be a conflict in that.

22 Q. All right. So you're--when you do these

1 trips for your church, you fund those trips personally
2 with your personal funds?

3 A. On some of the trips that I do with missions
4 I fund, and with some of them they fund them.

5 Q. Okay. In Paragraph 25 of your First Witness
6 Statement you say--and I quote--"that you have a good
7 credibility with your humanitarian work and your
8 residential development work."

9 A. Yes.

10 Q. And at Paragraph 44 of your First Witness
11 Statement, you--you also state that you built
12 credibility with the members of the church; correct?

13 A. This is in reference to a church in Atlanta,
14 yes.

15 Q. Okay. And in the same paragraph, 44, you say
16 that the fact--and I quote again--"The fact that the
17 purchasers of Las Olas lots--within this church
18 community have lost their money in a project that I
19 recommended to them has meant that I have lost that
20 credibility with the church community as a whole," and
21 that you are no longer welcome anymore in Pine Crest
22 Baptist Church.

1 Do you confirm the statement?

2 A. That is correct.

3 Q. Okay. Is there any basis on which you would
4 like to qualify these statements regarding your
5 credibility within your church communities and the
6 church communities within which you act?

7 A. This was a specific church community.

8 Q. Yes.

9 A. Pine Crest Baptist Church. Pine Crest
10 Baptist Church had a gentleman there who was the man
11 who brought investors to me, to David Aven, in a
12 meeting who were part and supporters of that church.
13 They supported what we were doing at World Hope and
14 missions.

15 As a result of the way things have gone on
16 this project, I have lost my credibility with them in
17 reference to recommending this, getting them involved
18 in this project.

19 Q. Okay. Now, in Paragraph 9 of your First
20 Witness Statement and then in Paragraph 25, you
21 indicate that World Heritage--sorry--World Hope
22 charity has--has built a multimillion-dollar school.

1 You--and that it has significant projects around the
2 world and in particular in Kenya.

3 A. Excuse me. Paragraph 9?

4 Q. 9 and 25. But this is, again, a fact that
5 you should be able to confirm, your--the activities of
6 your--the charity of which you are the president.

7 MR. BURN: It's, nonetheless, fair that the
8 witness be given a chance to refresh himself on the
9 two specific references you make before he answers
10 this question.

11 MS. BOUCHENAKI: It's a reference to what his
12 church is acting and in the areas--and he says that
13 he's still the president of the church--the charity.
14 I'm sorry.

15 THE WITNESS: And they are separate. World
16 Hope is a separate charity from the church.

17 BY MS. BOUCHENAKI:

18 Q. Yes. And I was asking about World Hope and
19 asking you to confirm your statements in Paragraphs 9
20 and 25.

21 A. That's why I wanted to look at them so I
22 could confirm them. Paragraph 9 I confirm, yes. And

1 Paragraph 25, yes.

2 Q. Is there any paragraph in your statements
3 that you--in your statements that you would not
4 confirm at this stage? I would think not. But you
5 confirmed that your statements are yours, that you
6 prepared them, that's your declaration?

7 A. That is correct.

8 Q. Okay. So, are you familiar with Mr. Craig
9 Mateer?

10 A. I am.

11 Q. Yes. He is a member of your church--of the
12 Orlando Baptist Church; correct?

13 A. No, he's not.

14 Q. Okay. So, he donated money to the two farms,
15 chicken farms, that World Hope--as part of World Hope
16 mission activities in Kenya; correct?

17 A. Yes, he did.

18 Q. And he then claimed that the money was not
19 used for those missions?

20 A. He did make that claim.

21 Q. And the--he then filed a claim against the
22 charity and you personally; correct?

1 A. No. He filed the claim against the church
2 and the charity.

3 Q. Okay. And he later--but his claim was
4 directed to you and--and accused you personally, did
5 it not?

6 A. His claim was that World Hope did not spend
7 the monies on the farms correctly.

8 Q. Okay. There was an article in the East
9 Orlando Post that reported this particular claim
10 against the church and they said against you. It's in
11 Exhibit 36 of the Credibility Report, and it's Tab 1
12 of your bundle. And then I can refer you to Tab 2 of
13 your bundle, which is Credibility Exhibit Number 37,
14 which makes a summary of this dispute with Mr. Mateer.

15 Now, these are fairly widely read newspapers
16 in your region; are they not?

17 A. No. No, they're not. The East Orlando Post
18 is not widely read. He's a paid blogger. He's a
19 college student who is paid to write what he writes.

20 Q. Okay.

21 A. He's paid by Mr. Mateer to write what he
22 writes.

1 Q. But it does affect--you know, these were
2 rumors that went to your reputation; right?

3 A. Rumors affect everyone. Yes, I agree with
4 that.

5 Q. Okay. So, would you still consider that the
6 Las Olas Project has affected your reputation?

7 A. At Pine Crest Baptist Church my reputation or
8 credibility was affected as it related to getting
9 people to make that investment.

10 Q. Okay. And you don't think that people in--in
11 that church ever googled you?

12 A. That's a whole separate question. I have no
13 idea who googles what.

14 Q. Okay. Now, in terms of--nine days after
15 your--your First Witness Statement, you filed for
16 personal bankruptcy; correct?

17 A. Correct.

18 Q. And your Second Witness Statement does not
19 make any mention of that filing; is that correct?

20 A. That is correct.

21 Q. So, could you please read Paragraph 11 of
22 your Second Witness Statement.

1 A. Yes, I've read it.

2 Q. Yes, please.

3 A. Would you like me--

4 Q. Oh, can you please read it.

5 A. Oh, yeah.

6 "From this background, I have a very good
7 understanding of the value that can be added to a
8 piece of land by obtaining proper zoning, planning and
9 permitting approvals. This added value was the niche
10 I developed for myself when I entered this market
11 because of the great margins when you take a property
12 through the entitlement phases."

13 Q. Okay. Thank you.

14 So, in Paragraph 10 of your Witness
15 Statement--of your Second Witness Statement, you refer
16 to a number of properties that you have developed;
17 correct?

18 A. Correct.

19 Q. Now, is it correct that in your filing for
20 bankruptcy, five of these six properties are listed as
21 properties that--to which your filing relate? And in
22 particular, Lake Hart, Villa City I, Villa City II,

1 Villa City, and Lake Jackson Ridge?

2 A. Yes, that is correct.

3 Q. And yet you did not disclose that in your
4 Second Witness Statement?

5 A. I'm misunderstanding you. I don't know what
6 you're asking me.

7 Q. You did not disclose that these
8 properties--that you filed for bankruptcy in relation
9 to these properties?

10 A. No, I did not put those in my Second Witness
11 Statement.

12 Q. Okay. Now, you said in your First Witness
13 Statement that you invested \$250,000 in Las Olas. Is
14 that correct?

15 A. Correct.

16 Q. But you didn't report that in your bankruptcy
17 filing?

18 A. That was prior to the ten years of reporting.

19 Q. So, your creditors in that bankruptcy do not
20 know that you are sitting here claiming for this--for
21 this money from Costa Rica; right?

22 A. They absolutely know. Yes, they do know.

1 Q. But it's not in your bankruptcy filing.

2 A. It is in the last filing that was filed.

3 This--everybody knows about everything here.

4 Q. But not in your Witness Statement?

5 A. No, it wasn't asked to be in my Witness
6 Statement.

7 Q. It wasn't asked by whom?

8 A. By anyone. My Witness Statement didn't have
9 it in there.

10 Q. But your Witness Statement represents that
11 you have experience in successfully developing
12 projects--

13 A. I absolutely have great success in
14 developing. Some of the best and greatest developers
15 in the United States have gone through bankruptcy
16 because of 2007 and '8, which was responsible for why
17 I had to declare bankruptcy.

18 Q. But your bankruptcy filing was in 2015.

19 A. Yes, that's right. I spent seven years
20 trying to take care of it so I would not have to do
21 that. And with the exception of one development, I
22 was able to do that.

1 Q. Would you not think that this is a piece of
2 information that a Tribunal and the party who is
3 assessing your statement that you are a successful
4 entrepreneur would need to have and assess for
5 themselves?

6 A. I did not assess it that way. No, ma'am. I
7 don't believe that that had to do with my lack of
8 credibility in being able to understand and develop
9 land.

10 Q. And you would--and you did not--you were not
11 inclined to letting the persons to whom you were
12 making these representations decide for themselves and
13 give them the full picture of who you are?

14 A. I did not think of that, no.

15 Q. Okay. Now, if I can direct you to
16 Paragraph 21 of your First Witness Statement. I'll
17 quote for you while you look for it.

18 You say, "Before buying the land, we"--and
19 that is you and Mr. Aven--"satisfied ourselves that
20 there were no environmental problems on the Las Olas
21 project site. The piece of land was comprised of
22 gently rolling hills, and Esterillos Oeste was already

1 an established community with homes, condos, hotels,
2 restaurants, and other businesses. It was obvious"--I
3 continue quoting--"that there were no environmental
4 problems with the property."

5 Do you have any technical qualification to
6 make such an assessment?

7 A. I would not say I have technical, but I have
8 experiential qualifications to do this. I deal in
9 getting lands through the processes to be able to
10 develop. I've had plenty of projects that have been
11 turned down for environmental reasons. And I
12 understand wetlands, and I understand uplands. And I
13 understand all of the issues that involve the
14 environment.

15 So, I have great experience in doing that and
16 certainly had understanding and insight in looking at
17 this property. Along with that, we were dealing with
18 E-D-S-A, EDSA, out of South Florida, who also is one
19 of the foremost companies in dealing with land use and
20 understanding environmental issues.

21 Q. But EDSA you did not contract prior to buying
22 the land; correct?

1 A. That is correct.

2 Q. So, at the time when you were making this
3 assessment to which you testified here, you had not
4 contracted any expert--

5 A. That is correct.

6 Q. --to make that evaluation.

7 In Paragraph 9 of your Second Witness
8 Statement, you describe your approach to new land
9 developments. And you state, and I quote, that
10 you--for such new developments, you "do a detailed due
11 diligence exercise to see if it is possible to get the
12 correcting--the correct permitting and entitlements to
13 carrying out the project."

14 A. That is correct.

15 Q. Yeah. How many legal and environmental
16 studies did you obtain upon deciding to team up with
17 Mr. Aven in relation to Las Olas?

18 A. I could not answer that as far as the number
19 of how many. The property was put under contract. We
20 studied the area. When I say "we studied the area,"
21 for all of the uses that were going on in the area.
22 This property rolls down. It's very unusual in that

1 properties on either side of Esterillos Oeste are
2 flatlands. But this property rolls down from the road
3 all the way to the sea.

4 Q. We will have--

5 A. And it's clear that it's not wetlands.

6 Q. I'm sorry to interrupt. We will have control
7 to--we'll speak to the conditions--

8 MR. BURN: Sorry. If the witness wishes to
9 answer, he should be allowed to complete his answer.

10 MS. BOUCHENAKI: But that was not my
11 question.

12 MR. BURN: Then you can take it up with him
13 when he's finished. And you can deal with that. He
14 should be allowed to finish his answer. And if it's
15 not relevant to the question, then you can take that
16 up.

17 BY MS. BOUCHENAKI:

18 Q. But that was--my question was, did you
19 contract with experts and legal advisers in order to
20 make your assessment, as you say, that this is your
21 approach to developing new properties?

22 A. Yes. That is my approach to developing

1 subdivisions in America whenever I'm buying land. And
2 on this particular piece of property, we looked at the
3 property. The property absolutely passed the visual
4 test of wetlands, of environmental species of tree
5 issues and--

6 Q. I'm sorry to interrupt. Does it pass the
7 visual test by the--according to the opinion of the
8 experts that you hired or according to your opinion?

9 A. According to my opinion. I can only speak
10 for me--

11 Q. So--

12 A. --but I'm not saying that there weren't other
13 tests done.

14 Q. Understood. And going back to my question,
15 which was, did you actually contract with
16 advisers--legal advisers?

17 A. I can't speak to that.

18 Q. You cannot speak to that because you cannot
19 remember?

20 A. Yes, because I don't know.

21 MS. BOUCHENAKI: Thank you.

22 THE WITNESS: Thank you.

1 PRESIDENT SIQUEIROS: You have no further
2 questions for Mr. Janney?

3 MS. BOUCHENAKI: I'm sorry. No. No further
4 questions.

5 PRESIDENT SIQUEIROS: Okay. Thank you.

6 Mr. Burn?

7 REDIRECT EXAMINATION

8 BY MR. BURN:

9 Q. Just one question by way of redirect,
10 Mr. Janney.

11 You were taken at the early part of the
12 cross-examination to Tabs 1 and 2 in the file in front
13 of you, the article from the East Orlando Post and an
14 article from, I think, the Orlando Sentinel. You
15 commented to some extent on those articles and the
16 origin of those articles.

17 But I just want to ask you whether you think
18 either of these articles accurately reflects anything
19 in relation to the difficulties experienced between
20 Mr. Mateer and the charity.

21 A. These articles are all a derivative of
22 Mr. Mateer. He's funded everything that's gone on in

1 this and his attacks on our ministries and myself
2 personally.

3 MR. BURN: Thank you.

4 I have no further questions.

5 PRESIDENT SIQUEIROS: Thank you, Mr. Janney.

6 You are free--

7 ARBITRATOR BAKER: Whoa. Whoa. Whoa. Not
8 so fast.

9 QUESTIONS FROM THE TRIBUNAL

10 ARBITRATOR BAKER: Mr. Janney, I will be
11 brief, but I do have a couple of questions. And the
12 first one is my understanding is that you based your
13 experience in the visual inspection you did of this
14 Costa Rican property on your experiences in Florida;
15 is that correct?

16 THE WITNESS: Yes, sir.

17 ARBITRATOR BAKER: Would I have it right that
18 you and Mr. Aven looked at the property from the
19 standpoint of experienced developers rather than from
20 the standpoint of scientific or other engineering
21 perspectives?

22 THE WITNESS: Yes, sir.

1 ARBITRATOR BAKER: And you said--and there
2 was a bit of an exchange, so I want to make sure I got
3 it right that this property was unusual, in your view,
4 physically because of its slope. Would you explain
5 that further to me.

6 THE WITNESS: Yes, sir. And while my
7 experience in developing had been in Florida at that
8 point, I had been in Costa Rica a lot. I was familiar
9 with how the ecology factors are so important, and
10 it's a part of what makes Costa Rica great.

11 But this property coming out of Jacó Beach
12 coming down this way is mostly flat and swampy. You
13 come to this piece of property and then beyond it, it
14 goes again flat down toward Quepos and mostly swampy,
15 a lot of wetlands.

16 This property, however, comes up on a hill as
17 you're coming down the highway. It is vertically
18 high. It comes down vertically all the way down to
19 the water. It was obviously, in looking at it,
20 from--from my standpoint as a developer, you didn't
21 see the issues with the water runoff. You didn't see
22 the issues--it was a pasture. There were cows and

1 horses grazing on it.

2 It was not a wetland. And that I--because
3 I've dealt with wetlands, you can go down and see
4 where the wetland growth is versus growth that is not
5 in a wetland area. And this didn't have any of that.

6 It was clear to see that it was a good
7 development project. It would be built tiered down
8 vertically because of the way it laid. It was not a
9 flat project.

10 There's some property that was being
11 developed next to it that was down in the lowlands.
12 But this property is the property that came down and
13 was a highland.

14 ARBITRATOR BAKER: So, from a developer's
15 perspective, you were unconcerned about potential
16 water accumulation because you believed that the slope
17 of the land would transfer it off the property; is
18 that correct?

19 THE WITNESS: You would have had to have dug
20 a pool on the property to accumulate any water.

21 ARBITRATOR BAKER: Okay. You mentioned that
22 there were cattle on the property. Knowing something

1 about cattle, how many would you say were on the
2 property?

3 THE WITNESS: You know, at different
4 times--when we first came there, there was probably 15
5 to 20 cows on the property--there's a road that
6 divides it--that were fenced in a pasture. And then
7 they had some grazing off ropes down on the part on
8 the other side of the road. There were two or three
9 horses in there also.

10 ARBITRATOR BAKER: Did you learn how long the
11 property had been used as grazing property prior to
12 your putting in the offer?

13 THE WITNESS: I could not answer that.

14 ARBITRATOR BAKER: Okay. Last question. And
15 that is, my understanding from a developer's
16 perspective is that raw land has one set of value
17 associated with it, being for grazing, as this was
18 obviously. Land that is subjected to a permitting
19 process and receives appropriate approvals can have a
20 much different value; is that correct?

21 THE WITNESS: Absolutely. That's been my
22 story of development, is buying it as a simple piece

1 of property that may be grazing land or that kind and
2 then take it through the processes, get all the
3 entitlements, and then it has a whole different value.

4 ARBITRATOR BAKER: Did you and Mr. Aven at
5 the time you put in the purchase offer put together a
6 plan of action in order to commence the permitting
7 process?

8 THE WITNESS: We did. And that was where we
9 hired two firms, EDSA and Norton Consulting, to go
10 through the process to help us to determine. We did
11 know enough, having watched the Marriott project at
12 Los Sueños and other projects going in around, that it
13 was suitable for condominium timeshare projects. And
14 so, that was our early look at this project. And when
15 we began to get those that do land planning,
16 consulting, and all of that, we began to see what
17 could happen with it.

18 ARBITRATOR BAKER: So, I assume you were
19 familiar with the California firm originally because
20 of your work in California. Had they done work on the
21 Marriott property as well?

22 THE WITNESS: I can't answer that. That

1 would be in David Aven's answers.

2 ARBITRATOR BAKER: Okay. Thank you,
3 Chairman.

4 Thank you, Mr. Janney.

5 PRESIDENT SIQUEIROS: Yes. Mr. Nikken will
6 have questions for you.

7 ARBITRATOR NIKKEN: Paragraph 14 of the first
8 declaration--you say that this property was a gem and
9 it was amazing cheap for the characteristic and
10 quality of the piece of land.

11 As a developer, do you ask yourself why it
12 was so cheap, being a gem in the zone that was already
13 in--known for tourism -development, urbanistic then?

14 THE WITNESS: Well, we had been looking, sir,
15 at a lot of properties. And this was a consistent
16 price range in some of the properties around there.
17 However, the other properties did not lay as this one
18 laid as far as the terrain and the ability to develop
19 it.

20 Along with that, things that maybe some
21 people did or did not notice when they looked at it,
22 when you came to the beach on this property, it is the

1 most, in my opinion, beautiful beach in the whole
2 central coast.

3 Just above that property, you have all of the
4 jetties from where the lava flowed out into the sea.
5 But in this area, it's a cove beach. There were just
6 things about this that made us realize this would be a
7 very special property.

8 And it was being offered at a good price.
9 The man selling the property, I'm sure, did not
10 envision the property as we envisioned the property,
11 and that's why we felt like we were getting it at a
12 good price.

13 PRESIDENT SIQUEIROS: I have no further
14 questions, Mr. Janney. Thank you very much.

15 THE WITNESS: Do I leave this notebook?

16 PRESIDENT SIQUEIROS: Yes. Your counsel will
17 collect it.

18 THE WITNESS: Thank you.

19 PRESIDENT SIQUEIROS: Are we ready to proceed
20 with Mr. Shiolen?

21 MR. BURN: We are, sir. We would invite
22 Mr. Shiolen to come to the desk, witness desk.

1 JEFFREY SHIOLENO, CLAIMANTS' WITNESS, CALLED

2 PRESIDENT SIQUEIROS: Good morning,

3 Mr. Shioleno.

4 THE WITNESS: Good morning.

5 PRESIDENT SIQUEIROS: You probably heard me

6 give some instructions to Mr. Janney--

7 THE WITNESS: Yes, sir.

8 PRESIDENT SIQUEIROS: --which, as you have
9 identified, there will be some direct questions from

10 Mr. Burn or his team, a cross-examination by

11 Respondent's counsel, to be followed with--perhaps

12 redirect questions from Claimants' counsel.

13 And as you also identified, if you have any
14 doubts as to the question that is being made to you,
15 you can request a clarification.

16 THE WITNESS: Thank you.

17 PRESIDENT SIQUEIROS: If a question is asked
18 of you, please first answer the question. And then if

19 you have any comment there too , you may clarify that
20 response. But you should first respond to the

21 question.

22 Thank you.

1 DIRECT EXAMINATION

2 BY MR. BURN:

3 Q. Good morning, Mr. Shiolen.

4 A. Good morning.

5 Q. You have in front of you a card. With the
6 permission of the President of the Tribunal, I will
7 ask you to read what is on that card out loud onto the
8 record.

9 A. "I solemnly declare upon my honor and
10 conscience that I shall speak the truth, the whole
11 truth, and nothing but the truth."

12 Q. Thank you, Mr. Shiolen.

13 Could you take the file that is in front of
14 you. In that file, you will find two versions of what
15 should be your first witness statement. The second
16 version is the Spanish language version. The first
17 version is in English. We're just going to quickly
18 check that this is all in order.

19 Could you look at the document, go through it
20 very quickly, just to familiarize yourself with it, in
21 order to check whether or not that does appear to be a
22 copy of your witness statement in these proceedings?

1 A. It appears to be my copy.

2 Q. And you didn't make a second statement, did
3 you?

4 A. No, sir.

5 Q. Are there any changes you wish to make to
6 this statement?

7 A. Not at this time.

8 Q. Could you go to the last page on page 11. Is
9 that your signature?

10 A. Yes, sir, it is.

11 MR. BURN: Thank you. I have no further
12 questions.

13 PRESIDENT SIQUEIROS: Okay.

14 Mr. Leathley. Thank you.

15 CROSS-EXAMINATION

16 BY MS. BOUCHENAKI:

17 Q. Good morning.

18 A. Good morning.

19 Q. I'm going to take you, please, to
20 Paragraph 19 of your witness statement. You state in
21 that paragraph that your work for Las Olas was to find
22 buyers and to develop marketing materials; correct?

1 A. Yes.

2 Q. So, although you said that you did not
3 remember when you acquired the shares, is it correct
4 that you never invested cash in the Las Olas Project
5 but, instead, received your investment in return for
6 services?

7 A. Yes, that's correct.

8 Q. That is what you state, in fact, in
9 Paragraphs 15 and 16 of your witness statement. Were
10 you given any stock certificates?

11 A. No, I never received any stock certificates.

12 Q. Your work was done out of Tampa; correct?

13 A. Yes, ma'am.

14 Q. And how many hours a week did you work on Las
15 Olas?

16 A. It varied during different portions of
17 the--of the Project.

18 Q. So, for example, between 2005 and 2008, how
19 much time would you say you've spent working on
20 developing this project?

21 A. I really couldn't say approximately how much
22 time. It was less in the beginning when we put

1 together the marketing brochures, pamphlets,
2 et cetera. And I collaborated with Mr. Aven. I
3 wouldn't want to guess.

4 Q. But you didn't realize any sales during that
5 period; correct?

6 A. No.

7 Q. And even though your primary responsibility
8 was to attract new investors for the Project at that
9 time; correct?

10 A. That is true.

11 Q. Now, is it the case that while you were given
12 your alleged investment in 2006, you indicate in
13 Paragraph 25 and 26 of your witness statement that you
14 were only preparing to roll up your sleeves in 2007
15 and get really stuck in? That's what you say in
16 paragraph--

17 A. In paragraph 25?

18 Q. 26. Sorry. Last sentence. That is really
19 where you really started, you say, working on this
20 project is 2010. So, I quote, for example,
21 Paragraph 25: "In the first half of 2010, I started
22 to run advertisements in newspapers for the Las Olas

1 Project."

2 And you carry on in Paragraph 26 where you
3 say that you were preparing at that time to roll up
4 your sleeves and get ready--and get really stuck in.

5 A. Yes.

6 Q. So that's--so, essentially, you would admit
7 that before 2010, you haven't done much for the
8 Project?

9 A. No, I didn't say that. The Project was shut
10 down during the global financial downturn in 2008.

11 Q. Right. But you started on this project in
12 2005; correct?

13 A. Yes.

14 Q. Okay. Would you agree with me that no due
15 diligence was made on your part in relation to this
16 investment in Las Olas?

17 A. When you say there was no due diligence,
18 could you explain that to me.

19 Q. So, what type of research studies did you
20 review in order to decide that you were going to
21 engage and commit to this project?

22 A. Well, that was through my conversations and

1 discussions with Mr. Aven, to whom I've had a--an
2 extensive relationship and friendship in business over
3 these last many years.

4 Q. So, independently from Mr. Aven, you did not
5 conduct an independent inquiry into what this alleged
6 investment was going to be for you?

7 A. The question is rather confusing, when you
8 say I didn't conduct a direct due diligence.

9 Q. So, let me rephrase this. Your due diligence
10 into this--you're a business person. You're used to
11 business ventures, and you understand that due
12 diligence is legal; correct?

13 A. Yes, I understand. I understand the term.

14 Q. So, you understand the concept of due
15 diligence; correct?

16 A. Yes, I do.

17 Q. Yes. So, is it correct, then, to say that
18 your due diligence for this particular project was
19 limited to speaking to Mr. Aven?

20 A. No. I wouldn't say that at all.

21 Q. So, what other steps did you take to conduct
22 the due diligence for this project?

1 A. My position was to be involved in sales and
2 marketing. So, when you say what due diligence did I
3 do, that wasn't my position to do the due diligence on
4 this project. That was done by Mr. Aven.

5 Q. Correct. So--

6 PRESIDENT SIQUEIROS: The question was quite
7 clear. So, would you please first answer the question
8 and then make any clarifications that you wish.

9 THE WITNESS: Sure.

10 A. So, what was the question again? Did I do
11 any other additional due diligence?

12 BY MS. BOUCHENAKI:

13 Q. What due diligence did you do to commit to
14 invest in this project?

15 A. I had always been associated with Mr. Aven.
16 He's been a very successful business man. When he
17 began to tell me about this project and how beautiful
18 it was in Costa Rica and the opportunities, I was
19 certainly interested.

20 The--at that time Americans were starting to
21 buy properties in Panama, Costa Rica because of the
22 high cost of real estate in places like Florida.

1 Q. That was not my question, though.

2 So, in terms of--you're a business person.

3 You say in your statement that you have been engaged
4 in various areas of business. So, you understand what
5 I mean by inquiring into a project before committing
6 either capital or resources to a project; correct?

7 A. That's correct.

8 Q. And so, with respect to this particular
9 project, the commitment that you have here in terms of
10 inquiring about this investment was limited to
11 speaking to Mr. Aven; correct?

12 A. That's correct.

13 Q. Now, you limited your marketing work for this
14 project to Florida; correct?

15 A. Yes, that's correct.

16 Q. And according to paragraph 25, again, of your
17 witness statement, your target population was in Tampa
18 where you lived; correct?

19 A. That is correct.

20 Q. Mr. Shiolen, just to summarize your
21 situation here as an alleged investor, you committed
22 no money to this project; correct? And your marketing

1 efforts have not resulted in any sales for the
2 Project. Am I stating this correctly?

3 A. No, I don't believe that's the case.

4 Q. Did you commit any capital to this project?

5 A. No. I already stated I did not commit
6 capital.

7 Q. And your marketing efforts were limited
8 to--from what we see here--an advertising campaign in
9 your area, in Tampa?

10 A. That's correct.

11 Q. Now, Mr.--so, are you aware of the amount of
12 damages that you are asking from Costa Rica in this
13 case?

14 A. Yes. I've reviewed them.

15 Q. And your alleged stake in this investment is
16 2 percent; correct?

17 A. That is correct.

18 Q. And the Claimants are asking for
19 approximately \$92 million; correct?

20 A. I--I don't know if--I'm not familiar with
21 \$92 million. I thought it was 75 or 78 million.

22 Q. So, you're not sure about how much money

1 you're asking the Costa Rican taxpayers to pay you?

2 A. I think with interest, it might be the figure
3 talking about.

4 MS. BOUCHENAKI: Thank you.

5 I have no other questions. Thanks.

6 PRESIDENT SIQUEIROS: Mr. Burn?

7 MR. BURN: Just one second, sir. Just a
8 couple of brief questions, sir.

9 REDIRECT EXAMINATION

10 BY MR. BURN:

11 Q. Mr. Shioleno, you've just been asked a few
12 questions relating to the nature of your investment in
13 Las Olas. You confirmed that you did not inject any
14 capital as such. How would you characterize the form
15 of your investment if not a capital investment?

16 A. Well, I would describe it as being sweat
17 equity based upon an arrangement I made with Mr. Aven,
18 someone that I've done business with for the last 38
19 years.

20 Q. Thank you.

21 And if the Project had not aborted, what do
22 you think you would have been required to do in

1 respect of the sweat to which you referred?

2 A. Well, in addition to helping Mr. Aven with
3 the marketing concepts, putting together the
4 brochures, the literature on the houses that we got
5 from Mussio. In 2010 when the Project started back up
6 again, I began to run advertising in Tampa, to the
7 Tampa Tribune to a million-circulation market.

8 I received somewhere between 40 and 60
9 various different phone calls from interested parties
10 who I discussed the project with. And when I felt
11 they had a viable interest, I would refer them down to
12 David and Jovan.

13 The plan going forward that I discussed with
14 Mr. Aven to get his approval was to begin to bring
15 groups of people down as the Project was coming up out
16 of the ground, maybe groups of 10 and 12, negotiate
17 deals with the hotels and the airlines to bring these
18 groups down. Seeing is believing. When you walk
19 interested parties onto a property such as the
20 Las Olas Project, seeing is believing.

21 MR. BURN: Thank you. I have no further
22 questions at this time, sir.

1 PRESIDENT SIQUEIROS: Mr. Baker?

2 ARBITRATOR BAKER: Thank you, Chairman.

3 Dr. Nikken asked most of my questions, but I
4 want to ask one follow-up to his.

5 You did not have any personal involvement in
6 the preparation of documents for the planning or
7 permitting processes; is that correct?

8 THE WITNESS: Yes, sir. That's correct.

9 ARBITRATOR BAKER: Okay. Thank you.

10 PRESIDENT SIQUEIROS: I have no further
11 questions, Mr. Shiolen. Thank you very much.

12 THE WITNESS: Thank you.

13 MR. LEATHLEY: Sir, if I can interrupt. I
14 think Mr. Mussio is next. Could we request just a
15 five-minute break if that's convenient? Because I
16 expect to examine Mr. Mussio for at least an hour.

17 PRESIDENT SIQUEIROS: Okay. Why don't we
18 take, then, a ten-minute break.

19 MR. LEATHLEY: Thank you, sir.

20 PRESIDENT SIQUEIROS: Okay. Thank you.

21 (Brief recess.)

22 MAURICIO MUSSIO, CLAIMANTS' WITNESS, CALLED

1 PRESIDENT SIQUEIROS: Okay. Are we ready to
2 proceed? Okay. Mr. Mussio, will you be testifying in
3 English or in Spanish?

4 THE WITNESS: In Spanish, please.

5 PRESIDENT SIQUEIROS: In Spanish.

6 Very well. I will give a presentation in
7 Spanish. There is interpretation into English.

8 Mr. Mussio, do you know that you are
9 appearing here as a witness for Claimants at this
10 Hearing?

11 THE WITNESS: Yes, sir.

12 PRESIDENT SIQUEIROS: The procedure to be
13 followed is the following: The counsel for Claimants
14 will introduce you. They will make some
15 questions--put some questions to you focused on your
16 Statement, and this will be followed by
17 cross-examination by counsel for Respondent.

18 Any question you may have, any doubt you may
19 have, please raise it and ask for clarification.

20 Prior to your responding, I will ask you to
21 allow time for the person asking questions of you to
22 finish the question; then you can start with your

1 answer. And if you have any clarification to make,
2 you may do so subsequently.

3 After the Respondent's cross-examination,
4 counsel for the Claimant may ask some further
5 questions to clarify your answers. The Members of the
6 Tribunal may put questions to you at any point in
7 time.

8 Lastly, there is a card on the table before
9 you, and I would ask you to please read the Spanish
10 version of that statement.

11 THE WITNESS: I solemnly declare upon my
12 honor and conscience that I shall speak the truth, the
13 whole truth, and nothing but the truth.

14 PRESIDENT SIQUEIROS: Thank you very much,
15 Mr. Mussio.

16 MR. LEATHLEY: I'm not getting all the
17 translation on English. I just wonder if we could do
18 a test of Mr. Mussio's microphone, because I was
19 hearing a translation on yours but not Mr. Mussio.

20 PRESIDENT SIQUEIROS: There might be an audio
21 problem.

22 (Pause.)

1 (Comments off microphone.)

2 THE WITNESS: My name is Mauricio Mussio
3 Vargas. I am an architect. Very well. I will read once
4 again the witness statement simply—I solemnly declare
5 upon my honor and conscience that I shall speak the
6 truth the whole truth, and nothing but the truth.

7 THE WITNESS: Very well. Once again, my name
8 is Mauricio Mussio.

9 Now you can hear me? Very well.

10 PRESIDENT SIQUEIROS: Mr. Mussio, I also
11 suggest, since the questions will be made in English,
12 will be asked in English, you have the earphones
13 there, to listen to the question in Spanish. You will
14 have to wear the earphone to listen to the
15 interpretation.

16 MR. BURN: Excuse me. I just had to retrieve
17 the files that were deposited a distance away.

18 DIRECT EXAMINATION

19 BY MR. BURN:

20 Q. Mr. Mussio, could you confirm for the record
21 that your full name is Mr. Mauricio Martin Mussio
22 Vargas?

1 A. Correct. Mauricio Martin Mussio Vargas.
2 That's my name.

3 Q. Thank you.

4 You've already read onto the record the
5 affirmation regarding the truthfulness of your
6 evidence.

7 Could you take from the three files to your
8 right the one that is marked "Volume 1."

9 At the top of the papers, there should be
10 the--a copy of the Spanish original of your first
11 statement.

12 Do you see that?

13 A. Yes?

14 What I want you to do is just flip through
15 the pages just to make sure that you're happy that
16 that is indeed a copy of the Statement that you made
17 for these Proceedings.

18 Does that appear to be an accurate copy of
19 your statement?

20 A. Yes, it is.

21 Q. Thank you.

22 Are there any changes, any amendments you

1 need to make to that Statement?

2 A. No, sir.

3 Q. Now, if you look at page 36, there's a
4 signature there.

5 Is that your signature?

6 A. Yes. It's my signature.

7 Q. Thank you.

8 Before handing over to counsel for the
9 Respondent, I just wanted to ask you a few questions
10 for the benefit of the Tribunal.

11 Could you describe for the Tribunal a little
12 about your--the company for which you work.

13 A. Okay. Maybe, if you allow me, I would like
14 to--I'm sorry, in Spanish.

15 I will speak maybe about the historical part
16 of the company and what it does, what the company
17 itself does; and about the two partners. Mr. Madrigal
18 and I, we are the two partners of this company.

19 Mussio Madrigal is the company that did the
20 design for Las Olas. It has a prior history. Its
21 name was Mussio Madrigal Arquitectos. This was more
22 or less in 1997, '98, when it began working--when I

1 began working with Mr. Edgardo Madrigal, we began
2 doing relatively small projects, and the projects
3 started becoming medium-sized projects and then large
4 projects; and then we established the first company
5 that is still alive, Mussio Madrigal & Arquitectos,
6 it's a corporation.

7 And before that, Architect Edgardo Madrigal
8 and I, we were colleagues at some of the university
9 courses. Both Architect Edgardo Madrigal and I, we
10 are, to a certain extent, the first professionals in
11 our families. So, that sort of brought us together.

12 In 2004, we saw a business opportunity where
13 a Mr. Sebastián Tenore (phonetic), who has a lot of
14 businesses in Costa Rica, invited us to become part of
15 a joint venture where he would be the capitalist
16 partner and we would be contributing our professional
17 services, and we did establish the corporation, Sotela
18 Mussio Madrigal, and at that point, the real estate
19 boom began.

20 A large amount of work began arriving in our
21 country, and we were in a position--in a good
22 position--or in a good area of the city, and through

1 Mr. Sebastián, we began making business contacts, and
2 we began working on large projects, 100 hectares, 150
3 hectares.

4 The largest project we developed was 238
5 hectares. At that point, Mr. David's group came and
6 hired us. That's the context I wanted to give you.

7 Now, as for as Edgardo Madrigal, the
8 architect, he has truly been a blessing. He's an
9 incredible person, very honest, very hard-working,
10 very interested in details. He's truly somebody very
11 moderate in that--well, I'm more impulsive, and he's
12 calmer, and that kind of balance led to very good
13 synergy between us.

14 Mr. Madrigal, when we became partners, he
15 already had had long-standing experience in the design
16 of neighborhood--or, rather, neighborhood residential
17 sectors. We're speaking about millions of square
18 meters. And my strong point is handling working with
19 customers and the inspection and construction itself.

20 So, basically, it's been 20 years since we've
21 become partners; and more than a partner--well, we've
22 always seen each other as more than friends, almost

1 like brothers. We see each other every day. I see
2 him more than my family. He's someone really
3 incredible, incredibly honest, very correct person.

4 As for me, I come from a family of builders.
5 My grandfather came to the country, invited by the
6 Government of Costa Rica, to build a very beautiful
7 building, a postal building. It's called--he stayed.
8 He got married.

9 All my uncles and father work in construction
10 too. We are a large family, ten brothers and sisters.
11 Our house was always--something was being built there,
12 a room or something. So, I've been in construction
13 forever.

14 In 1999 I went to the Architects Association.
15 That is compulsory to become a member of the
16 Architects Association in order to be able to be an
17 architect.

18 And in 2001, I went into a bidding process
19 for social housing done by the University of Lund in
20 Sweden in which a number of people from Latin America
21 participated, and I got a scholarship.

22 And in 2002, I took a graduate course called

1 "Housing and Development," always aimed at social
2 benefit to develop low-income housing.

3 And by 2004, we began--well, the large boom
4 of real estate development began.

5 And recently, and to conclude, I would like
6 to say that I obtained my Master's in Project
7 Development with emphasis in construction based on the
8 PMI, the Project Management Institute of the
9 United States. Basically, that is the context of our
10 experience.

11 I maybe forgot to mention, and if I may, I
12 would like to add that our company's an adaptable
13 company. It's a company that can build from a house
14 to a project, for instance, of 238 hectares, as I
15 mentioned. That is large. We do the design part
16 while everything having to do with the basic studies,
17 preliminary studies, the draft project; of course,
18 applying all standards and rules and laws and
19 regulations. We do the negotiation part or the
20 paperwork, and we do the inspection normally, if the
21 client so wishes.

22 Basically, that is what we do.

1 Q. Thank you, Mr. Mussio.

2 Just one other question, but I do invite you
3 just to keep your answer relatively brief. I'm sure
4 the Tribunal helped--is helped by the very full answer
5 you gave to this, but before I hand over, I just want
6 to ask you one very brief question.

7 In your Statement, you refer to being on the
8 Board of Directors of what in Spanish is called the
9 INVU, and in English translates to the National
10 Institute of Housing and Urban Development.

11 Just for the benefit of the Tribunal, can you
12 briefly explain what the INVU is and what it means to
13 be a board member on the INVU.

14 A. In--well, by the last year of President Laura
15 Chinchilla's term, I received an invitation to become
16 a member of the board of INVU, I-N-V-U, which is the
17 National Institute for Housing and Urban Development.

18 And it is an autonomous entity of the
19 Government of Costa Rica. It has its own regulations.
20 INVU, I-N-V-U, makes efforts to carry out low-income
21 housing projects. I've been a member of the board
22 since the last year of President Laura Chinchilla's

1 term, and I still have about a year and a half to go
2 as a member of INVU.

3 INVU, as part of its roles, in addition to
4 manage low-income housing projects, also has to see to
5 all the regulations governing urban development in the
6 country, urban renewal, the law for land division,
7 rules that regulate urban development in Costa Rica.

8 It's been an interesting and challenging
9 work. It's actually a moral commitment when we
10 have--when we accept this type of position.

11 It is a political position.

12 When Mrs. Laura Chinchilla's administration
13 and--when she and the Government council requested my
14 participation, they did so because of the technical
15 substance of my know-how more than for political
16 reasons. I wanted to clarify that.

17 Because at that point, the board did not have
18 a technical branch. It sort of was in its teenage
19 years regarding the technical part, the regulations,
20 condominium laws, land division law. It was still in
21 an intermediate term. In other words, those
22 regulations were somewhat old, 30 or 40 years old.

1 So, when I became member of the board, it was
2 in order to make contributions in that area, in the
3 technical area.

4 MR. BURN: Thank you, Mr. Mussio.

5 I have no further questions at this point.

6 PRESIDENT SIQUEIROS: Thank you.

7 MR. LEATHLEY: Thank you, Mr. President.

8 CROSS-EXAMINATION

9 BY MR. LEATHLEY:

10 Q. And good morning, Mr. Mussio.

11 A. Good morning.

12 Q. My name is Christian Leathley.

13 MR. LEATHLEY: Actually, I'm sorry. There's
14 one procedural point which is, sir, in relation to our
15 521 document we mentioned, I will be using it during
16 the cross of Mr. Mussio. So, can we distribute copies
17 at least so you have a hard copy. We can make sure it
18 goes into your files properly.

19 PRESIDENT SIQUEIROS: Okay.

20 MR. LEATHLEY: It is in the documents, and
21 hopefully Mr. Burn will recognize it as what has been
22 previously discussed as C-295.

1 I see Mr. Burn looking quizzically at the
2 other folders on his desk. They are simply
3 because--we will be referring to a couple of documents
4 from the record, which we were unable to get into the
5 cross-bundles in time this morning. So, you'll be
6 able to source them from your record. I'll source
7 them appropriately and reference them.

8 MR. BURN: And I'm sure the copies of the
9 Witness Statements are properly there as well in the--

10 MR. LEATHLEY: Oh, yes. Yes.

11 MR. BURN: Thank you.

12 BY MR. LEATHLEY:

13 Q. Thank you.

14 And good morning, Mr. Mussio.

15 A. Good morning.

16 Q. As I was saying, my name is Christian
17 Leathley. I'm here on behalf of the Respondent, Costa
18 Rica.

19 And you've provided one Witness Statement in
20 this Arbitration; is that right, sir?

21 A. Yes. Yes.

22 Q. And that was in August of 2016?

1 A. Yes. I believe so, yes.

2 Q. And you chose not to present a Witness
3 Statement to accompany the Claimants' Memorial of
4 April 2016; is that right?

5 A. Let me--can you translate, please?

6 Q. Someone else will.

7 A. Okay.

8 Q. Let me repeat the question. You chose not to
9 provide a Witness Statement to accompany the
10 Claimants' Memorial in April of 2016; is that right?

11 A. I don't remember having refused to make a
12 Statement.

13 Q. And your partner is Mussio Madrigal, you
14 said; is that right, sir?

15 I'm sorry. Edgardo Madrigal?

16 A. Correct.

17 Q. And--but he has not provided a Witness
18 Statement in these Arbitration proceedings; is that
19 correct?

20 A. Actually--

21 Q. It's a yes-or-no answer, sir.

22 A. Yes.

1 Q. He has provided--

2 A. With me, together.

3 Q. I don't understand, sir.

4 You provided your testimony in your Witness
5 Statement. Where is Mr. Madrigal's testimony in this
6 Arbitration?

7 Sir, it's a simple question. Does--has
8 Mr. Madrigal submitted a Witness Statement in this
9 Arbitration? It's a yes-or-no answer.

10 A. No.

11 Q. Okay. But you're testifying on his behalf.

12 A. Yes, as an architectural company, yes.

13 Q. In Paragraph 61 of your Witness Statement--

14 A. Could I look at it?

15 Q. Yes.

16 61. First Witness Statement--well, only
17 Witness Statement.

18 It's on page 30. I'm--I'm going to be
19 referring, sir, to an English version.

20 Sorry. Paragraph--look at 61. And there,
21 you say, "If, in dealing with SETENA, I had decided to
22 declare a particular area to develop, and then not

1 respected that or given false details, this would have
2 constituted bad faith," in your opinion; is that
3 correct?

4 This is in the second half of that paragraph.

5 Can you see that wording there, sir?

6 A. I'm reading it right now.

7 Q. Can I help you at all with finding where it
8 is in the paragraph?

9 A. I'm reading the previous paragraph to know
10 what it was referring to.

11 Q. If you feel you need to read the paragraph
12 before, I'll let you to do that, or your counsel can
13 redirect you to Paragraph 60 if he wishes. But let's
14 look at Paragraph 61, because that is where my
15 question is focused.

16 There you say that "If, in dealing with
17 SETENA"--you can see actually--I think there's only
18 two references to SETENA in that paragraph. So, go to
19 the first reference where SETENA appears, on page 33
20 of your Spanish version.

21 "If, in dealing with SETENA, I had decided to
22 declare a particular area to develop and then not

1 respected that or given false details," then what
2 you're saying and you're referring in early part of
3 that sentence, you're saying it would have been bad
4 faith; is that correct?

5 Is that still your testimony, sir?

6 A. Yes, definitely, what is here and what I'm
7 saying.

8 I'm going to read it well, and I'll
9 answer--I'll answer you correctly.

10 Q. To whether that sentence is still your
11 testimony.

12 A. Yes, it is still my testimony, of course.

13 Q. Thank you.

14 And so, providing false details would
15 constitute bad faith, in your opinion.

16 A. Yes, definitely, of course.

17 Q. And that would presumably include providing
18 information that was knowingly inaccurate or
19 incomplete.

20 A. Can you repeat the question?

21 Q. Yes.

22 You just said that providing false details

1 would constitute bad faith. And so, I asked then
2 whether that would presumably also include that
3 providing information that was knowingly inaccurate
4 and incomplete would also constitute bad faith.

5 A. As far as I can tell regarding this specific
6 point, yes.

7 Q. Thank you, sir.

8 And you discussed in the opening part of your
9 Witness Statement--and I'm referring generally now to
10 your Witness Statement--the experience that you have
11 had in Costa Rica.

12 And, in particular, in Paragraph 9, you
13 say--Paragraph 9 is a very short paragraph--you say,
14 "It's normal for problems to occur."

15 Is that still your testimony today, sir?
16 It's the third sentence.

17 A. Maybe the important thing is to give the
18 context of what I'm making reference to.

19 Q. The paragraph here refers to the preparation
20 for large projects, the development of large projects;
21 and then you say in the third sentence, "It is normal
22 for problems to occur."

1 Is that still your testimony today?

2 A. Yes, definitely large project always will
3 include a number of challenges that need to be faced.
4 If, at that point, I gave that perspective and said
5 it's a problem, it could be--also be seen as a
6 challenge, yes, definitely.

7 Q. Thank you.

8 A. There are many variables that are involved in
9 a large project, many social, political, economic--in
10 any case...

11 Q. Yes. And presumably technical and
12 environmental problems; is that right, sir?

13 A. Yes, totally technical, and the environmental
14 part--well, the company always delegates that to
15 experts.

16 Q. And this is to be expected when your projects
17 interface with the many stages that you've set out in
18 your Witness Statement. And, for example--and I'm
19 thinking of Paragraph 17. There, you refer--and I'm
20 only going to refer to it generally, sir, so, I think
21 you bold--I think you highlight certain things in
22 these upcoming paragraphs.

1 You talk about basic studies in Paragraph 17.
2 In Paragraph 18, you talk about preliminary studies.
3 You talk about preliminary designs in Paragraph 20.
4 And you talk about the drafting of the building plans
5 in Paragraph 21; is that right, sir?

6 A. With reference to this specific point, these
7 items here--

8 Q. The question was simply whether those were
9 what your paragraphs were generally talking to. I'm
10 not asking to go into any further detail than that.
11 You--

12 A. Not necessarily. Not necessarily. These
13 five items I established by the Federate Association
14 of Engineers and Architects.

15 In a project this large, the number--

16 Q. I'm sorry, sir. The question I have to
17 ask--your counsel can always ask later.

18 My question is whether Paragraphs 17, 18, 20,
19 and 21 are referring to the basic studies, preliminary
20 studies phase, preliminary design, and the drafting of
21 the building plans. That's what your testimony
22 appears to me. I just want to confirm that that's

1 what you're talking about.

2 A. Correct.

3 Q. Okay. Thank you, sir.

4 And in Paragraph 23 of your Witness
5 Statement, you list numerous institutions in
6 Costa Rica that you have to deal with in the course of
7 your work.

8 Do you see Paragraph 23, sir? It comprises a
9 lot of subparagraphs, letter A through, I think, to H.

10 Do you see that, sir?

11 A. Correct.

12 Q. And then you--I'm sorry. I need to wait for
13 the translation.

14 And then you say in Paragraph 24 of your
15 Witness Statement, you say, "Generally speaking, there
16 is a lack of coordination among the government
17 entities involved in the obtaining of the
18 environmental building permits."

19 That's your testimony, is it, sir?

20 A. Correct.

21 Q. And I assume your observations are based on
22 your experience; is that right?

1 A. Totally.

2 Q. And, Mr. Mussio, I assume that you come
3 across others in your line of work in Costa Rica as
4 well; is that correct?

5 A. With other professionals who have the same
6 opinion? With many.

7 Q. Thank you.

8 And they share your views?

9 A. 100 percent, yes.

10 Q. Thank you, sir.

11 In the opening part of your Witness
12 Statement, you also talk about the care that you take
13 in relation to the environmental aspects of your role;
14 correct?

15 A. Yes, sir.

16 Q. And in particular, in and around Paragraph 14
17 of your Witness Statement, you say that there are
18 cases where you--and I'm now quoting--"have identified
19 an area that might be classified as a wetland."

20 I think in Spanish, you say "puede ser." Do
21 you see that in Paragraph 14?

22 A. Yes, sir.

1 Q. And I assume that at the outset, it could be
2 said--it could be the case that it's not necessarily
3 clear whether there is an--whether the area does have
4 a wetland, which is why you go on in the same
5 paragraph, just after about halfway, you say, "Nothing
6 is left to chance; thus minimizing uncertainty and
7 therefore reducing risk."

8 A. Correct.

9 Q. Thank you, sir.

10 And nothing is left to chance because if a
11 wetland were to be found, then this has obvious
12 consequences for any project; correct?

13 A. Correct.

14 Q. Such as suspension.

15 A. Well, in case the corresponding entity,
16 which--that is to recommend--

17 Q. That's not my question. My question is
18 whether in theory, if the consequence of finding a
19 wetland, a project could be suspended.

20 We'll come on to this project. We'll have
21 plenty of time. We're going to talk about this
22 project in detail.

1 A. Okay. Well, if hypothetically it were a
2 wetland, we would have known that before--

3 Q. You're answering a question I haven't asked.
4 We will come onto the wetlands themselves.

5 My question is simple: In theory, if a
6 wetland were to have been found on any project, then
7 the consequence could be the suspension of the
8 project, by operation of the law.

9 A. Not necessarily. But not necessarily.

10 Q. But then you appreciate that it could; maybe
11 or maybe not?

12 A. Well, I think that your question has more a
13 legal than technical substance, and that is my
14 experience, the technical aspect.

15 Q. Thank you. Let's move on.

16 And I wonder, you say that you have dealt
17 with the permitting process, with the technical
18 details. I'm assuming you're relatively familiar with
19 certain of the legal requirements, is that correct, in
20 order to do your job?

21 A. Yes. We do have a general idea, a general
22 idea, of everything that will happen in the project.

1 But in the final analysis, there are some aspects that
2 are not only legal, but also technical, that we
3 necessarily have to delegate to a hydraulic engineer,
4 a geologist, a biologist, a forestry engineer, for
5 legal advice, too. That definitely is done that way.

6 But we do have a general know-how, but not
7 detailed.

8 Q. Thank you, sir.

9 And presumably, that's because ecosystems
10 such as wetlands are protected by Costa Rican law.

11 A. I also think that that question requires a
12 legal response, and that's what I delegate.

13 In other words, if the expert, the one we
14 hire, shows through evidence that there's a special
15 situation, then that comes to me, where I do the
16 design. And that is--we do envisage it, we isolate
17 it, or we leave it, or--well, to give you an example,
18 creeks have a characteristic of certain protection
19 that is done by the INVU, and generally set a level
20 curve--papers and designs are given, and then we'll
21 respect the setback. It can be 10, 15, or 50 meters.
22 That is determined by the law, and that is determined

1 by an institute--by the Institute itself.

2 Q. Thank you.

3 And wetlands are also protected by the law;
4 correct? You don't know?

5 A. Well, it would be based on my scarce
6 knowledge, I understand, yes.

7 Q. Scarce knowledge.

8 A. With regard to that specific aspect, well,
9 the environmental issue in Costa Rica is a very
10 complex one. So, I would repeat that what we do in
11 this case, specifically in Las Olas, we hired a
12 geoenvironmental business, which is a business that
13 has dealt with environmental issues, big projects, the
14 Highway 27, and the environmental complexity is
15 immense. So, we hire experts.

16 So, I would repeat that I know it--what it
17 might be, and I have stated in my Witness Statement
18 what we know about the project.

19 Well, going back to the structure that we use
20 in the business--

21 Q. Yes, thank you, sir. We'll talk about the
22 structure of your business in a moment.

1 I wonder if I can show you Article 45.

2 MR. LEATHLEY: This is C-185 for the record.

3 BY MR. LEATHLEY:

4 Q. This is the organic environmental law. In
5 Tab 2 of that first binder--you probably want to put a
6 pen in your Witness Statement, because you may be
7 going back to that.

8 And we're looking for Article 45.

9 Actually, let's look at Article 41.

10 Do you see that, sir? It says: "Interes
11 Publico"?

12 A. Correct.

13 Q. And I'll read the Spanish. (In Spanish.)

14 "Wetlands are declared to be a public
15 interest in their conservation because of their
16 multiple use where they're protected by--or not
17 protected by the law that governs in this material."

18 Sorry, sir. Did I read it--there's a
19 translation going on in English, and I want to make
20 sure that anyone who's listening in English can hear
21 the end of that before I ask the next question. It's
22 particularly important for the people who are

1 transcribing.

2 I'd also like you to look at Article 45. I
3 think you may have to turn the page.

4 Again, I'd like to read this to you.

5 It says: "Prohibition: Activities are
6 prohibited that would interrupt the natural cycles of
7 wetland ecosystems, such as the construction of dikes,
8 which would handle the flow of Continental or ocean
9 waters, their drainage, their drying, their filling,
10 or any other alteration that could cause deterioration
11 or elimination of such ecosystems."

12 You see that, sir?

13 A. Would you like me to refer to this?

14 Q. Is this the first time you've seen those
15 articles?

16 A. Well, I have really gone into what really
17 most impacted the design as far as the environment is
18 concerned.

19 Q. So, this is not the first time.

20 A. No. In reality, though, it's the first time
21 that I studied it in this manner.

22 Q. Now, even if a protected ecosystem like this

1 is found, it is part of Costa Rican law to do what you
2 say in Paragraph 23G? Let's go to 23G of your Witness
3 Statement.

4 And there, you say--please just read the
5 first sentence of Paragraph 23G.

6 A. "The National Technical Secretariat for the
7 Environment, this is a body that is under MINAE and
8 has the responsibility to ensure all urban
9 development, construction, or infrastructure, so that
10 it complies with environmental regulations, must be
11 developed affecting the environment in any way and
12 mitigate adverse effects to the environment that any
13 project may generate."

14 Q. Yes. To mitigate, we have the--only
15 environment that the project might generate.

16 And in Paragraph 23G, where you're talking
17 about SETENA, this is your experience of them,
18 correct, that they will want to harmonize any
19 environmental sensitivities with a developer's plan to
20 construct; correct?

21 A. Can you repeat the question, please?

22 Q. In this same paragraph, 23G, where you're

1 talking about SETENA, this is your experience of them;
2 correct?

3 So, I tell you what. You spoke a little bit
4 earlier in English. If you're happy for me to speak
5 slowly, it may be easier for me to speak in English,
6 you listen to it in English, and if there's
7 difficulty, we can listen to a translation.

8 A. Yes. Well, we have been going from one place
9 to another, and I don't really understand the
10 question. I don't know if your question is referring
11 to some of the points that you already mentioned.

12 Q. My question is referring--just to the
13 question I'm asking you right now. You're talking
14 about SETENA in Paragraph 23G. And you're saying that
15 they will want to harmonize any environmental
16 sensitivities with the developer's plan to construct;
17 is that correct?

18 A. Yes. Any project has an impact. Any
19 project. The idea is that through SETENA's
20 requirements--for example, some call for very detailed
21 studies; others are more simple in keeping with the
22 impact that the project might generate.

1 But SETENA's function is to dictate what the
2 rules are, to see what the impact is, and so, of
3 course, seeking the urban development and project
4 development without it affecting aggressively the
5 environment.

6 Q. And so, if the common goal of everyone,
7 you--the authorities and environmentalists, is to
8 protect wetlands, then I suppose, if there might be a
9 wetland, one has to ensure that the authorities are
10 given all the relevant information; would you agree?

11 A. Well, you--your question has two parts. It
12 has two parts. You say--well, perhaps you can repeat
13 it. I can answer the first part and then I can answer
14 the second part of your question.

15 Q. Let me ask the second part. If there might
16 be a wetland, one has to ensure that the authorities
17 are given all relevant information; correct?

18 A. Well, the correct thing would be that the
19 agencies which are experts in the field--well, would
20 tell one, this way you present the information in a
21 less--in the Las Olas project, it was clear--if you
22 would allow me to delve into this here because it

1 really supplements the answer I want to give.

2 Q. That's not my question, sir. And we then
3 come in a moment. That's not my question Sir and it's
4 very important that you answer my question.

5 You will have time to talk about the project
6 in a moment, and your counsel can redirect if he feels
7 necessary.

8 My question is: Building on your comments
9 earlier, you said that it's important--you said that
10 it would be bad faith if there was false or
11 intentionally incorrect or incomplete information.
12 So, I'm asking whether--if there might be a wetland,
13 one has to ensure that the authorities are given all
14 the relevant information. It doesn't seem to be a
15 complex question to me, sir.

16 A. No, it's not a complex question, but it needs
17 to be clarified. Well, if you say it's--whether it's
18 a wetland or not, that should be the agency of the
19 State. It's not me, not even expert that I have.

20 In this case, at that point, it was SINAC,
21 the National System for Conservation Areas. They need
22 to tell us what's going on environmentally, or in the

1 case of Las Olas, whether there are wetlands or not.

2 Q. Are you aware of the burden of proof that a
3 developer is under when submitting a D1 Application?

4 A. Excuse me. I don't know what you mean by
5 "burden of proof."

6 Q. Well, let's turn to C-207. This is the
7 Biodiversity Law. And that's in Tab 4 of your binder.

8 You just said to me you don't understand
9 what's meant by (in Spanish [carga de la prueba]), or
10 burden of proof. Look at Article 109. Do you see
11 that, sir? Is this the--yes. Is that the first time
12 you've looked at this article?

13 A. Yes. It is the first time that I have seen
14 it.

15 Q. Let me read it to you, sir.
16 Article 109--this is C-207. Hopefully the Tribunal
17 will have it to hand--it says, "The burden of
18 proof--the burden of proof of the absence of
19 pollution, degradation, or nonpermitted impacts will
20 correspond to the person requesting the approval, the
21 permit, or access to the--to biodiversity or the
22 person who is accused of having actually caused

1 environmental damage."

2 And so, the risk is on the developer, since
3 the damage--the risk of damage is assumed by the
4 developer and the owners; correct?

5 A. In the case related to my participation, what
6 we did was a draft project--

7 Q. We'll get on to your experience. We'll get
8 on to the projects. I'd like to look at Article 109.
9 I appreciate you say you haven't seen it before, but
10 this is a pretty important concept about who has the
11 burden.

12 And I'm asking you whether, from reading this
13 article, or from your experience with the number of
14 years that you've explained you've been working in
15 this field, your understanding is that the risk is on
16 the developer. And in fact, sir, the risk is also on
17 you, your consultancy.

18 MR. BURN: In order to aid Mr. Leathley, can
19 I just suggest that the witness is taken to
20 Article 105.

21 MR. LEATHLEY: You can ask that on redirect,
22 sir.

1 MR. BURN: Well, you're not just not giving
2 the witness the chance to understand the question.

3 MR. LEATHLEY: Then you can ask on redirect.

4 THE WITNESS: What I can't find is
5 environmental damage. What environmental damage? In
6 this case? What I don't find is the environmental
7 damage, because we never initiated works on our part.

8 BY MR. LEATHLEY:

9 Q. So, is this the first time, sir, that you've
10 been encountered with this concept of who has the
11 burden of proof?

12 A. Perhaps, if you would allow me, sir--we
13 delegate this. We have to delegate this. It's
14 materially impossible, in my opinion--not just my
15 firm--rather that of my colleagues--can manage all of
16 these legal conditions or characteristics regarding
17 the environment, when there's a project.

18 As far as I know, there is no consulting,
19 architectural consulting firm, that generates this
20 kind of master plan or projects for urban development
21 that also have an environmental consulting firm. We
22 always subcontract that. It's always subcontracted.

1 The fact that I don't know the concept of the
2 burden of proof and where it is here to say the truth,
3 I don't know it. It's the first time I've seen it.
4 But I am 100 percent sure that the consulting firm,
5 the environmental consulting firm, does understand
6 these concepts. Without a doubt.

7 Q. But you're the environmental consulting firm.
8 But you're explaining you don't understand it.

9 A. No. There's something wrong in your
10 question.

11 I am not the environmental consulting firm.
12 I am the architectural firm. I'm the architectural
13 firm.

14 Q. Understood, sir. But you're giving advice in
15 this context on the D1 Application; correct?

16 A. No. No, sir. There's a concept that's off
17 here.

18 Everything that has to do with drawing up D1
19 and preparation of Environmental Viability is given to
20 a consulting firm. It's Geoambiente. They prepare
21 everything, all the protocols. Clearly, it is a
22 multiprofessional endeavor.

1 Just to give you an example, just to give you
2 some context, within the protocols, the environmental
3 protocols, for example, there is one on geology. The
4 environmental firm requests that we hire the number of
5 tests stipulated by SETENA, depending on the number of
6 hectares of the project, that we hire a laboratory
7 that is--specialized, does the testing, and then that
8 is passed on to the environmental firm.

9 Now, with regard to archeology, it is a
10 protocol that must be carried out. We have to attach
11 it to the Environmental Viability.

12 What we do do is to support the document
13 through our firm--well, through our signatures, excuse
14 me. And I believe that Edgardo Madrigal signed it for
15 submission to--for the Environmental Viability, but,
16 of course, there are multiple professionals that have
17 prepared this document.

18 But just to clarify, the firm Sotela Mussio
19 Madrigal is an architectural firm, and Geoambiente is
20 the business that does the Environmental Viability
21 part.

22 Now, if you would also allow me--

1 Q. Excuse me, sir.

2 And in Paragraph 23G, you say that during the
3 period of the application for the Environmental
4 Viability that you considered some sensitive-care
5 areas.

6 And I think if you go to the last
7 page--Paragraph 23G is a long paragraph, and I would
8 turn on the last page on which it appears.

9 Do you recall talking about sensitive-care
10 areas?

11 A. Wonderful that we're here.

12 Q. Do you remember talking about--

13 A. Yes, of course. Here, you see the good faith
14 that we have, where we--without being experts,
15 considered where there must be attention given.

16 Q. Yes, because you want to minimize risk;
17 correct?

18 A. Yes, totally.

19 Q. And minimizing this risk and sharing
20 information with--with the authorities is not just a
21 checking-of-the-box exercise, is it?

22 A. Can you repeat the question?

1 Q. Yes--no, I'm not going to repeat the
2 question. Sorry. I won't ask it.

3 Let's look at your Paragraph 23G. You talked
4 about sensitive areas. And in that paragraph, you
5 mention that there were sensitive-care areas that were
6 designated by your firm; is that correct?

7 A. May I give you the context?

8 Q. No, sir. It's a yes-or-no answer as to
9 whether you designated sensitive-care areas.

10 A. Yes.

11 Q. And these areas were never disclosed to
12 SETENA, were they?

13 A. SETENA was there.

14 Q. I'm talking about the D1 Application, sir.

15 A. In D1 Application is based on the information
16 that we have from government entities. If government
17 entities do not--or did not identify these areas as
18 such, then I don't understand why we would have to
19 include it.

20 Q. Sir, the burden of proof, as we've just seen
21 from Costa Rican law, puts it on the developer.

22 MR. BURN: Sir, I have to object--

1 MR. LEATHLEY: No, I'd like to know--

2 MR. BURN: No, I'm sorry. I have to object
3 because this question--this line of questioning has
4 been put to the witness based on a fundamental
5 misunderstanding of the law to which Mr. Leathley has
6 taken the witness. There is a fundamental mistake of
7 law that is underlying this line of questioning.

8 I'm happy for it to proceed. It's a waste of
9 time because it's based on an error of law, but--and
10 we can come back and fix it. But I do need to object
11 to make it very clear to the Tribunal that this is
12 based upon a fundamental error.

13 MR. LEATHLEY: Mr. President, I vehemently
14 object to testimony from opposing counsel during my
15 cross-examination. I don't think I've ever seen that
16 in my life. If Mr. Burn has a desire to redirect the
17 witness, he may do so. We're here to examine the
18 knowledge of Mr. Mussio. Let me examine his
19 knowledge.

20 PRESIDENT SIQUEIROS: Please proceed.

21 But bear in mind that Mr. Mussio has already
22 acknowledged that he wasn't aware of the burden of

1 proof established under--as is established under the
2 Biodiversity Law.

3 And also, as Mr. Baker wishes to have clear,
4 that the witness is not a lawyer, so, his knowledge of
5 the law or not in this context should be limited as to
6 his experience as a firm of architects in developing a
7 project in Costa Rica.

8 MR. LEATHLEY: Thank you, sir.

9 BY MR. LEATHLEY:

10 Q. The sensitive-care area--so, you talk in your
11 testimony about the D1 Application. It was your
12 voluntary testimony to describe your involvement in
13 the D1 Application process to SETENA; is that correct?

14 It's a simple yes or no. Does your Witness
15 Statement deal with the D1 Application?

16 A. Yes.

17 Q. This is an application process that is
18 submitted to SETENA; correct?

19 A. D1, yes. Yes, sir.

20 Q. Thank you.

21 And the SETENA--the application, the D1
22 Application that was submitted to SETENA for Las Olas

1 Project for the Condominium Section did not identify
2 the sensitive areas that were identified in your
3 witness testimony.

4 A. Frankly, I don't know.

5 Q. Thank you.

6 Let's go to Paragraph 13 of your Witness
7 Statement, sir. Here, you say that your experience
8 with wetlands is extensive. The English version says
9 "broad," but the Spanish version says "extensiva"; is
10 that correct?

11 A. With all due respect-Is that a yes or no or I
12 may delve into this?

13 PRESIDENT SIQUEIROS: The answer should be
14 yes or no, and thereafter, if you would like to make a
15 clarification, you may.

16 THE WITNESS: Yes, and if you would allow me
17 to clarify.

18 BY MR. LEATHLEY:

19 Q. Yes, please.

20 A. Okay. Perhaps here we need context and
21 understand how the dynamics of the climate work--it's
22 tropical. It rains a lot.

1 MR. LEATHLEY: I'm sorry, Mr. President. I
2 will interrupt this question. In light of the speech
3 we're about to get, I'd like to rephrase my question.

4 BY MR. LEATHLEY:

5 Q. Does the first line of your Witness Statement
6 in Paragraph 13 say that "My experience with wetlands
7 is extensive"?

8 A. May I expand on this?

9 Q. It's a yes-or-no question. I'd like to know
10 whether your Witness Statement is correct, as I'm
11 reading that, if that's still your testimony today.

12 You can correct that sentence if it's--or we
13 can strike that sentence in its entirety. But you
14 affirmed earlier today that that's your testimony.
15 I'd just like to confirm--because I have many more
16 questions, sir. We'll be here all day, if need be,
17 but I've got many more questions.

18 I'd like to know if that is still your
19 witness testimony, that first part of your sentence.
20 We'll come on to the details of the project. I know
21 you're keen to talk about it. We're very keen as
22 well.

1 A. Yes.

2 Q. You go on to say in this same Paragraph 13,
3 that you are familiar with the characteristics of
4 wetlands. That's a little bit further down in the
5 same paragraph.

6 Do you see that, sir?

7 A. Yes. Yes.

8 Q. Now, you refer in your Witness Statement to
9 the report prepared by Mr. Protti. And you criticize
10 Mr. Protti's report. And in particular, you say that
11 his reference to the swampy-type flooded areas with
12 poor drainage does not refer to a wetland.

13 That was your testimony, wasn't it, sir?

14 A. No. My opinion is no.

15 Q. And just so we don't get confused between the
16 Spanish and English use of "no," you mean no, you
17 agree; but you criticized Mr. Protti's report, and in
18 particular, you say that his reference to swampy-type
19 flooded areas with poor drainage does not refer to a
20 wetland. That was your conclusion or your criticism
21 of Mr. Protti.

22 A. Yes. I criticized him, and what is difficult

1 to not be able to clarify in this same Protti report,
2 in the same notes below, he said that is because of a
3 lack of drainage, that the situation is because of a
4 lack of drainage, which something that I say and what
5 strikes me, and I'll just take a minute, because that
6 is a municipal street.

7 Q. You weren't present when Mr. Protti conducted
8 his survey, were you?

9 A. No.

10 Q. And your conclusion is based on his
11 terminology in his report; correct? There's no other
12 way you could have reached your conclusion; you
13 weren't with him. You've read his report, and that's
14 how you reach your conclusion; is that correct?

15 A. I read the report, and I consulted with the
16 environmental people to reach that conclusion, yes.
17 But I have my own ideas about why that has happened.

18 Q. And we'll discuss those now.

19 You say in Paragraph 48 of your Witness
20 Statement that "At no time was it stated by Mr. Protti
21 that it is an area known as a wetland." That's down
22 towards the bottom half--the bottom third of that

1 Paragraph 48.

2 Do you see that, sir?

3 A. Yes, correct.

4 Q. And you stated the term "wetland" is a
5 technical term; correct?

6 A. Correct.

7 Q. In fact, let me read that sentence in its
8 entirety. I'm reading the English translation. This
9 is Paragraph 48 still.

10 "With that, he's indicating that the area is
11 not suitable for developing the project, but at no
12 time was it stated by Mr. Protti that it is an area
13 known as a wetland, which is a specific technical term
14 that is not stated in the document."

15 Do you see that sentence--that
16 paragraph--sorry, that sentence?

17 A. Yes, sir.

18 Q. So, without knowing what Mr. Protti saw,
19 because you weren't there, you're concluding from the
20 term "swampy"--and I'd like to know what the
21 translation is, swampy. "Pantanososo"?

22 A. "Pantanososo."

1 Q. Uh-huh. Flooded and poor drainage.

2 A. Correct.

3 Q. That based on the words, whatever Mr. Protti
4 saw could not have been a wetland, in your opinion;
5 correct?

6 A. Correct.

7 May I expand on that?

8 Q. We'll get there, sir.

9 PRESIDENT SIQUEIROS: If it's a very specific
10 clarification, please go ahead. But we do not want
11 you to digress on this topic.

12 THE WITNESS: In regard to the very specific
13 question, my reply is equally specific. What Mr.
14 Protti saw is something that we can see today.

15 As far as I understand it, a wetland has to
16 meet three characteristics, basic ones: "Flora,
17 fauna, and soil.

18 With my knowledge, my technical knowledge,
19 the three do not appear at the same time, beginning
20 basically, with soil.

21 BY MR. LEATHLEY:

22 Q. Thank you.

1 Could you give me one moment, sir.

2 (Pause.)

3 BY MR. LEATHLEY:

4 Q. If you'd give me one second, sir. Sorry, Mr.
5 Mussio; I'm just going to look through my papers.

6 A. That's fine.

7 (Pause.)

8 BY MR. LEATHLEY:

9 Q. Mr. Mussio, the Protti report was prepared
10 for Techno Control. Let me show you the Protti
11 report. It's Exhibit R-11. It's--I'm afraid we have
12 to consult the record here, because it doesn't form--
13 We'll find you the right document and we'll
14 give the proper reference. R-11, for the Tribunal's
15 purposes.

16 You hired Techno Control; is that correct,
17 sir?

18 A. Yes, sir.

19 Q. Techno Control hired Mr. Protti; is that
20 correct, sir?

21 A. I believe that is--was the case. But let
22 me--may I clarify?

1 Q. Yes, please do.

2 A. It might be important--Techno Control is a
3 soils study firm. And Techno Control at the same
4 time, probably, hired Mr. Protti.

5 I must say that this does refer to soils.
6 So, the study focused on soils: Support,
7 infiltration, and other characteristics. And why do I
8 criticize Protti's report? Because he's not an
9 expert. He's not an expert to say what's a wetland,
10 what's a pond or a lake.

11 Even when it comes to surface runoff, there
12 is a department in Costa Rica to say whether it's a
13 river, a stream, or it isn't a river, it's not a
14 stream, or it's the use--

15 Q. Your counsel or your--Claimants' counsel has
16 kindly explained all the institutions to us yesterday.

17 The Geoambiente report was submitted with the
18 D1 Application; correct?

19 A. Could you repeat your--the question, please?

20 Q. Yes. The Geoambiente report was submitted
21 with the D1 Application; is that correct?

22 A. It is my belief that that was the case.

1 Q. And that is in your Witness Statement.

2 And you also say in your Witness Statement
3 that "Geoambiente hired a professional in hydrogeology
4 named Eduardo Hernandez Garcia."

5 A. Yes, sir.

6 Q. I wonder if you can turn to the first page of
7 R-11. This is the Protti report. Just inside
8 the--basically, the front cover. You need to go back
9 to the left-hand--there you go. Yes.

10 Can you tell me what the first few words are?
11 Well, let me tell you, sir, and you can tell me if you
12 agree. (In Spanish. [Estudio Geologico
13 Hidrogeologico])

14 Is that right, sir?

15 A. Yes. That's what it says here.

16 Q. And Mr. Protti is a hydrogeologist; correct?

17 A. Give me a minute, please.

18 He's a geologist. Geologist. That's
19 something different.

20 Q. How do you know--where is your testimony that
21 he's a geologist? Where is your source for that, sir?

22 A. Well, he signs off here as a geologist.

1 Q. And the report is a hydrologist report;
2 correct? Sorry, hydrogeologist. That's what it says
3 on the cover and that's what it talks about in the
4 first line. "The content of geological and
5 hydrogeological studies."

6 A. That's what it says here, but may I clarify
7 it?

8 Q. And so, Mr. Protti reported to Techno
9 Control; Techno Control reported to you. But the
10 Geoambiente report was the one that was submitted to
11 SETENA in the D1 Application; is that correct, sir?

12 A. Correct.

13 Q. Thank you.

14 The Geoambiente report did not identify any
15 of the features that the Protti report identified, did
16 it, sir?

17 A. I do not know.

18 Q. You testified about the Geoambiente report in
19 your Witness Statement?

20 A. Yes, of course.

21 Q. Did you review it before providing your
22 Witness Statement?

1 A. That was my partner. My partner took care of
2 these office matters.

3 Let me clarify something. I spend a lot of
4 time in the field. My partner spends a lot of his
5 time in the office, and this is office work.

6 Q. Thank you, sir.

7 A. My pleasure.

8 Q. Claimants have said this week that there are
9 wetlands on the land today. You've earlier stated
10 that what Mr. Protti saw is the same as what is there
11 today.

12 Do you stand by that testimony, sir?

13 A. Yes, as long as what happens today continues
14 happening technically, yes.

15 Q. Thank you.

16 In various parts of your Witness Statement,
17 you assert that no type of activity was allowed to be
18 carried out in Las Olas without the prior
19 authorization to do so.

20 A. I do not understand your question.

21 Q. Let me rephrase it.

22 You say in your statement that no type of

1 activity was allowed or carried out in Las Olas
2 without the prior authorization to do so; correct?

3 A. Okay. There's a time factor here. When we
4 did our work and when the project for the Las Olas
5 condominium was worked on, there were no works
6 underway. That is what I can say.

7 Q. And when is your work, sir?

8 A. We began in 2007, and by 2008, if I'm not
9 mistaken--by mid-2008, we had already obtained the due
10 process prior to presenting it to the Municipality.
11 It was all ready and prepared to submit to the
12 Municipality and that was the scope of our contract.
13 In our contract we specified that we would deliver to
14 the Las Olas group the plans that had gone through
15 SETENA, "IAM" (phonetic), Ministry of Health.

16 Obviously, there were some municipal
17 formalities, and this is to give you the context. The
18 construction permit is issued by the Municipality once
19 all these prior steps in the process have been
20 complied with.

21 We do deliver it with the School of--with the
22 formal authorization and approval of the School of

1 Architect.

2 Q. And you say in Paragraph 23G, you mention
3 that all permits were obtained before initiating works
4 on the site; correct?

5 A. Just a minute. You said 23G?

6 Q. Yes, sir.

7 A. Whereabouts, please?

8 Q. This is your Witness Statement, sir; you've
9 reread it for today.

10 Let me try and find it. I'm looking at the
11 English version, top of page 14. I would suggest it's
12 probably close to the top of the last page.

13 Well, let me ask you the general question,
14 sir: Is it your testimony that all permits were
15 obtained before works commenced on the site?

16 A. I cannot affirm that, because I performed my
17 work prior to its presentation to the Municipality.
18 The construction permit, let me repeat, is something
19 issued by the Municipality.

20 We delivered to the Las Olas group all
21 permits so that they could then submit it for this
22 last final step. They needed all the other permits.

1 Then they go and present it to the Municipality, and I
2 can perfectly assert that they had all of the prior
3 documents. The Municipality will give them the permit
4 for construction. That's when they can begin. But
5 that was not done while we were working for them,
6 because it is prior to the construction permit.

7 Q. Well, I'm confused, sir, because this doesn't
8 square with what your testimony is. Maybe this is Mr.
9 Madrigal's testimony rather than yours.

10 In paragraph 23G, you say that all of the
11 permits were filed and then you italicize "before
12 starting the works and the respective authorization
13 was obtained from SETENA."

14 This is page 14--look down at the last six
15 lines of page 14. Is this your wording or is it Mr.
16 Madrigal's wording?

17 A. If you'd allow me a moment, I'd like to find
18 it, read it, and then I can answer.

19 (Pause.)

20 THE WITNESS: Okay. I've found it.

21 BY MR. LEATHLEY:

22 Q. Is that still your testimony today, sir, or

1 would you like to correct that?

2 A. No, I don't want to correct it, but I would
3 like to clarify what I mean, because perhaps it's a
4 matter of a conceptual issue here, if I'm allowed to.

5 Very well. What I am saying, and I'm going
6 to read it, is that in this case, it is--no, I
7 apologize. No.

8 Because as I indicated before, in the case of
9 Las Olas Project, all of the permits were filed before
10 starting the works, and the respective authorization
11 was obtained from SETENA when it granted the
12 Environmental Viability.

13 What I am seeing here conceptually is that
14 everything is ready. Now, perhaps--and maybe could
15 clarify here--what SETENA issues is a license. What
16 the other government entities provide are
17 authorizations.

18 The permit, per se--and maybe I'm trying to
19 put it into English. It's a permit, not a license.
20 For instance, a driving license gives you the
21 authority to drive. The permit is that they can then
22 begin work.

1 We delivered everything ready to begin. What
2 I'm trying to say, the concept behind all of this is
3 that once they have paid for the construction permit
4 at the Municipality, then yes--and that will then be
5 in force for one year, and it's important to
6 understand that. It remains valid for one year.

7 Q. So, let's be clear about our terminology.
8 When I say "permit," I mean a construction permit,
9 which follows on from an Environmental Viability.

10 Would you agree, sir?

11 A. And other documents, the Environmental
12 Viability and other documents.

13 Q. Let's turn to Paragraph 70. 70 of your
14 Witness Statement. You see at Part 7--just about
15 Paragraph 68, it's titled, "Construction." And
16 Paragraph 70 says: "No unauthorized work was carried
17 out while I was involved in the Las Olas Condominium
18 Project which was also proven by SETENA in the visits
19 they made, as there was no paved highways; likewise,
20 in the easement area, since everything that was done
21 therein had a construction permit and was implemented
22 prior to the specified dates."

1 You see that language there, sir? I don't
2 have a question; I'm just asking if you can see that.

3 A. Correct. I do see it.

4 Q. And you say in Paragraph 42 of your witness
5 statement that Mussio Madrigal was in charge of
6 processing the construction permits and supervising
7 the works; is that correct, sir?

8 A. Yes. But, here again, I think I need to
9 clarify something. We have the Las Olas Condominium
10 as a condominium, as a legal entity that appears as
11 the term "condominium."

12 Then we have the easements. This is another
13 structure that is allowed by the division law or the
14 fractioning law. For the Members of the Tribunal,
15 what I'm trying to make clear, we can't really have a
16 jigsaw of one figure with the other one because
17 legally they are very different.

18 Environmental Viability construction permits
19 for the Las Olas Condominium belong to the Las Olas
20 Condominium. The permits obtained for the easements
21 are physical figures with cadastral numbers, all
22 different, and the owners are different.

1 Perhaps that clarifies or--or perhaps you'll
2 tell me if you need me to expand further on this.

3 Q. I'm just interested now in your understanding
4 of the--the fragmentation. This is a legal term. Is
5 that a legal term you're familiar with?

6 A. Physical fragmentation of the division of the
7 land--well, I brought with me the Urban Code. It's a
8 compendium of all the law in Costa Rica.

9 Q. I apologize. Have to keep--time is our only
10 asset in our week, so I have to keep you to our
11 questions which I've prepared very carefully. And if
12 your counsel wishes to ask you a follow-up question,
13 they can do so.

14 Let's go to R-521.

15 PRESIDENT SIQUEIROS: Perhaps
16 Mr. Leathley--can you just repeat the number of the
17 paragraph.

18 MR. LEATHLEY: Yes. This is--I'm now in an
19 exhibit. This is--I'm sorry. I give the Tribunal my
20 back. My apologies.

21 This is R-521. And, yes, it was what was
22 previously known as C-295. This is a document that

1 has two letters. The first is a request for
2 construction permits.

3 BY MR. LEATHLEY:

4 Q. Have you seen this document before?

5 A. No. No, sir.

6 Q. So, this is a request from Claimants' Costa
7 Rican lawyers making requests for construction permits
8 for the easements. And then the response from the
9 municipality says--and let me read it into the record
10 because I don't think we have a translation.

11 "In response to your request to certify
12 construction permits granted to conduct work on the
13 easements that affect the properties of the Province
14 of Puntarenas and that affect the cadastral"--and
15 there are a series of numbers--"I'd like to inform you
16 that it cannot be issued because, according to our
17 records, in this property there has not been any
18 permit--there are no approvals for construction
19 permits."

20 My question is, this is confirming there are
21 no construction permits for the easements in 2008 and
22 2009. Is that right, sir?

1 A. No, sir. From documents it might be so, but
2 we did obtain the construction permits for two
3 easements.

4 Q. And could you take me to those documents,
5 please, sir.

6 A. Unfortunately--let me see. I'll be brief,
7 but I do need to provide a context.

8 Q. No, sir. My question is, do you have those
9 construction permits? Because we don't have them on
10 the record in this arbitration. So, I would be
11 interested to know if you still keep a copy of those
12 documents.

13 A. The permits are very old. Ten years old
14 practically.

15 Q. Sir, I appreciate that. It's a simple yes or
16 no .

17 Do you in your possession or does Mussio
18 Madigral have those construction permits?

19 A. We have what we obtained from the Association
20 of Engineers and Architects. They gave us the permit.
21 And this is the process that I explained. First the
22 association and then the municipality.

1 Q. Yes. The municipality permits that were
2 requested--because the municipality issues the permits.

3 A. Correct.

4 Q. You asked in the days before--I will ask you
5 to take a note of the date of this letter, 9th of
6 November 2016. That's barely three weeks ago. They
7 ask for construction permits for 2008 and 2009. And
8 the response is that none were ever approved.

9 A. Correct.

10 Q. Are you contesting the response of a
11 municipality? Are you saying they're wrong?

12 A. Unfortunately, I must say yes. Definitely
13 yes. Because they even lost documents--a significant
14 number of documents due to the flooding after the Alma
15 Hurricane. And I was in the area at the time. And
16 I'm sure that they lost many documents.

17 Unfortunately, I don't have the permit per
18 se. I said that we looked at the historical
19 documents, and we did find the permits that we
20 presented to the Association of Engineers and
21 Architects.

22 Q. So, of all of these documents in the entire

1 arbitration, we have everything except for two permits
2 from 2008 and 2009 which you say were lost in a flood;
3 is that right, sir? Is that your testimony before
4 this Tribunal?

5 A. As far as I understand it, yes. That's what
6 I am stating, yes.

7 Q. Okay. Let's go to C-295. We'd like to go to
8 the Claimants' C-295. This is the document that was
9 submitted onto the record this morning.

10 PRESIDENT SIQUEIROS: Just a question of
11 procedure. How long would you estimate your
12 examination to continue? Otherwise perhaps we could
13 consider a short break at this moment. I don't want
14 to interrupt if--

15 MR. LEATHLEY: If I can just finish this
16 immediate line of questions, and then I'll find an
17 natural break.

18 PRESIDENT SIQUEIROS: That's fine. Thank
19 you.

20 MR. LEATHLEY: C-295. And I wonder if we
21 could request Claimants' counsel to deliver to the
22 witness a copy of C-295 from their files, please.

1 BY MR. LEATHLEY:

2 Q. This is a request again from Claimants'
3 counsel--Costa Rican counsel--sorry. This is a
4 response to a request. It's addressed to Claimants'
5 Costa Rican counsel. It's from the municipality, and
6 it follows up on the 29th of November, 2016. This is
7 days ago. And it refers to the hurricane that you're
8 referring to; is that right, sir?

9 A. I haven't read it.

10 Q. Please read it. Are you ready, sir?

11 A. Yes.

12 Q. And you were aware of this request being
13 made, weren't you, sir?

14 A. This?

15 Q. Yes, sir.

16 A. No, sir.

17 Q. You didn't phone or approach Kattia Castro
18 Hernandez after the receipt of this document I
19 previously showed you, which was R-521?

20 A. I don't know Ms. Kattia. I have never spoken
21 to her.

22 Q. So, if we were to get a witness statement

1 from Ms. Kattia Castro testifying that after the
2 delivery of this letter of the 14th of November, 2016,
3 you or someone from your firm requested a more general
4 reference to construction permits, you--you wouldn't
5 anticipate that testimony to be correct?

6 A. We--by refreshing my memory regarding the
7 documents we found. We had ten binders such as this
8 one of the Las Olas process. Unfortunately, we only
9 recovered four. One second, please. We only
10 recovered four.

11 And we did try--as a matter of fact and very
12 possibly, my partner called the municipality. But not
13 only that, we also obtained a certification from the
14 Federated Association of Architects and Engineers of
15 all projects from 2004, 2005, until that date just to
16 refresh our memories because, basically, ten years
17 have gone by. It's a long time.

18 Q. Thank you, sir.

19 And so, Mussio Madigral approached Kattia
20 Castro Hernandez after the 14th of November which
21 said that there were no construction permits because
22 you weren't happy with the answer, and so you asked

1 for the files; correct?

2 A. What might--what may have been requested or
3 asked was if they did have that information. That's
4 what we asked, if they had that information.

5 Q. Although they had said very clearly that
6 those permits--the construction permits for the
7 easements had not been approved in 2008 and 2009.
8 That's what they were telling you. But you went back.

9 And then let's look at this document, C-295.
10 And here it refers to the hurricane. This is
11 presumably the same Hurricane Alma that you were
12 referring to; is that correct, sir?

13 A. Just a technical clarification. It wasn't a
14 hurricane. It was a tropical storm. That's it.

15 And as--with regard to these two documents, I
16 don't know them. I don't--I also don't know when the
17 request was made as far as we're concerned.

18 Now, what I don't understand, and with all
19 due respect--what I don't understand how--in this
20 first document of November 14th it says that there are
21 no permits, but then in this document it says that
22 everything was taken by the floods.

1 So, obviously--and that's why I'm repeating
2 my position that we did get the construction permits.
3 My firm is one which, as you yourself said, minimizes
4 risk.

5 Q. Thank you, sir.

6 So, let's look at the C-295 document where it
7 refers to the construction permits, Number 154 of
8 2007. And it's that file that they say was lost in
9 the flood. And 154-2007 is actually the Concession,
10 isn't it, sir? It's not the easements.

11 A. You're asking...

12 Q. 154 of 2007, the paragraph that you're
13 looking at, the last paragraph where it says the file
14 had been damaged or lost in the flood, that
15 construction permit relates to the Concession. It's
16 an entirely different plot of land to the easements?

17 A. Yes, totally different.

18 Q. And so, it's quite possible that the
19 construction permit for the Concession was lost, and
20 the affirmation from the municipality that there were
21 no construction permits approved for the easements is
22 also true. These two letters can perfectly coexist

1 without contradicting one another; correct?

2 A. I wouldn't be able to tell. I don't know
3 what the internal processes are of how they control
4 the process having to do with municipality permits.

5 But what I can recall--because that had a
6 large impact, not only in Las Olas but also in other
7 projects that we had in that area. And that was
8 something major as far as floods are concerned in the
9 Tarcoles part. It was also very bad in the Parritas
10 part too. So much so that as far as I know, the--the
11 whole information of construction permits, computers,
12 designs, basically, 1 or 2 meters of flood at the
13 municipality.

14 Q. And--and that flooded the depository that
15 stored the construction permits for the Maritime
16 zones, but it didn't for the easement section? You
17 don't know?

18 A. No, I don't.

19 MR. LEATHLEY: Thank you. Maybe this is a
20 good point for a break, sir. I'll try to then clarify
21 how much time I have left.

22 If we could perhaps just ask

1 the--respectfully, the Tribunal to remind the witness
2 not to converse with others during this break.

3 PRESIDENT SIQUEIROS: Do you--since we
4 anticipate that the line of questions will still
5 continue and there will be perhaps a substantial
6 redirect and the Tribunal does have some questions,
7 why don't we take the opportunity to--it's 10 minutes
8 past 12:00--to take the lunch break. And we will
9 return in one hour to continue with Mr. Mussio.

10 Mr. Mussio, I would like to ask that through
11 the lunch break you abstain from speaking to any
12 member of your team, the lawyers, the Claimant, or
13 anyone else on any issue having to do with the
14 examination and cross-examination, and I would simply
15 like to ask that you be careful with that. Thank you.

16 THE WITNESS: Yes, of course.

17 PRESIDENT SIQUEIROS: So, we will break until
18 1:15.

19 (Whereupon, at 12:09 p.m., the Hearing was
20 adjourned until 1:21 p.m. the same day.)

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1 Q. And in Paragraph 10, you also complain or you
2 stated that it did not result in any decision against
3 you; is this correct?

4 A. Right now I don't have a single document from
5 that association that says anything to the contrary.

6 Q. Could you please look at Exhibit 412. It's
7 Tab 25. This is the first resolution of the Federated
8 College of Engineers and Architects for this
9 disciplinary process; is that correct?

10 A. Did you say at the end? Did you say at the
11 end?

12 Q. Yes.

13 And it's about 26 pages; is that correct?

14 A. Approximately.

15 Q. And taking you to the last sentence on
16 Page 25.

17 Do you have it there?

18 A. Yes, I do.

19 Q. And it states: "For Architect Mauricio
20 Mussio Vargas."

21 That's you; correct?

22 A. Yes.

1 Q. It says: "In accordance with the analysis
2 established, this Tribunal recommends unanimously to
3 the Honorable General Board to apply according to the
4 regulations--the effective regulations the penalty of
5 admonition because it has demonstrated that, with your
6 actions, you violated the ethic code of the school or
7 the Association of Engineers and Architects of Costa
8 Rica.

9 Do you see that there? Do you agree with
10 what I have just read? Is the document correct?

11 A. What I can tell you--

12 Q. No. My question is if the document is as
13 what I read.

14 A. Yes.

15 Q. And if I may, sir--if I can read what we
16 believe is the translation, just to be clear for the
17 record. "In accordance with the established analysis,
18 this Honorable Court unanimously recommends to the
19 Honorable General Board of Directors to apply, as per
20 the regulations in force, the penalty of confidential
21 reprimand as it was established by their actions that
22 they violated the Code of Professional Ethics of the

1 Federate Association of Engineers and Architects of
2 Costa Rica."

3 And, so, the Association of Architects and
4 Engineers did admonish you?

5 A. I don't know. You have to finish the
6 sentence. Because it says, "However, in spite of the
7 fact that the cause has expired, it should be filed."
8 The procedure was not only known, it was poorly
9 managed, poorly handled. And right now, unless you
10 show that there is a document to the contrary, I have
11 not received any document by that association.

12 Q. Understood.

13 So, due to the statute of limitations, you
14 cannot continue. But that's what the final resolution
15 of the Association says?

16 A. I don't know if that is correct.

17 It says so here. But what I'm saying is that
18 I even made a consultation on the basis of this--this
19 document that you're looking at. I spoke with one of
20 the attorneys of that Association--of the Association
21 of Architects and Engineers. I made a consultation.
22 As a matter of fact, my record is intact.

1 Q. Yes.

2 But your statement says that there is no
3 decision against or to the contrary. What you're
4 trying to explain, then, is that there was no decision
5 because of the statute of limitations but that the
6 final resolution did punish you because of questions
7 of ethics?

8 A. It isn't correct. Because when I made my
9 statement, I ignored. I did not know this result.
10 The Association never gave me any document where it
11 states that I was admonished/reprimanded. I have no
12 document. On the contrary. By that time I would have
13 been able to say yes, it was punishment. But I don't
14 know what they mean by a "confidential reprimand."

15 Anyway, I simply do not know what a
16 "confidential reprimand" means.

17 Q. You did not research it after finding out
18 about the resolution?

19 A. I spoke to an attorney. His name is Mike. I
20 called him and I said, "What does this mean?"

21 And he said, "Your record is clean. This is
22 not going through. It has no substance."

1 I am still analyzing on the basis of this
2 situation--still analyzing if I will legally proceed
3 against the Association of Architects and Engineers
4 because this proceeding was baseless. It was based on
5 the news in the newspaper.

6 Q. Very well.

7 So, Mr. Mussio, the Administrative Tribunal,
8 the TAA, as we know it, by its acronym, also regarding
9 the Costa Montaña Project, punished you because of
10 environmental damages; is that correct?

11 A. I don't know.

12 Q. Can you go to Exhibit R-419. It's in Tab 27,
13 cross-bundled.

14 This is a resolution by the Administrative
15 Tribunal issued against the Costa Montaña Project;
16 correct?

17 A. I don't know.

18 Q. So, you don't know. So, let us go to page
19 20. And here it states in the last paragraph--

20 Sorry, sir. I'm just looking for the
21 reference. Excuse me. The question is whether you
22 are aware of this argument.

1 A. No, sir.

2 Q. And you're not aware of this Project with
3 which you worked as an architectural firm. And it
4 said there had been a severe impact on the
5 environment.

6 A. The Project had capricious characteristics
7 with regard to soils. I'm not talking about the
8 Project; rather that--the document.

9 Q. Did you know that there was a resolution that
10 existed from the Administrative Tribunal that there
11 had been a severe impact on the forest, and in this
12 case also it was determined that the rules of
13 subdivision of INVU do not replace the criteria for
14 the environmental regulations that need to be used in
15 its entirety?

16 A. What?

17 Q. That the rules for INVU--well, you know what?
18 INVU, the Institute, National Institute for Housing
19 and Urban Development. It does not replace the
20 evaluation criteria.

21 A. I don't understand that word. "It does not
22 replace"--

1 Q. It does not replace the evaluation or
2 environmental evaluation criteria that must be used in
3 its totality. You're not aware of this resolution
4 about a project where your firm is named?

5 A. No, I don't know this document. Well, I
6 don't understand the relationship between INVU
7 subdividing and the other part you said. That's what
8 I don't really understand.

9 MR. LEATHLEY: Well, that's okay.

10 PRESIDENT SIQUEIROS: Mr. Burn. Redirect?

11 REDIRECT EXAMINATION

12 BY MR. BURN:

13 Q. Mr. Mussio, I just have a few questions for
14 you. You need to treat the questions that I put to
15 you with the very same seriousness that you treat
16 questions put by Respondent's counsel and questions
17 that are put by the Tribunal.

18 All of my questions relate to matters to
19 which Mr. Leathley has taken you.

20 If you cast your mind back to the beginning
21 of the cross-examination process with counsel for the
22 Respondent--and this is a relatively small point to

1 begin with. But it was said that problems--and I'm
2 quoting from the transcript. From the transcript,
3 "Problems are to be expected when your projects
4 interface with many stages." You've set that
5 out--that you've set out in your Witness Statement.

6 You weren't given the opportunity to comment
7 on that proposition. I just wanted you to reflect on
8 whether you accept that.

9 Do you accept that when there are projects
10 that interface with many stages that there will
11 inevitably be problems?

12 A. Perhaps. It's a conceptual opinion. It
13 could be said in that I have had the opportunity to
14 give classes at the university. And you can give a
15 context to a construction project as a problem that
16 needs a solution for the soils, the technical
17 solution, sidewalks, a project. That's the
18 concept--that's the context in which I use the word
19 "problem."

20 I could use a word like "challenge," which
21 would be the same thing.

22 If I understand the question, the large-scale

1 projects, like Las Olas or even larger impact
2 projects, you have to see them from a construction and
3 technical point of view, but there's also a social
4 perspective. There's also a political perspective,
5 even municipalities.

6 When a project is presented that has certain
7 characteristics, the political part goes--also
8 intervening because it's going to impact the
9 community. Las Olas--well, Esterillos is a community
10 that needs employment. And, of course, some people
11 see it positively; some see it negatively.

12 But to respond to the question, if it's a
13 problem or not--well, it needs a solution based on
14 laws, standards, regulations, basically.

15 I don't know if I'm answering the question or
16 if I need to go on.

17 Q. That's satisfactory from my point of view, so
18 I will not ask you to continue. The Tribunal members
19 may have their own questions relating to that topic or
20 any other topic.

21 Now, you were asked a series of questions, of
22 course, because it's an important issue in the case,

1 about the suggestion of there being wetlands at the
2 Las Olas site in the time that you worked on the
3 Project.

4 You recall being asked questions about that?

5 A. Again, please.

6 Q. So, just to remind you, Mr. Leathley put
7 various questions to you relating to the topic of
8 wetlands and whether or not there were wetlands on the
9 site in the time that you were working on it.

10 Do you remember those--being asked those
11 questions by Mr. Leathley?

12 A. If you would like, we can go through them one
13 by one. That way I can clarify. In general terms,
14 it's been said that there has been bad faith on our
15 part. Well, frankly, I don't understand where there's
16 been bad faith. What we stated in our statement--and
17 I support this 100 percent--there are important zones
18 which need to be paid attention to without being an
19 expert.

20 One thing is, of course, the gully which then
21 has a setback that you can fill in. And then with
22 regard to the other points, it's been said and I read

1 that we were hiding something. No, I don't understand
2 that. I don't understand that. And I don't know what
3 that refers to when it said that we were hiding
4 something. That we were hiding something? This is
5 out in the open.

6 The points that we brought up--there is a
7 technical reason for this, the issue that this
8 situation has risen because there's a technical issue
9 that needs to be resolved at the level of central
10 government and the municipal government with the
11 engineering part.

12 Now, simply, how can you hide something
13 that's clear? How can I? Since I'm an architect, not
14 an expert in wetlands, but I do know what is, for
15 example, different kind of wetlands, for example.

16 I did say that during the boom that they
17 didn't buy--they shouldn't buy property because
18 everything was a mangrove.

19 I was in a project in the south where we told
20 the clients that is a wetland based on what the
21 experts say.

22 And the point is that we have--it has been

1 said that we've been hiding something. These are
2 evident points. We don't need to even get out of the
3 car. I don't know how you can say that when an expert
4 or anyone can see that from 100 meters away.

5 We have never hidden anything. We did do our
6 due diligence in SETENA when they asked for the prior
7 deed.

8 Let me explain that. When we submitted all
9 the documents to SETENA, the full body studies that
10 their people from ICT and from many of the State
11 agencies, and they asked us--they say, "We need these
12 points to be clarified."

13 And within those points they requested an
14 opinion about the forest of SINAC.

15 And through facts that my associate sent and
16 the facts--well, that I took--"Well, are you going to
17 respond to us?" They responded to us. And it's
18 2 April--I know the date--of 2008 they responded to
19 us, and then we submitted it.

20 So, given--well, what's been said, that we
21 were hiding something, this is not a project of
22 700 hectares. We can walk around it in one day, and

1 it's there.

2 What I can't understand, how in some way and
3 according to the words of the gentleman from Costa
4 Rica, how I could fool so many experts? How could I
5 have an entire ministry? There must be thousands of
6 people there, hundreds of experts that studied this.
7 And they were with me several times, and I recall that
8 one of the first times I rented horses for them for
9 questions of security and so it could be quick.

10 And MINAE came to the place and went around
11 the entire place.

12 And that accusation--I cannot accept
13 that--that in some way we were deceiving anyone or
14 hiding information. The person from SETENA, the
15 technical expert who gave this to the Plenary and said
16 that this Environmental Viability can be granted, he
17 was there, and this was evident.

18 There are not thousands of streets to get
19 there. There's one street. The people who work in
20 MINAE and Quepos, they go by there every day.

21 Q. Now, you referred to identifying that there
22 were some areas on the site around which you needed to

1 be careful and the developers needed to be careful.
2 You refer in your statement to a report by Geoambiente
3 that's appended to your statement.

4 Would you turn to that statement--to that
5 report that's appended to your statement.

6 If you go to the Spanish version of your
7 statement, the original. Page 36 of the last page of
8 your actual statement. And then after that you will
9 see a report.

10 If you turn to the last page in that report.
11 Not the last page of your statement. Carry on going.
12 The report. You go to the last page of that report.
13 What do you see?

14 So, what do you see? Bearing in mind your
15 comments just now that you identified that there were
16 some sensitive zones on-site, what do you see here?

17 A. These are the areas that we pointed out.

18 THE REPORTER: Can you repeat?

19 A. Those were the same areas--those are the
20 areas that preliminarily we considered to be areas to
21 be studied, that there needed to be care taken.

22 BY MR. BURN:

1 Q. And you've also been asked questions about
2 the D1 Application that you filed.

3 Now, before filing it, what inquiries have to
4 be made either by you as consulting architect or by
5 one of the agencies? What inquiries have to be made
6 before the D1 Application is filed?

7 A. Well, quite a bit. Quite a few. We have a
8 list of the--checklist of the letters and the studies
9 that are required by SETENA, protocols of SETENA.
10 Road alignments, setbacks from rivers, soil studies,
11 topography, that's with regard to the technical part.
12 Setback from municipal streets. Permits for
13 stormwater drainage.

14 When there's a development you also have to
15 impermeabilize the soil. That means that the
16 Municipality in this case--that's why I stated
17 before--before the construction permit, you have to
18 consult with the Municipality, as I've said in my
19 Statement. You have to ask for permits for the
20 treatment plants, also for stormwater, for water,
21 potable water. A project is not a project without
22 potable water.

1 The land use, that's an administrative
2 document. In the case of Las Olas it's important to
3 highlight that there is a regulatory plan.

4 Now, this is a plan which is more specific
5 than the general law or the general standard, and it's
6 my understanding that it is a law--regulatory plan
7 becomes law because when the plan goes into effect, it
8 refers to the maps of the regulatory plan, and so you
9 don't use the construction code because the regulatory
10 plan has that encompassed within.

11 But there are many studies, yes.

12 Q. Thank you.

13 Does one of those inquiries relate to whether
14 the land is within a Wildlife Protected Area?

15 A. Yes, sir.

16 Q. And which agency would give an answer to that
17 question?

18 A. In this case, that we consulted with ACOPAC
19 and SINAC. SINAC is the National System of
20 Conservation Areas, for purposes of translation.

21 Q. Right. And would you be consulting with the
22 central offices of SINAC or the local offices of SINAC

1 for the purposes of this project?

2 A. The office in Quepos. That's where we
3 presented the applications, the questions, also the
4 visits.

5 Q. So, the local offices?

6 A. Local, yes, sir.

7 Q. Okay. Can you turn to Tab 4?

8 MR. BURN: I'm hearing it in Spanish. I
9 think someone needs to flip the channel.

10 BY MR. BURN:

11 Q. Can you go to Tab 4 in Volume 1 of the
12 cross-examination bundle. You will remember that
13 Mr. Leathley put various questions to you about this
14 law on biodiversity. This is Law Number 7788.

15 Do you remember the questions that were put
16 to you? I'm not asking you to repeat your answers.
17 But do you remember being asked questions?

18 A. Yes.

19 Q. Do you recall that Mr. Leathley took you to
20 Article 109 headed "Burden of Proof"?

21 A. Yes.

22 Q. And he also put a series of propositions to

1 you about the importance of this provision for the
2 way in which developers and those working with
3 developers need to conduct themselves in relation to
4 environmental matters? You recall that?

5 A. Yes.

6 Q. Could you just look on the previous page and
7 read onto the record the heading starting with
8 Capitulo IX. Nueve. So, this is the page before, the
9 heading immediately above Article 105. I think you're
10 going the wrong direction.

11 A. What article?

12 Q. Look at 105.

13 A. Okay.

14 Q. Do you see a heading?

15 A. Okay. Procedures, processes, and penalties
16 in general.

17 Q. And do you see an Article 105 immediately
18 below it?

19 A. Yes.

20 Q. Could you just read the text out loud?

21 A. "Everyone will have standing to present a
22 case in administrative or courts or in the regular

1 courts to defend and protect biodiversity."

2 Q. Now, bearing in mind the sage words of the
3 Tribunal that you are not a lawyer in Costa Rica or
4 elsewhere, you are not--I am not putting questions to
5 you to check whether you--you have an understanding of
6 law as such but bearing in mind what you've just
7 looked at, the heading of this section and the text of
8 Article 105, what would your understanding be as to
9 the scope of application of this part of Law 7788?

10 A. Well, any person--practically any person that
11 believes that they are defending biodiversity can
12 present a complaint before SINAC or the municipality
13 or agencies. It's a bit vulnerable because, as I
14 said, any project is going to have people who are
15 against it and people who are for it.

16 I did not know this article, but I knew that
17 it's true that a person could put in danger a project
18 that had everything in order. But I understand the
19 spirit of the law, that you can intervene before any
20 agency. So, any person can arrive and say, "There is
21 environmental danger."

22 Q. Okay. Thank you.

1 Now, you were asked a series of questions
2 about the Protti Report. You recall that?

3 A. Yes, sir.

4 Q. This is the report, of course, that the
5 Respondent considers has great significance for this
6 case. I want to take you to--back to that report.
7 So, if you could have Exhibit R-11 in front of you. I
8 think you will probably find it in that red folder.
9 Yeah. It's not in the cross-examination folder.

10 A. 11?

11 Q. That's correct. Yes.

12 Now, you were asked various questions about
13 what this report means, what it is saying. I want to
14 spend a little time just--so bear with me. Be
15 patient--going back to this report so that it is clear
16 to you and you can explain to the Tribunal what you
17 consider this report to be about.

18 If you could turn, first of all, to the page
19 that has in manuscript, in handwriting "125" at the
20 top. This is the second page of text.

21 Now, I want you to read--I want to ask you to
22 read out loud various sections of the text starting

1 with the last sentence in the first section of that
2 report. Starting in Spanish, "Los terrenos en
3 estos."

4 If you just read that sentence and then you
5 read all the way down to the end of the last section
6 on that page. Just read that out.

7 A. The land in these projects show good drainage
8 conditions. However, we're in the central area.
9 There are flooded areas that are swampy and have poor
10 drainage.

11 Hydrogeology. The site has different
12 morphology according to the terrain. But in most of
13 these, the indicated level is found 10 meters down,
14 and it has a level saturation, a local saturation
15 which is aqueous, which are in sedimentary soil. So,
16 these are different aquifers which are under the
17 sedimentary rock which are saturated and have been
18 altered.

19 The parameters, the hydrogeological
20 parameters of this sedentary rock are permeability,
21 .16 MD. And I see the reference, porosity, also
22 hydraulic level, and also 0.07. The index of

1 vulnerability of aquifers in sedimentary rock for most
2 of the Project is .20 which corresponds to low
3 vulnerability with regard to pollution.

4 The time of transit for percolation in these
5 areas is--and so that these percolated waters is T
6 equals 70 days, could be at 2 or 3 meters. And it is
7 commented this has a treatment plant for stormwater,
8 so there is a minimized risk of percolation for these
9 waters, especially in the south of the Project.

10 MR. LEATHLEY: Sorry, Mr. Burn, to interrupt.
11 Going to make it clear on the record. There's a
12 slight mistranslation on the record. In the first
13 sentence, it was read the transcript said "and
14 drainage." It should have been "poor drainage."

15 Thank you.

16 BY MR. BURN:

17 Q. So, if you could continue.

18 A. Excuse me. I want to be clear. It says:
19 "The terrains of this site have good drainage
20 conditions. This is a study with regard to the
21 transit of pollution."

22 Shall I continue? Morphology--

1 Q. Just to make it clear, I don't think there's
2 any disagreement between the two sides on this. That
3 sentence at the beginning to which Mr. Leathley refers
4 does say "good drainage in general," but in the second
5 part of that sentence it identifies a certain area
6 with poor drainage.

7 Do you see that, "con pobre drenaje"?

8 A. Yes, with poor drainage. If you would allow
9 me, what they're referring to there, two concepts.
10 There's a percolation drainage, and then there's
11 surface water.

12 And the second one, when there are areas that
13 are flooded and poor drainage and marshy, it's because
14 the--the tube that would have to take the rainwater
15 from one side of the street to the other is blocked.

16 Q. Bear with me.

17 I just want you to go back to reading text.
18 If you could just pick up from the heading that begins
19 "geomorfología," and just read the heading and the
20 first two paragraphs, and then we'll move on.

21 A. "Geomorphology and natural threats. The
22 general relief of the area with the convex, rolling

1 hills going south-south--south-southwest, these
2 lands"--

3 I do apologize.

4 "Geomorphology and natural threats. The
5 general relief of the land under the rolling hills
6 with convex gradients of low slope running
7 south-southwest. These lots do not have any threat of
8 seasonal flooding because they are located outside of
9 the area of influence of any river system that can
10 generate such conditions. Nonetheless, in the western
11 portion, there is a swampy area, possibly developed by
12 the drainage"--no. I'm sorry--"possibly developed by
13 the poor drainage conditions in this sector."

14 Q. Thank you. Now, if you just go on a couple
15 of pages here to page 128. And you'll see about
16 three-quarters--four-fifths of the way down that page,
17 there's a sentence that begins "Se deduce de la
18 aplicación."

19 If you'll just read that paragraph.

20 A. "One can deduct from applying the previously
21 described methodology that construction and operation
22 of this project raises a threat of--low to no

1 contamination threat for the aquifer, underground
2 aquifers. Nonetheless, given the closeness of the
3 project with surface water areas that are susceptible
4 to contamination, it is recommended that a treatment
5 plant be built to treat the waters in order to
6 minimize the discharge--direct discharge risk of
7 untreated water into these bodies of water and, in
8 particular, towards the Aserradero Swamp that are a
9 few meters southwest of the project site."

10 Q. Thank you.

11 And if you just turn over the page, you'll
12 see in Section 7 there are some observations. Can you
13 read just the third paragraph there starting " Estos
14 terrenos."

15 Sorry. This is section--I may have made a
16 mistake. I apologize. Section 6. Apologies.

17 A. "These lands, these lots do not appear to be
18 the under the threat of seasonal flooding because they
19 are outside the area of influence of any river system
20 capable of generating such conditions. Nonetheless,
21 to the west there is a swampy area potentially caused
22 by the poor drainage conditions of the sector. The

1 natural slopes have good stability conditions."

2 Q. The last part of this document I want you to
3 go to, if you do down to Section 7 in which the
4 principal conclusions are set out. Could you
5 just--there are--there isn't a numbering for this, but
6 there are effectively seven principal
7 conclusions--main conclusions that are set out there.

8 I just want you to look at the--from the
9 fourth down. So, fourth, fifth, and then going over
10 to the next page, the sixth and the seventh.

11 Do you have those?

12 A. Yes.

13 Q. If you can read those for me.

14 A. The one beginning with the "aquifers
15 vulnerability index"?

16 "The aquifers vulnerability index for the
17 sedimentary rock units under the alteration coverage
18 of the IUVA equal 20. That corresponds to low
19 vulner--low contamination vulnerability."

20 Do I continue?

21 Q. Yes, the next three.

22 A. "It has been recommended that this project

1 have a wastewater treatment plant such as that in
2 normal operating conditions they ought not to be a
3 contaminating charge that could percolate towards the
4 underground.

5 "In the event of problems with the operation
6 of the treatment plant that allows wastewater
7 percolation into the underground, it is necessary to
8 have a distance of 2.0M gradient under the site where
9 the percolation occurs.

10 "In order for there to be natural
11 disinfection of the percolating water, the land on
12 this project are not subject to geological risks of a
13 short return period, such as flooding, slope
14 instability. Based on the Costa Rican seismic code,
15 the Project area is located within Seismic Area 3 with
16 an S1 soil profile, such as the structural design of
17 the work with an effective peak acceleration value of
18 AE equal to 0.3 minimizes the seismic risk for the
19 civil works of the Project."

20 Q. Thank you.

21 You see, as you observed when you were first
22 taken to this document, that it's signed "Roberto

1 Protti, Consultant Geologist."

2 Now, having gone through all of that--and I
3 do apologize to you and to the Tribunal, and
4 especially to the court reporters and translators.

5 What would you say this report is actually
6 about?

7 A. It's basically a technical study that is
8 called the Transit of Contaminants. The purpose of
9 such a study is to identify whether bacteria in
10 treated water could perhaps contaminate an aquifer.

11 In the case of this report, it clearly states
12 that it's low risk. Nonetheless, the recommendation
13 is that there be a treatment plant.

14 This is a healthy recommendation that, in any
15 event--and it's worth mentioning this here that it was
16 indeed done. There was a--on the design a treatment
17 plant was included. A treatment plant was--design was
18 contracted. This is a study--or it's an indirect cost
19 that the developer incurs.

20 It was done. The location was sought because
21 you need a permit for the location. You can't just
22 put the treatment plant wherever you want. There are

1 rules--preset rules.

2 So, we did that. And hopefully the document
3 is available because we did do that also. And this is
4 issued by the Health Ministry. So, the Ministry of
5 Health issues the location permit, and this was done.

6 And the aim is for these waters to be
7 treated. And one of the characteristics of the
8 water--treated waters are called DBOs in
9 Spanish--should be acceptable before it can flow into
10 a constant-flow body. And it says so in the
11 documents. It talks about constant-flow waters.

12 Q. And looking at the--those principal
13 conclusions in Section 7, do you observe any that
14 relate to suspicions of there being wetlands on the
15 site?

16 A. No.

17 Q. Thank you.

18 You have noted the various references in the
19 report to poor drainage.

20 From your work on the site, do you know or
21 suspect what the cause of the poor drainage that's
22 referred to might have been?

1 A. It's definitely lack of maintenance. So, the
2 situation occurs because when roads are built, when
3 the local government or the central government builds
4 the roadway going towards the north or the street that
5 goes to the west, which is a municipal street, there
6 needs to be civil work carried out based on specific
7 calculations. And that was not done. It was not done
8 in any of the two, not only here, but all along the
9 coastal area.

10 And I don't want to sound arrogant, but we
11 see all along the coastline there's a lot of civil
12 work that's being carried out. And for cost reasons,
13 it is perhaps not correctly done.

14 And not only do you have to build it
15 correctly, but it has to be maintained correctly also.
16 And this is a situation--and I've seen it since our
17 very first studies when we speak about the preliminary
18 or the basic studies.

19 And when I say that we are committed to this
20 project that we--it's because we know the Project.
21 Obviously, there are some deep technical aspects that
22 I left in the hands of the experts. There are other

1 things that are obvious, such as this situation, that
2 we call sewers or waterways that simply were not
3 properly built. But it was obvious that the
4 calculations were not quite right because the diameter
5 of the tubes was ridiculous.

6 So, with time and lack of maintenance, these
7 pipes clog up; and then the surface waters are
8 trapped, both in the north area and the area that we
9 are referring to that we say needs to be studied. And
10 it's important to bear in mind that the work I'm
11 talking about that is technical engineering are for
12 the public roads and so on that's not a part of the
13 private property.

14 We see this in the roadway going to the
15 north. 15 meters are in the hands of the Ministry of
16 Public Works and Transport. And on the western side,
17 they belong to the municipality. And here, again, it
18 is public land.

19 So, common sense dictates that, first of all,
20 they ought to be constructed correctly and, second,
21 that they need to be maintained. And, unfortunately,
22 neither one happens.

1 And it is on the property belonging to
2 somebody else, in this case the property of the State
3 or of the municipality.

4 Q. Thank you.

5 You can now have Volume 3 of the
6 cross-examination bundle in front of you. Turn to
7 Tab 25 in that file. You will recall that
8 Mr. Leathley put various questions to you in relation
9 to this document, which is Exhibit Number R-412.

10 Do you remember the questions that were put
11 to you?

12 A. Yes, sir.

13 Q. Hold on a second. I just want to make sure
14 that members of the Tribunal have the document.

15 Now, on the very first page of that document,
16 which has a couple of different numbers on it--15608
17 at the top and 1094 on the bottom right. But on that
18 page you will see that in the middle there, there is a
19 description of what this document is starting "Informe
20 Final De Minorìa."

21 Can you just read the whole of that line onto
22 the record?

1 A. Do you mean where it says to resolve--to
2 decide to issue the final report? Is that the word?

3 Q. No. If you just look--so, do you see where
4 it says "Expediente Administrative No. 156" and so on?
5 Do you see that? And then immediately under it says
6 "Informe Final De Minorìa A La Junta Directiva
7 General."

8 Do you see that?

9 A. On page 1?

10 Q. Look where I'm pointing.

11 A. Okay. Okay.

12 Q. What does that say?

13 A. Okay. "Final Report of the Minority to the
14 General Board of Directors.

15 Q. The Minority?

16 A. Correct.

17 Q. So, when we see at the back end of the
18 document on page 26, internal numbering page 26 of the
19 document, when Mr. Leathley referred you to the words
20 under (f), in particular the unanimous recommendation
21 of this Tribunal, do you understand that to mean the
22 unanimous recommendation of the Minority of this

1 Tribunal?

2 A. I understand, but perhaps you can clarify
3 this a little bit further, because it says "minority";
4 right? It says: "Final report of the minority to the
5 board," and then afterwards, it talks about a
6 unanimous agreement, and that unanimous agreement is
7 of the minority.

8 Q. Correct. Now, if you could--back on the
9 first page--so, back on the first page, I just want
10 you to check--read one sentence.

11 If you go two paragraphs down--so,
12 there's--after the heading that you've read, in the
13 sentence that begins (in Spanish), see that? Just go
14 to the very last sentence in that paragraph. Just
15 read out that sentence.

16 A. Where it begins, "Once the investigated facts
17 were analyzed"?

18 Q. Yes.

19 A. "Once the investigated facts were analyzed
20 and the applicable standards or rules and the
21 evidentiary elements, and once we"--"the discussion
22 was carried out to be presented for consideration by

1 the general board. This act is carried out pursuant
2 to the law, observing the legal procedures and
3 prescriptions. This is drafted by Engineer Olman
4 Vargas and Architect Ricardo Fliman Wurgaft."

5 Q. And just--just back to finish on this
6 document, back to the--the end of it, if you go to
7 page 25--

8 A. Okay.

9 Q. --if you look at Paragraphs A and C, you
10 don't need to read out the--the takes here, but what
11 do you understand Paragraphs A and C to do?

12 A. Let me read them.

13 (Pause.)

14 A. Okay. Concerning Paragraph A,
15 that's--regards my partner, it says that there was no
16 founding--that--well, I understand that having not
17 found sufficient criteria to determine some kind of
18 reprimand, he is released; there is nothing brought
19 against him.

20 With regards to myself, they recommend
21 unanimously to impose a confidential reprimand, but
22 this does not occur because of the time prescription,

1 because this was already a case that had been filed
2 away; and therefore, that sanction--that reprimand
3 could not be enforced.

4 Q. That's right. This is the minority report.

5 A. That's right.

6 Q. In the same file, and this may be the last
7 topic I have to take you to--or there may be one very
8 small point after that.

9 But while we're close to this document,
10 you--this is at Tab 27. This is a TAA Decision. It's
11 Exhibit R-419.

12 You'll recall that Mr. Leathley put some
13 questions to you in relation to this document.

14 Now, I'm going to hand over and delegate
15 briefly to my colleague, Mr. Roger Guevara, who's just
16 got a couple of questions for you in relation to this
17 item.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. GUEVARA:

20 Q. Mr. Mussio, I'm going to ask the Tribunal to
21 look at document R-354. And I would like Mr. Mussio
22 to be handed a copy.

1 R-354.

2 MR. LEATHLEY: My cross-examination--I'm
3 sorry, my cross-examination, as far as I'm aware, and
4 so, could not form part your redirect.

5 MR. BURN: It forms part of the redirect
6 because it's in rebuttal, examination topics on
7 Exhibit R-419, as will become clear.

8 MR. GUEVARA: It's part of the question
9 relating to the document R-419 that was responded to.

10 BY MR. GUEVARA:

11 Q. Could you please read the content of this
12 document? If so, we can compare it.

13 (Pause.)

14 A. I'm ready.

15 BY MR. GUEVARA:

16 Q. This report about a tribunal--the TAA's
17 activities. I would like you to tell us how many
18 projects did the Tribunal shut down, given that news?

19 A. Well, the news clearly said that they closed
20 360 condominiums.

21 Q. Are they referring to any specific area?

22 A. Yes. In Tarcoles and Esterillos.

1 Q. Tarcoles, is that close to Esterillos?

2 A. No, sir. Tarcoles is at--some good 40
3 minutes to one hour away.

4 Q. And Esterillos, is this referring to
5 Esterillos and the location of the Las Olas Project?

6 A. No, sir.

7 Q. Based on the news, the name of José Lino, is
8 that a name you're familiar with?

9 A. Yes, sir.

10 Q. Can you tell this Tribunal who he is?

11 A. At the time, he was the President of the TAA.

12 Q. At the time? You mean in 2008?

13 A. Yes, sir.

14 Q. And he was responsible for these closures,
15 all of them? Or was it under different
16 administrations that the closures occurred?

17 A. No. As far as I understand--at a curious
18 time, if I can describe it that way, when he was
19 President of the TAA.

20 Q. Could you elaborate a little bit more what
21 you mean by a "curious time"?

22 A. Yes. And not one--a very pleasant memory, I

1 must be honest, if I may be allowed. I know that your
2 time is extremely valuable, but I do feel it's
3 necessary to provide a context.

4 When this situation arose, especially with
5 the Costa Montaña project, I was there. I, as I have
6 often told you, was working on the project. So, when
7 this happened, the first thing that reaches the press
8 doesn't get--reach the TAA, it hits the first press.
9 And when I mean the media, it's because there were
10 more than 20 reporters. 20 minutes later, Mr. Lino
11 came at the head of caravan cars, sort of in a
12 threatening manner. So, the first thing I did was ask
13 who he was, because I didn't know him. He's
14 introduced to me.

15 José Lino comes and I say, who are you to ask
16 for the project permits? What I'm going to--about to
17 tell you I recall as if it happened yesterday, because
18 these were words that raised a lot of--made me very
19 indignant. And he said, I'm coming to close the
20 project. I don't come to look at the permits.

21 From many common sense, logically one should
22 say let's look at the permits. Let's look at what's

1 happening. But it's--it really was like a circus. I
2 do apologize, but it was a circus.

3 And ultimately, the project was shut down,
4 without even at the time--well, I don't know what
5 happened afterwards, because the--counsel or attorney
6 for that developer turned it into a case. It's
7 obviously something that I'm not involved in, but all
8 of this then happened. But it was arbitrary. It was
9 untoward. It was not consistent.

10 And you can even see in the news, it says
11 that José Lino himself--and I don't want to say
12 something that's wrong.

13 He says, we did have the permits, and the
14 project of Esterillos don't have them. But that's
15 another story. That's not--has nothing to do with us.

16 And opening of parentheses here because I
17 want to make myself clearly understood.

18 The guiding organ, or the tribunal of honor
19 of the Federated College of Architects--Architects is
20 so arbitrary that they put all the projects into a
21 single case. And I just wanted to mention that, and I
22 close that parenthesis.

1 But in my opinion, it was incorrect behavior.
2 I could summarize it that way, but I could go on and
3 on, because many different problems arose, but I think
4 that that is--

5 Q. With regard to the evidence on--by the
6 counterpart, R-419, which is Annex 27 of
7 Volume 3--that is Tab 27 of Volume 3...

8 A. 27?

9 Q. Yes, 27, in Binder 3. Yes, the resolution of
10 the TAA.

11 A. Yes.

12 Q. Could you indicate if you or your firm,
13 Mussio Madrigal, was a party to that process?

14 A. No. No, sir.

15 FURTHER REDIRECT EXAMINATION

16 BY MR. BURN:

17 Q. Thank you. And just to resume with one--one
18 very brief topic to which you were talking, you recall
19 that Mr. Leathley asked you questions relating
20 to--well, I think in the relevant document, it was
21 called Hurricane Alma but you corrected it to be, I
22 think, Tropical Storm Alma, or something along those

1 lines. And you will recall that there was reference
2 to Municipality having lost various documents in--in
3 Tropical Storm Alma.

4 But you will be familiar, from your
5 day-to-day work, with the office buildings in
6 municipalities such as Parrita. Yes?

7 A. (Witness nodded.)

8 Q. Do you--how would you describe those office
9 buildings physically and their condition?

10 A. Physically--well, it was a house, actually.
11 A wood--house made out of wood. You can't really say
12 that it was something that would protect--well, first
13 of all, human life, of course. But it simply did
14 not--in my opinion, it did not--it did not comply with
15 the idea of--or it was not consistent with a building
16 that should be for a local government service. So
17 much so, that when the flooding happened, the first
18 building that had to be evacuated was the Municipality
19 because it is simply in the most vulnerable area, even
20 as shown in maps, maps established by the National
21 Emergency Commission, and the Municipality is simply
22 in the most dangerous area in the case of flooding.

1 And Hurricane Alma did not only lead to this
2 type of tragedy; but also as a result of that, it led
3 to a recalculation, going into more technical details,
4 of the calculations regarding rain--stormwater
5 drainage. But the building was not only the most
6 dangerous area, but it was made out of wood. Simply
7 made out of wood.

8 And I clearly remember that the engineering
9 department was on the first floor; and once the
10 hurricane went by, the Municipality had to leave.
11 They now rent part of a building in downtown Parrita.

12 Q. Thank you.

13 And did they keep--do they keep or did they
14 keep electronic copies of the documents?

15 A. Well, this is important, because a short time
16 ago--well, I'll try to be more precise. About two
17 years ago--well, yes, about two years ago, the plans
18 have been looked at both--digitally, both by the--the
19 Association of Engineers and Architects and by some
20 municipalities, not all. And some municipalities
21 everything having to do with this process is
22 digitally.

1 But at that time, it was simply rows of paper
2 that were taken. Everything was done physically.

3 Q. Thank you.

4 And then final question. The--how often, or
5 at what periods, does your firm dispose of documents
6 in its possession?

7 A. Well, we follow the standards of the
8 Architects and Engineering Association, and that is
9 that our responsibilities are for five years, so, that
10 anything that is civil, be the infrastructure works or
11 plans, it's five years. And we have the moral
12 responsibility to keep them for ten years.

13 Now, we like to go even beyond that as
14 to--well, these are files. And files take up space,
15 of course. And after the real estate boom, the market
16 fell, things changed. We also changed--we went from
17 having 50 people in our consulting firm to practically
18 five.

19 Because at that point, that was what was
20 required. So, we changed offices--or offices changed,
21 and we simply kept the documents as long as possible.

22 It should be five years. It should be five

1 years. But in this case, unfortunately, for reasons
2 due to climate, to weather, we lost some files.

3 But normally, it's five years. And we keep
4 everything we can, at least up to now.

5 MR. BURN: Thank you. I have no further
6 questions.

7 QUESTIONS BY THE TRIBUNAL

8 PRESIDENT SIQUEIROS: Mr. Nikken? No
9 questions?

10 Mr. Baker?

11 ARBITRATOR BAKER: I have several.

12 Mr. Mussio, my name is Mark Baker, and I have
13 some questions.

14 You have lived this story; I'm still trying
15 to learn it, so, perhaps you can help me.

16 Can you tell me, sir, when you--your firm was
17 first hired by the Claimants in this case for any
18 purpose?

19 THE WITNESS: I think it was by the
20 beginning--sorry. The group--well, we were first
21 approached because we were developing a number of
22 projects in the area in Esterillos. We had about five

1 projects there. And Mr. David Aven contacted us. He
2 showed us some plans, some designs that he had--some
3 maps, sorry--and we--well, these were condominium
4 plans, and we made him see that there were some
5 mistakes in the conceptual implementation of the
6 condominium design.

7 So, that was more or less beginning 2007 or
8 mid-2007. Then at some point, we made an offer and
9 then we were contracted.

10 ARBITRATOR BAKER: So, I understand, Mr. Aven
11 brought some conceptual design drawings to your firm
12 for you to review and to consult with about helping
13 him go forward on the project? Is that right?

14 THE WITNESS: No, not quite that, no. Those
15 plans that were shown by David Aven were plans that
16 had been prepared by a well-recognized firm of Costa
17 Rica.

18 Now, these were well-designed plans.
19 Well-designed--in other words, diagrams, drawings,
20 technical specifications. They were well-done. But
21 conceptually, the project had been poorly envisioned.
22 Because there are 28 hectares, and they basically had

1 26 hectares in common area. If they sold the
2 condominium, those 26 hectares were immediately--or
3 would have immediately become part of that
4 condominium. And that's what we showed him or told
5 him.

6 ARBITRATOR BAKER: So, when you agreed to
7 work with Mr. Aven, was it on a fixed-fee basis or was
8 it on an hourly basis? What was the basis your
9 contractual relationship?

10 THE WITNESS: We established a fixed price
11 for a certain amount and for a certain time.

12 ARBITRATOR BAKER: Then the concept would be
13 after those fee-for-service agreements were completed,
14 if further work was necessary, you would revisit the
15 fee at that time?

16 THE WITNESS: We established the scope, and
17 it was the plans for a condominium of individual
18 houses, a condominium on lots. In other words, that
19 process would conclude, and then, eventually, we would
20 offer more services for building houses, designing
21 houses.

22 ARBITRATOR BAKER: So, in the scoping

1 document, help me, and try to be as precise as you
2 can.

3 In the scoping document, it was agreed that
4 you would assist with the condominium and the
5 Concession and the Easements and then do houses later?
6 Do I have that right?

7 THE WITNESS: First the condominium, then we
8 spoke about the Easements, and then in--after that, we
9 spoke about the Concession--or doing that, we spoke
10 about the Concession. But always with the expectation
11 that at a given point, when they started doing their
12 sales--because we had generated preliminary plans for
13 houses, and--so that people could see it, so that if
14 they were interested in houses, we could generate the
15 plans, the permits, and the construction.

16 ARBITRATOR BAKER: So, again, sticking with
17 the scope of the representation for a moment, you were
18 also going to provide--in addition to the revised
19 architectural drawings, you were also going to provide
20 permitting application services for the project; is
21 that correct?

22 THE WITNESS: Correct. Yes. Yes, sir.

1 ARBITRATOR BAKER: So, help me understand, as
2 a non-Costa Rican, the levels of this process. This
3 is your area, and you're in the field being.

4 So, my understanding is that EVs must be
5 required--must be obtained before construction
6 permits? Is that correct?

7 THE WITNESS: What is EV?

8 ARBITRATOR BAKER: The Environmental--

9 MR. BURN: --Viability.

10 THE WITNESS: Yes. Yes. The answer is that
11 it depends on the size of the project, depending on
12 the size of the project, there's certain environmental
13 instruments.

14 For instance, a house of up to 300 square
15 meters requires a very small study. But if the house
16 does not go beyond this 300 meters, it's not even
17 required. It's simply a house, a residential house.
18 And it does not require an environmental instrument.

19 But if it goes beyond 300 and up to 1,000,
20 it's called a V2, that instrument, that environmental
21 instrument, I mean.

22 ARBITRATOR BAKER: So, at the time you were

1 hired by the Claimants in this case and agreed on the
2 scope of work, what had been the largest project that
3 your firm had done Environmental Viability studies
4 for?

5 THE WITNESS: The largest project at that
6 point was 238 hectares. In that area, as a matter of
7 fact, just by chance, about 3 kilometers away from
8 Las Olas.

9 ARBITRATOR BAKER: We heard some testimony
10 about Mr. Janney this morning about a Sheraton area
11 development. Is that that area or is it another
12 region?

13 THE WITNESS: I don't know where the Sheraton
14 is.

15 ARBITRATOR BAKER: So--so, having been hired
16 to do this project, was there anything that stood out
17 in your mind when you first saw the land, as an
18 experienced environmental professional, that alarmed
19 you or gave you any concern when you looked at the
20 property for the first time?

21 THE WITNESS: As a matter of fact, I've even
22 mentioned it in my Statement. For me, to this day, I

1 believe that it is one of the most manageable
2 projects, because it is not so large and it's not so
3 small. And it also has a very technical and legal
4 characteristic, which is quite important in that it's
5 surrounded by roads.

6 It has public roads all over the place, and
7 for a development, of course--well, for land planning,
8 that is really a strong point. Sometimes we find
9 situations where the project has excellent and
10 beautiful characteristics, but there are no public
11 roads. So, that, of course, limits and simply chokes
12 a project.

13 But in this case, the Las Olas Project had
14 the Costanera, which is one of the most important
15 highways going south from the capital to--to the south
16 of the country that was in the north, and in the east,
17 it has a public road. In the west, it also has a
18 public road, as well as in the south. So, that is one
19 characteristic.

20 The second characteristic is that it has what
21 in English what would--would be called rolling hills.
22 These are--a soft topography, which is not dangerous,

1 very easy, and near the sea at a distance of--at a
2 walking distance--one can walk from anywhere in the
3 project to the beach. A beautiful beach, as a matter
4 of fact.

5 It had another strong point and that is that
6 had 2 hectares to do a clubhouse. For any project,
7 that is something desirable. If you have a
8 condominium development and houses, you would like to
9 be able to offer the clients a clubhouse with a pool
10 near the sea.

11 As I mentioned in my Statement and as far as
12 I believe and know, this was not a project that at
13 first glance would entail major technical challenges.
14 No. Rather, it was a project--because the type of
15 soil was also very good, the view of the sea.

16 So, every time I think about it, and I
17 continue thinking about it and still maintain that and
18 I still comment that to my partner, with Edgardo, this
19 is--well, this project has incredible potential.

20 ARBITRATOR BAKER: I'll return to the scope
21 questions in a minute, but you've mentioned the
22 important concept of public roads and easy access to

1 the property.

2 You testified about the construction
3 deficiencies and maintenance difficulties on public
4 roads that surround this property in response to some
5 of the questions that you were asked before I started
6 my questions.

7 Did you believe that the lack of proper
8 construction and the lack of proper maintenance is
9 responsible for water intrusion onto the Claimants'
10 property? Is that what you're saying?

11 THE WITNESS: Definitely, yes. I'm
12 100 percent sure that that is the cause.

13 ARBITRATOR BAKER: Let me return to the scope
14 questions for a minute.

15 My understanding is that your firm had the
16 responsibility for the preparation of the D1
17 Application? Is that correct?

18 THE WITNESS: Yes, sir. We--what we do--it's
19 actually a very technical document of an environmental
20 nature. And as I said--and as I said before, this is
21 subcontracted. This is--

22 ARBITRATOR BAKER: And let me stop you and

1 ask you some specific questions about that
2 subcontracting process.

3 So, my understanding is that you told
4 Mr. Aven's group, the Claimant group, that there were
5 skills that were going to be required to properly
6 complete the D1 Application, which would require your
7 firm to subcontract parts of that to other experts.
8 Is that correct?

9 THE WITNESS: Yes, that is the case. Yes,
10 sir.

11 ARBITRATOR BAKER: Okay. And so, in that
12 situation, your firm would be coordinating the overall
13 submissions from each one of those experts; but it was
14 your firm that was, in fact, signing the application;
15 is that correct?

16 THE WITNESS: Yes, sir. Yes. That is
17 correct, that assessment.

18 We coordinated, yes, but--yes.

19 ARBITRATOR BAKER: So, could you give me a
20 list, as you sit here today, of the different experts
21 who were retained by your firm who had input into the
22 D1 Application and tell me their area of expertise,

1 please.

2 If there's a document that would help you to
3 do that--my purpose is to get the information; it's
4 not a memory test.

5 THE WITNESS: Yeah, I was just trying to--I
6 was simply trying to--well, I think there were two
7 professionals, two of them, who had expertise in the
8 areas of how to evacuate rainwater related to the
9 project under D1. Mr. Guillermo "Amador" (phonetic),
10 a civil engineer with 30 years' experience in that
11 area of how to design everything having to do with
12 culverts and water, and then I don't remember the
13 name--the last name was Vaca, also in our list, who
14 gave information, calculations. And after that--I
15 think that is the end with regard to your question.

16 But after that--or--depending on the project,
17 you may need more or fewer professionals in biology
18 maybe, geology, hydrogeology, forestry engineer, soil
19 engineers for soil studies.

20 ARBITRATOR BAKER: So, let me make sure I
21 understand what you're saying. Are you saying in some
22 D1 Applications, all of these other specialties would

1 be required, but they were not in this particular D1
2 Application; or are you saying that input from all of
3 those extra disciplines that you just named was
4 required for this D1 Application?

5 THE WITNESS: All these disciplines were
6 required for the D1 process for Las Olas, yes.

7 ARBITRATOR BAKER: So, with the exception of
8 the civil engineer and--I think you said Vargas--I
9 haven't gone back to look--the second gentleman, you
10 had this other expertise in your firm; is that
11 correct?

12 THE WITNESS: No, sir. Geoambiente was
13 providing them.

14 ARBITRATOR BAKER: Before the D1 Application
15 was submitted to the appropriate authority, were all
16 of these professionals involved in its preparation
17 presented the opportunity to review the complete D1
18 submission?

19 What I'm really asking you was, was the
20 entire team of people that were involved in the D1
21 Application in agreement with all aspects of the
22 application as it was submitted; or was it simply each

1 group was responsible for its own area of expertise,
2 and only your firm as the coordinating agency was
3 responsible for the entire Application?

4 THE WITNESS: What we practice as--for
5 structure--or as far as structure's concerned, is that
6 in this case, Edgardo, my partner, would coordinate
7 with Mrs. "Ursula" (phonetic) and Mr.--another person
8 from Geoambiente; I don't remember his name--they
9 would meet, and if Geoambiente needed studies or
10 required that information, we would coordinate that.

11 But they, in turn, coordinated with the
12 forestry engineer, with the biologist, with the
13 hydrogeologists, and that was sort of--Mrs. Ursula
14 would direct that.

15 ARBITRATOR BAKER: So, let me take you to the
16 notion, then, of fragmentation for a minute. We're
17 not finished with the D1, but I'm trying to do this,
18 at least in my mind's logical order.

19 THE WITNESS: Okay.

20 ARBITRATOR BAKER: Where did the concept of
21 fragmentation come from? Where did the recommendation
22 to the Claimants to fragment, as we've talked about,

1 originate? That was at your firm or somewhere else?

2 THE WITNESS: Well, maybe as far as this is
3 concerned, it's important to say the following because
4 I read something. When we speak about fragmentation
5 or--when we speak about fraction, we're talking about
6 division of land; correct?

7 So, when we conceptualized the project--well,
8 each project has parallel requirements. For
9 instance--and this was part of a discussion we had
10 with the Las Olas group, because--well, and obviously,
11 they had their idea of this business. They came in
12 with one idea--for instance, in the northeast section,
13 they wanted to--well, it would be fragmented, the land
14 would be subdivided, in order to do a commercial
15 project where there could be a bank, maybe a store, a
16 convenience center, something like that. That was in
17 the north side--in the northeast side.

18 And then we have the fragmentation--well,
19 first of all, we have the analysis of the
20 fragmentation for Easements.

21 And this--because regulations or national
22 laws allow you--authorize you to fragment the land

1 before--that's next to roads and new sales.

2 That initiative comes from the Las Olas
3 group, of course, definitely; but I should say that it
4 fully complies with the law. That is fully and
5 completely legal.

6 ARBITRATOR BAKER: So, was the land
7 development concept of fragmentation that we've been
8 talking about, was that discussed with attorneys prior
9 to the filing of the D1 Statement?

10 THE WITNESS: No, sir. No, because--we did
11 do consultations, we did prior consultations. As a
12 matter of fact, the local government is one--well,
13 it's a Municipality. We went there. We told them
14 about it. They had no objections to develop this kind
15 of fragmentation.

16 But from a legal point of view, no, because
17 that is something that we simply do and it was--you
18 know, it was done and we continue doing it. And with
19 all due respect, if next week a customer comes and
20 says, Mauricio, I have a lot in front of a public
21 road, I want to do some fragmentation, some land
22 division there, it can be done.

1 ARBITRATOR BAKER: So, that is my next
2 question, and that is: If a client was coming to you
3 today with a tract of land to be developed that was
4 about this size, in your mind, the concept of
5 fragmentation would be appropriate. Even after having
6 lived through this case.

7 THE WITNESS: Well, it is important to
8 clarify one thing. First, we have what the client
9 wants. So, the purpose of what the--of the client,
10 what the customer wants for his project, that is
11 Number 1, of course.

12 Now, assuming that he wants to do that, and
13 in spite of that, it's something that is within the
14 law. It's something that--apart from that, it's
15 something that is in the law, it's something allowed
16 by the law. So, I would be a poor adviser, from my
17 point of view, and given my knowledge if, next week,
18 somebody comes with a property before a public road
19 that does comply--and that, of course, is very
20 important. If it does comply with what is there--when
21 I say "with what is there," I mean the rules,
22 regulatory plan, a very detailed regulatory plan, or

1 the construction law, which is very broad, very
2 general.

3 So, basically, it allows for very small
4 fragmentation. And in that case--well, the regulatory
5 plan of the La Parrita canton is a very visionary type
6 regulatory plan. It's a regulatory plan, which if I
7 remember correctly, was implemented in 1997, and
8 there's a relationship between the slope and the size
9 of the lot.

10 What do I mean by that? That today, we have
11 regulatory plans which the only thing they do is be
12 confusing regarding coverage, density, et cetera. But
13 that regulatory plan is very visionary, and in my
14 opinion, and in spite of the fact that it is a rather
15 old regulatory plan--in spite of that, it is quite
16 intelligent.

17 ARBITRATOR BAKER: Let me go back to
18 something you observed a minute ago, and I want to
19 make sure I heard this correctly.

20 I understood you to say that prior to the
21 filing of the D1 that you or members of your firm
22 traveled to the township of Parrita in order to

1 discuss with them and seek their knowledge and consent
2 to the fragmentation plan; is that correct?

3 THE WITNESS: Yes, sir.

4 ARBITRATOR BAKER: Okay. So, now let me take
5 you from the D1 to the actual application for
6 construction permits, which I understand comes next in
7 the process; is that right?

8 THE WITNESS: Yes, sir.

9 ARBITRATOR BAKER: Do I understand your prior
10 testimony from cross-examination this morning that the
11 plans for--or the permits for construction are
12 actually issued by the Municipality, not by one of the
13 other environmental agencies?

14 THE WITNESS: The local government issues the
15 construction permits, yes.

16 ARBITRATOR BAKER: And did I also understand
17 you to say this morning that you did not--or your firm
18 did not appear on behalf of the Claimants to seek
19 those construction permits; but you gave the completed
20 forms to the Claimants, and they themselves went?

21 Did I get that right, or did I misunderstand
22 that this morning?

1 THE WITNESS: I think you misunderstood.

2 ARBITRATOR BAKER: That's why I'm asking you
3 for clarification.

4 So, it was your firm that went forward to
5 Parrita to obtain the construction permits as well?

6 THE WITNESS: In 2008?

7 ARBITRATOR BAKER: Yes.

8 THE WITNESS: No. We gave the group, David,
9 everything that was ready so he could go to the local
10 government and obtain the permit. He had to take the
11 plans to the local government. They do an evaluation,
12 and then they charge taxes on that. It's 1 percent.

13 ARBITRATOR BAKER: So, was that simply a
14 ministerial process, that if my plans are in the right
15 shape and form, and they have all the engineers and
16 architect stamps that I need on them, is it simply a
17 registration process with the municipal authorities
18 and the payment of the fees; or is there a review or a
19 planning commission or something more substantive than
20 just registering and getting a permit?

21 THE WITNESS: Yes. There is a review by the
22 Municipality. This process exists. They review the

1 Environmental Viability, and it must be in force. It
2 must be approved. It must exist. There must be
3 compliance with many regulations.

4 And in Las Olas' case, and the specific case
5 of the Municipality, there is a regulatory plan. And
6 this plan talks about land use, and it must be in
7 keeping with what is presented.

8 For example, with regard to the relationship
9 of the slope, for example, and other factors and--yes,
10 they do review it.

11 ARBITRATOR BAKER: Okay. So, let me make
12 sure I have this correct.

13 My understanding of what you've just told me
14 is that the Parrita municipal authority is the last
15 action necessary in order to obtain a construction
16 permit; but it is within their power to decide to deny
17 such a permit if they believe that any of the
18 environmental standards which must be done as a
19 prerequisite to the application have not been
20 correctly done.

21 Do I have that correctly from your testimony?

22 THE WITNESS: Yes, sir. Even if there--well,

1 I understand that if it has a regulatory plan, the
2 Municipality has even more power, much more power, to
3 deny or endorse what is being submitted.

4 ARBITRATOR BAKER: Okay. In discussions with
5 counsel on both sides of the aisle, there was some
6 discussion earlier today about the environmental law
7 of Costa Rica apparently authorizing anyone to make a
8 complaint against a project at any time for any reason
9 for an alleged breach of an environmental regulation;
10 is that correct?

11 THE WITNESS: Yes, that is correct.

12 ARBITRATOR BAKER: Okay. So, if that
13 complaint is made, does the Complainant have to make
14 it to a particular agency; or can they pick from any
15 one of the multiple agencies that have a stake in
16 regulating and protecting the Costa Rican environment;
17 or do they have to make it to the permitting
18 authority, the last act in the chain, if you will, at
19 the Municipality?

20 THE WITNESS: Let me see. Perhaps if I can
21 frame it in this way.

22 For example, if the works--if the complaint

1 is about something that's being constructed, then they
2 would go to the Municipality. If the works are
3 beginning or the person who wants to present the
4 complaint--for example, with regard to environment--I
5 think they have to go to Quepos, to the Office of
6 MINAE. That would be the correct thing.

7 ARBITRATOR BAKER: So, your history as an
8 environmental consultant and professional in Costa
9 Rica, how many projects, in your firm's history, have
10 received complaints throughout the life of the
11 project? Every one? None? Some number in between?

12 THE WITNESS: Well, if I understood you
13 correctly, we are an architectural consulting firm.

14 ARBITRATOR BAKER: Sorry for misspeaking.
15 Because I'm not interested, really, in the
16 characterization of the firm; I'm trying to find out
17 how common these complaints are against projects in
18 Costa Rica, in your experience.

19 THE WITNESS: Well, I'm trying to remember.
20 Well, there's so many actors involved when a project
21 begins. There are always people who are for it,
22 people who are against it.

1 Personally, what we do is we approach the
2 people that have a complaint, and we explain it to
3 them. Well, because of a complaint--

4 ARBITRATOR BAKER: Let me stop you for just a
5 minute, because a--"complaint" can be used in many
6 different ways, and so I--you know, we all know the
7 concept of "not in my backyard" or "don't put it
8 here," that's not what I'm talking about. The fact
9 that people may be unhappy or they don't like the fact
10 that the project is being developed next to them, many
11 of them just grumble quietly and never say a thing.

12 What I'm trying to find out is how many
13 people avail themselves of the statutory and
14 constitutional framework of Costa Rica that allows
15 somebody to make a complaint at any time against any
16 project, an official complaint that leads to official
17 action or dismissing of the complaint. I just--

18 THE WITNESS: None of my projects.

19 ARBITRATOR BAKER: So, let me make sure
20 I'm--none of the projects that you or your firm have
21 been involved in since the formation of the firm have
22 ever had an official complaint filed like the one in

1 this case; is that correct?

2 THE WITNESS: No, none, sir.

3 ARBITRATOR BAKER: Okay. Thank you.

4 That's it, Chairman. Thank you.

5 PRESIDENT SIQUEIROS: I have just a few
6 additional questions. I'll try to be brief. I know
7 our Parties are tired after this process.

8 Mr. Mussio, I have a couple of questions.
9 Some of them have been answered, the ones that I had
10 in mind--well, you responded to some of them when you
11 responded to Mr. Baker.

12 I understand that the fragmentation--when we
13 talk about fragmentation of the land, in the proposal
14 that was made, this is a proposal that entails
15 subdivision of the land for the Condominium Project?
16 Or is it actually subdividing the entire land mass and
17 then within those sections, you fragment more?

18 THE WITNESS: Now, let me see. I'm going to
19 try to describe it to you in this way.

20 In the case of Las Olas, it's a condominium,
21 which at the same time, has lots. We have
22 individualized lots--well, we can all have part of

1 that fragmentation or subdivision because--within the
2 framework of the law.

3 Now, in this case, we can take this island,
4 which has streets around it, which is Las Olas, and we
5 can segregate it or fragment it.

6 In Las Olas' case, there was the intention to
7 provide further services when the project was further
8 along, when people were already there. We could
9 fragment part of the land.

10 PRESIDENT SIQUEIROS: Yes. Let me show you
11 the document which is the drawing which is with your
12 Statement.

13 When you talk about fragmenting--so, there's
14 subcondominiums or just one condominium?

15 THE WITNESS: It's just one condominium.

16 PRESIDENT SIQUEIROS: Which is going to be
17 developed in portions, or are you going to construct
18 it--everything at the same time?

19 THE WITNESS: That depends how the owners
20 want to develop it. For example, you can do a first
21 part, sell it, and then continue.

22 PRESIDENT SIQUEIROS: But the license and the

1 permits is one for the entire project?

2 THE WITNESS: No, the entire condominium.

3 PRESIDENT SIQUEIROS: And now with regard to
4 the easements, I understand that they're called
5 easements because there are easements that connect the
6 land to the local road. Why are they called
7 easements?

8 THE WITNESS: Why is that part called
9 easements? Well, the easement is a private road.
10 It's a--and that is, in a general way, the regulations
11 state that it's allowed so you can access the lot
12 through a--using a street as long as it's not more
13 than 60 meters.

14 PRESIDENT SIQUEIROS: Well, normally, when a
15 lawyer--and you are not a lawyer; you stated that.

16 When we think about easements, we think that
17 it would be on the land of a third party. I have an
18 easement over the land of another person, whether I am
19 a company or an individual, and there is the right to
20 access.

21 Now, the land that was contiguous to the west
22 section is called the easement--easements, because

1 it's over the land of a third party?

2 THE WITNESS: No. It's created. You create
3 the easement. But--really, what you say is correct,
4 because--

5 PRESIDENT SIQUEIROS: --the street belongs to
6 everyone.

7 THE WITNESS: Yes.

8 PRESIDENT SIQUEIROS: But who creates the
9 easements that--you do it on your own land?

10 THE WITNESS: Well, you could say that it's
11 on yours and on everybody's land.

12 PRESIDENT SIQUEIROS: And another issue that
13 we have to discuss is that there are different
14 entities that are owners of the land that make up the
15 entirety. But the easement is just in reference
16 to--there is an access road, but it's part of this
17 same complex, development.

18 THE WITNESS: Yes, it's something common for
19 everyone.

20 PRESIDENT SIQUEIROS: Well, just to clarify
21 one last--well, the last question Mr. Baker posed.

22 You mentioned that as a firm, you put

1 together the file, you presented it, you got the
2 environmental authorizations and other kinds of
3 authorizations, the ones you listed in your Statement,
4 and that you would give the owners the packet so that
5 the client, the only thing that they had to do was to
6 get the construction permit; is that correct?

7 THE WITNESS: Yes, that is correct.

8 PRESIDENT SIQUEIROS: But the person
9 responsible--the person that could subcontract just as
10 you would, for example, subcontract different
11 companies, but the person responsible for the entire
12 project was your firm, Mussio Madrigal Architectos?

13 THE WITNESS: Well, I'm sorry, but really, we
14 presented it as a firm, but there's several
15 professionals that have that responsibility. I don't
16 know if I'm explaining myself clearly.

17 PRESIDENT SIQUEIROS: I just mean
18 responsibility vis-à-vis the client--vis-à-vis the
19 client, was there any--if there was any technical
20 statement that needed to be made?

21 Well, for example, a civil engineer that had
22 to make calculations, the civil engineer that has to

1 issue an opinion, they will be responsible vis-à-vis
2 authorities.

3 Now, the person that does the reports for
4 SETENA, who presents the information to SETENA?

5 THE WITNESS: Yes, it would be our firm.
6 Yes, it would be our firm.

7 PRESIDENT SIQUEIROS: So, you would be
8 supported with studies that were done by Geoambiente,
9 for example? But you are responsible vis-à-vis SETENA
10 just as you would be responsible vis-à-vis the other
11 agencies of the State?

12 THE WITNESS: Well, I feel that--well, this
13 has a legal response that's necessary.

14 We present this to SETENA. We do the
15 paperwork, and we make sure that that is approved.
16 And--well, if it's a permit, for example, at some
17 point--

18 PRESIDENT SIQUEIROS: So, you just manage the
19 paperwork on behalf of the client, and it's on behalf
20 of the client, not on behalf of your firm, but--so,
21 you're going to put together the file, get the
22 information, D1, present it to the authorities, and

1 once that permit is actually obtained, you will give
2 it to the client so that it can be developed.

3 And you do that with all projects? Las Olas
4 is not an exception to the other projects that you're
5 involved in? Your general rule is--

6 THE WITNESS: Well, the general rule is that
7 we almost always do the entire process. Almost
8 always. But that doesn't mean that a client can tell
9 us, well, we have a company that does the
10 environmental part; perhaps we could work jointly.

11 But in Las Olas case, yes, we did the
12 process.

13 PRESIDENT SIQUEIROS: Thank you. I don't
14 have any further questions.

15 I'm not sure whether the parties, in light of
16 the questioning from the Members of the Tribunal, have
17 any additional questions?

18 Professor Nikken has a question.

19 ARBITRATOR NIKKEN: I think in different
20 submissions, you referred to the political effect
21 with--vis-à-vis developers. What do you mean by this
22 "political effect"? That can be understood in many

1 ways. More specifically, does it have to do with the
2 concern that might be created in the community with
3 regard to the changes brought about by developments;
4 or do you mean the intervention of political actors in
5 this process?

6 THE WITNESS: I think--no, it is the
7 intervention of the political actors in projects of
8 this kind.

9 ARBITRATOR NIKKEN: How is that?

10 THE WITNESS: Well, they get involved--they
11 get involved because eventually, this is going to
12 create employment, revenue for the Municipality.

13 So, in some way, the Municipality--one of
14 their obligations is to provide benefits to the area.
15 So, you--it's something you--that must be done. When
16 we have a project in hand like this, we go to the
17 municipal council a lot, we go to the mayor and the
18 active groups in the area, explaining to them--for
19 example, just--by way of example, because I think this
20 works.

21 When the Costa Montaña project was beginning
22 to be developed, one of the first comments to the

1 developers was, we have to go to the town, you can
2 have a marvelous project, but, of course, the town is
3 really in decline. And so, in Esterillos, we also did
4 that. In Esterillos, I remember that we did that at
5 schools, in Tarcoles. We went to talk to single
6 mothers. There's a large group of single mothers, and
7 so, we did interesting work to garner that support.

8 So, we need to have society involved and the
9 political sector involved as part of the project. But
10 of course, there are other sectors that perhaps are
11 not pleased with developments.

12 ARBITRATOR NIKKEN: Okay.

13 PRESIDENT SIQUEIROS: Mr. Baker, do you have
14 any other questions?

15 ARBITRATOR BAKER: I have one last question
16 that I forgot to ask, so, I apologize.

17 Under Costa Rican law, in your understanding
18 as a design and development architectural
19 professional, do municipal authorities have to comply
20 with the environmental law? Do they have to apply for
21 and receive EVs before they do something for the
22 Municipality?

1 THE WITNESS: Yes, they do. Yes. The
2 Municipality also has the obligation to also generate
3 these permits, yes.

4 ARBITRATOR BAKER: And does the--in your
5 understanding, does the same right of the ability of
6 anyone to complain about a violation or potential
7 violation of one of the environmental laws or
8 regulations also extend to governmental authorities in
9 Costa Rica?

10 THE WITNESS: Yes, sir.

11 ARBITRATOR BAKER: Have you ever seen a
12 government that received official complaints?

13 THE WITNESS: Yes.

14 ARBITRATOR BAKER: Is it more common for
15 these official complaints to be made against
16 governmental-sponsored projects or against private
17 projects, in your experience?

18 THE WITNESS: I don't know about the private
19 projects. I know that when it's a complaint against
20 the government, it's in the news. And--yes. In fact,
21 if you would allow me to comment--and this is just my
22 opinion as a Costa Rican.

1 I believe that one of the problems we have in
2 infrastructure, why we're behind, it has to do with
3 these environmental processes--well, in my
4 understanding, should be more objective.

5 Our country now is 40 years behind with
6 regard to infrastructure, and we are all living
7 through that. And if Costa Rican say that's not true,
8 then they don't live in Costa Rica. 40 years where
9 there's been an absence of infrastructure works.

10 And personally, I am praying that a large
11 project called the Canal Seco is going to be developed
12 because it will bring us many benefits. And I've been
13 hearing about this since 1984. And the thing is that
14 the environmental issue--well, I--if someone raises
15 their hand, I don't agree, and then everything comes
16 to a halt. And so, the government also faces barriers
17 because of these environmental issues.

18 ARBITRATOR BAKER: Thank you.

19 Mr. Chairman?

20 PRESIDENT SIQUEIROS: Mr. Burn? Mr.
21 Leathley?

22 MR. BURN: We have no further questions at

1 this point.

2 MR. LEATHLEY: No, thank you, sir.

3 PRESIDENT SIQUEIROS: Okay. Thank you.

4 THE WITNESS: I'd just like to thank you.

5 And, of course, I committed the error of not thanking
6 you when I began my presentation. It's not very
7 common to be in this situation, but I thank you for
8 having had me here and letting me explain our
9 intervention in the Las Olas Project. Thank you.

10 PRESIDENT SIQUEIROS: Thank you very much,
11 Mr. Mussio. You may go.

12 If you would like to, you may stay here. You
13 don't have to go outside.

14 So, is now a good time to take a break, a
15 10-minute break?

16 MR. BURN: Indeed, sir.

17 PRESIDENT SIQUEIROS: Okay.

18 MR. BURN: And we will be resuming with the
19 testimony of Mr. Esteban Bermudez. Ten minutes is
20 perfectly satisfactory.

21 PRESIDENT SIQUEIROS: Okay.

22 (Brief recess.)

1 PRESIDENT SIQUEIROS: Are we ready to proceed
2 on the Claimants' side?

3 MR. BURN: Yes, sir.

4 PRESIDENT SIQUEIROS: On the Respondent's
5 side?

6 MR. LEATHLEY: Yes, sir. We're just
7 organizing the folders so that we can present them to
8 Mr. Bermudez.

9 PRESIDENT SIQUEIROS: Would you like a couple
10 of minutes?

11 MR. LEATHLEY: I think we may need one
12 minute, yes, sir. Thank you.

13 PRESIDENT SIQUEIROS: Thank you.

14 (Pause.)

15 MR. LEATHLEY: Thank you, sir.

16 ESTEBAN BERMUDEZ, CLAIMANTS' WITNESS, CALLED

17 PRESIDENT SIQUEIROS: Mr. Bermudez, I
18 understand you will be testifying in English. You
19 have submitted your Witness Statement in English?

20 THE WITNESS: That's correct.

21 PRESIDENT SIQUEIROS: Okay. I will just give
22 you a few directions as to how this will proceed, as

1 you may have been already advised by counsel.

2 Counsel for Claimants will have the
3 opportunity to make some brief questions of you. This
4 will be followed by cross-examination by counsel to
5 Respondent and redirect on the part of Claimants'
6 counsel on those issues--limited to those issues which
7 were addressed during cross-examination.

8 If you have--if you don't understand any
9 question, feel free to ask a clarification. But when
10 you're asked a question, please answer the question
11 first. And then if you need to make any
12 clarification, the clarification will follow.

13 And you have a card there in front of you,
14 which is a statement that the Tribunal asks you to
15 make before we begin the examination.

16 THE WITNESS: Should I read it?

17 PRESIDENT SIQUEIROS: Please do, out loud.

18 THE WITNESS: (In Spanish.)

19 PRESIDENT SIQUEIROS: Thank you. And, also,
20 just one point, when you speak, try to speak close to
21 the microphone. Because even though the Tribunal
22 might be able to hear you, the interpreters and the

1 court reporters need to have you close at the
2 microphone so they can listen well. Thank you.

3 DIRECT EXAMINATION

4 BY MR. BURN:

5 Q. Mr. Bermudez, you have a file immediately to
6 your right. If you could take that file and open it.

7 Now, just so you understand, this file
8 contains copies of various documents.

9 And during the course of the Respondent's
10 cross-examination of your evidence in these
11 proceedings, you'll be taken to documents by reference
12 to the tab numbers that run alongside.

13 For current purposes, all I need to do with
14 you is just to take you to your two statements in
15 these proceedings, and we just need to confirm those
16 statements for the record, in the formal sense, and
17 check whether you have any changes or amendments to
18 make.

19 So the--your first statement should be right
20 at the top there. What I want you to do is to flick
21 through the text to the blue page and just make sure
22 that it does, indeed, look like a complete copy of the

1 first statement that you made in these proceedings.

2 A. Yes.

3 Q. And you see there on the last page there's a
4 signature.

5 Is that your signature?

6 A. Yes, it is.

7 Q. Do you have any changes or amendments you
8 need to make to this first statement?

9 A. No, I don't.

10 Q. Okay. You see the white tab. If you can go
11 behind that. There ought to be a copy of your Second
12 Statement. If you could go through the same process.
13 Just flick through, make sure it looks like a good
14 copy of your Second Statement in these proceedings.

15 A. Yes.

16 Q. And are there any changes or amendments you
17 need to make to this Second Statement?

18 A. No.

19 Q. You see there's a signature on page 5 of that
20 document. Can you confirm whether that appears to be
21 your signature?

22 A. Yes, it is.

1 Q. It does?

2 A. Yeah.

3 Q. Okay. I have no further questions for you.

4 But just to reiterate the President for the Tribunal's
5 instructions to you: Your obligation here is very
6 simple. It's to answer all the questions that are put
7 to you to the best of your knowledge, whether those
8 questions come from counsel for the Respondent, from
9 me, or from members of the Tribunal.

10 A. Yes.

11 MR. BURN: Thank you very much.

12 I have no further questions.

13 CROSS-EXAMINATION

14 BY MR. LEATHLEY:

15 Q. Good afternoon, Mr. Bermudez.

16 A. Good afternoon.

17 Q. My name is Christian Leathley. I'm here on
18 behalf of Costa Rica this afternoon. I'm going to ask
19 you a few questions. If I don't look at you as you're
20 answering, it's no disrespect. I may be looking at my
21 papers or the screen so...

22 A. Okay.

1 Q. Paragraph 9, sir--by the way, you provided
2 two statements you said. Paragraph 9 of your First
3 Witness Statement, you say you regularly act as the
4 Environmental Regent; correct?

5 A. Yeah.

6 Q. And you were, in fact, appointed as the
7 Environmental Regent for the Condo Section in around
8 June 2010; is that right?

9 A. Correct.

10 Q. And the same paragraph--and we can go there
11 if you want, but please--maybe you don't need to look
12 at it to answer the question.

13 You explain, "An Environmental Regent is
14 appointed on every project to ensure that the project
15 complies with any environmental undertakings detailed
16 in the Environmental Permit."

17 Is that right?

18 A. That's correct.

19 Q. And you also mention that the role of the
20 Environmental Regent is to inform SETENA of the
21 results of its environmental monitoring of the
22 project, its activity and any construction work; is

1 that right?

2 A. That's right.

3 Q. But SETENA does not pay the Environmental
4 Regent; right? The--

5 A. No.

6 Q. --the fees.

7 And those fees are paid by Mr. Aven?

8 A. By the developer, yeah.

9 Q. By the developer.

10 In your role as an Environmental Regent for
11 the Condo Section, you say you prepared reports every
12 two months; correct?

13 A. Yes.

14 Q. And those reports would consider the
15 environmental issues as detailed in the Environmental
16 Viability; correct?

17 A. Correct.

18 Q. And you say, in Paragraph 27 of your first
19 statement, that you would write up your reports
20 following your visits and send them to Mr. Aven;
21 correct?

22 A. Yeah.

1 Q. And you say that, at the same time, "I cannot
2 recall Mr. Aven ever asking me to make any changes."

3 A. Yeah.

4 Q. And all your reports are exhibited to your
5 First Witness Statement, I think. That's correct?

6 A. I'm sorry?

7 Q. And all of your--all of those reports, those
8 bimonthly reports, were exhibited to your First
9 Witness Statement?

10 A. Yes.

11 Q. Mm-hum. And all of your reports are in
12 Spanish; is that right, sir?

13 A. That's right. Yeah.

14 Q. But Mr. Aven doesn't speak Spanish, does he,
15 sir?

16 A. No.

17 Q. And so, Mr. Aven would never have been able
18 to give you comments on your reports, would he?

19 A. No.

20 Q. Would others have given you comments, sir?

21 A. No.

22 Q. Okay. In Paragraph 8 of your First Witness

1 Statement, you talk about your experience in
2 particular at DEPPAT. And you say that you helped to
3 arrange applications for environmental permits;
4 correct?

5 A. That's correct.

6 Q. And you've been working for about 15 years in
7 this sector?

8 A. 16.

9 Q. 16.

10 And you testify, in Paragraph 8 of your First
11 Witness Statement, that you coordinate with all the
12 experts who need to carry out studies to be presented
13 to the various government institutions; correct?

14 A. Correct.

15 Q. And you continue, in the same Paragraph 8,
16 that this is a complex process involving lots of
17 different steps for different institutions; is that
18 right?

19 A. That's right.

20 Q. And that's still your testimony today, is it,
21 sir?

22 A. (Nodded.)

1 Q. You say also, in Paragraph 16 of your First
2 Witness Statement, that the process can get
3 complicated of presenting information of, quote,
4 different agencies, quote, sometimes take
5 contradictory positions.

6 And that's all in your first statement, I
7 think it was.

8 A. Yes.

9 Q. But you said that even though that's the
10 market's expectation, you can work your way through
11 with different agencies and different standards;
12 correct?

13 A. Yes.

14 Q. And in Paragraph 11 of your First Witness
15 Statement, you say you are very familiar with Costa
16 Rican laws and regulations relating to the
17 environment; correct?

18 A. Correct.

19 Q. And the Biodiversity Law is part of Costa
20 Rican law relating to the environment; is that right?

21 A. Yes.

22 Q. And so, you'd be familiar with the

1 precautionary principle?

2 A. Yes.

3 Q. Okay. Thank you.

4 And the precautionary principle requires the
5 person who wishes to carry out an activity to prove
6 that it will not cause harm to the environment?

7 A. Yes.

8 Q. Thank you.

9 And according to Article 109 of the
10 Biodiversity Law, it was for the Claimants, as the
11 developers, to prove any potential impact to the
12 environment in their EV Application; right?

13 A. Yes.

14 Q. Now, Mr. Bermudez, in Paragraph 8 of your
15 Second Witness Statement, you say that, quote, The
16 responsibility to submit all necessary studies is
17 shared by the developer and the environmental
18 consultant; is that correct?

19 A. Yes.

20 Q. And "the environmental consultant," you mean
21 those consultants that are hired by the developer?

22 A. Yes.

1 Q. So, for example, Mr. Mussio of Mussio
2 Madrigal, who signed--whose name the D1 Application
3 was in.

4 A. Actually, they are not environmental
5 consultants.

6 Q. Okay. Sorry. Maybe you could explain.

7 A. I believe they hired another company to do
8 so.

9 Q. You don't recall?

10 A. No. Because I wasn't involved in that
11 process so--

12 Q. I see.

13 Now, we mentioned the precautionary
14 principle. And in the Environmental Organic Law, I
15 think it's expressed in Article 99--and I'd be very
16 happy to show you. But maybe I can read it. And you
17 said you're very familiar with Costa Rican laws. And
18 I'm happy to represent this is a reading of
19 Article 99.

20 It's, "In the event of a violation of the
21 regulations for environmental protection or conduct
22 damaging to the environment established in this law,

1 the Public Administration would apply the following
2 protective measures and sanctions."

3 And then there's a shopping list of sanctions
4 that might flow from that. Is that right, sir?

5 A. Yes.

6 Q. And so, this is probably what you're aware of
7 in your role as the Environmental Regent because, of
8 course, those laws could lead to the suspension or--or
9 the checking in some way of the--of the project if
10 there's a risk of harm to the environment; is that
11 right?

12 A. Yes.

13 Q. And so, you say, in Paragraph 8 of your
14 Second Witness Statement, that, quote, The
15 responsibility to submit all necessary studies is
16 shared by the developer and the environmental
17 consultant--that was a point I just read a moment
18 ago--and necessary.

19 So, let me reread what comes from your
20 statement Paragraph 8. "The responsibility to submit
21 all necessary studies is shared by the developer and
22 the consultant."

1 Would you include reports that are necessary
2 to prove the absence of pollution, unauthorized
3 degradation or impact?

4 A. Yes.

5 Q. And that would be consistent with the
6 precautionary principle, essentially?

7 A. Yes.

8 Q. And so, "necessary" would include reporting
9 about wetlands if any existed?

10 A. Yes.

11 Q. And because the precautionary principle
12 applies even if there isn't scientific certainty, then
13 it would be necessary even if you had reason to
14 suspect the existence of a wetland; correct?

15 A. Correct.

16 Q. Now, if you're expected to do your job, then
17 you would have also known that those applying for the
18 EV permits--and when I say "do your job," as an
19 Environmental Regent"--to do--those that are applying
20 for the permits would have also had to comply with
21 Costa Rican law?

22 A. Yes.

1 Q. And in Paragraph 10 of your Second Witness
2 Statement, you say that "SETENA has a, quote, shared
3 responsibility to identify any additional studies or
4 data that are needed to evaluate a site and a
5 project."

6 Is that correct?

7 A. Yes. SETENA has to do a thorough study of
8 all the--all the documents that are submitted to them.
9 It also has to do a site inspection to make sure that
10 everything that was submitted is okay with the
11 regulations.

12 Q. And in Paragraph 9 of your Second Witness
13 Statement, you say that it was SETENA's responsibility
14 to ask for a detailed biological study if they thought
15 it necessary; correct?

16 A. Yes.

17 Q. And you say that you're aware of the process,
18 sir, because you, obviously, know this as your role as
19 a Environmental Regent, and the developer submits the
20 D1 EV Application with the reports that it has
21 selected for that application; correct?

22 A. Yes.

1 Q. And so, at this point, your testimony is that
2 those reports with the D1 Application must be the ones
3 necessary to discharge that responsibility on the
4 developers; correct?

5 A. Yes.

6 Q. So, how can you reconcile your remark
7 earlier, sir, about the shared responsibility for
8 SETENA if SETENA doesn't know of the gaps that exist
9 in the reporting that the developers have accumulated?

10 A. Well, they are supposed to resolve that on
11 the studies of the--of the documents and with the site
12 inspection. They are supposed to say, "Okay. These
13 studies are enough to grant the permit to the
14 developer." Or if not, they--they should say, "No, we
15 need some other studies that should be submitted
16 before we--we grant the permit."

17 Q. Have you read the D1 Application for the Las
18 Olas Project?

19 A. A long time ago.

20 Q. And that was E1--sorry--that was the
21 D1 Application for the Condominium Section; is that
22 right?

1 A. Yes. Yes.

2 Q. And there was not an application for any
3 other part of that Las Olas Project?

4 A. No.

5 Q. And then you haven't seen the report. You
6 may want to see it--sorry. You haven't seen the
7 D1 Application. We'd be happy to show it to you. But
8 do you recall if the Protti Report was part of that
9 D1 Application?

10 A. No, not that I recall.

11 Q. You don't recall.

12 Would you agree with me that it does not form
13 a part of that D1 Application?

14 A. No.

15 Q. Would you like to see the D1 Application to
16 verify, sir?

17 A. No.

18 Q. So, would you take my representation that the
19 D1 Application does not include the Protti Report?

20 A. Yeah.

21 Q. Okay. Thank you, sir.

22 So, how would SETENA, taking the

1 D1 Application, be able to identify the lack of
2 anything if it wasn't there?

3 A. Well, as I mentioned, SETENA has the
4 obligation to do site inspections. In the site
5 inspections they are supposed to see if there is any
6 gap or any missing study in the documents that were
7 submitted, and they should--they should act on behalf
8 of that.

9 Q. Well, that's not strictly true, is it, sir?
10 Because SETENA doesn't have an obligation. SETENA has
11 the right to do an inspection but not an obligation;
12 is that right?

13 A. It's an obligation. They are public--they
14 are public agents. They are.

15 Q. And what's your authority there's an
16 obligation on SETENA?

17 A. My authority?

18 Q. Yes. So, you said earlier that you're very
19 familiar with Costa Rican law. You're saying SETENA
20 has an obligation to inspect the site. I wondered
21 what your--what your basis was for that statement.

22 A. Well, it's just basic procedures. I mean,

1 I've been doing this for 16 years. I know when they
2 are reviewing a project and they get all the studies
3 and documents submitted by the developer, they
4 can--they can choose not to do a site inspection, if
5 they--if they feel it's not necessary.

6 But in most cases, they feel it's necessary
7 to do inspections so they do it.

8 Q. And they would do--and they would do such a
9 site visit after having received the D1 Application;
10 right?

11 A. Yes.

12 Q. And so, they would be verifying the various
13 statements and affirmations that have been made in
14 that D1 Application with the various details there;
15 correct?

16 A. Yeah.

17 Q. And so, if there wasn't something contained
18 in the D1 Application, it wouldn't necessarily occur
19 to them to verify that missing fact, would it?

20 A. That's what the--why the site inspection
21 is--is needed for. You know, they're--they cannot
22 approve a project without knowing what they are

1 approving. They have to visit the site, get familiar
2 with the property, inspect the areas that are going to
3 be affected by the development. And based on that
4 knowledge, they--they can say, "Okay. We approve the
5 project with these studies, or we need other studies
6 to evaluate and to assess."

7 Q. Absolutely. So, they can if they wish to
8 visit the site. But the obligation, as you agreed--in
9 fact, as you testified a moment before, was that it's
10 the obligation on the developers; correct?

11 A. Yes.

12 Q. So, ultimately, the buck stops with the
13 developers.

14 A. Sorry.

15 Q. Ultimately, the buck stops--that is to say,
16 ultimately the responsibility lies with the
17 developers, as you've testified a moment ago.

18 A. Yes.

19 Q. In Paragraph 13 of your Second Witness
20 Statement, you say that "The Protti Report showed an
21 area of poor drainage located on the Condominium Site
22 and the area of the easements"; correct?

1 A. Yes.

2 Q. Now, just pausing there for a moment.

3 Mr. Protti--you're familiar with the Protti Report,
4 are you, sir? You refer to him in your Witness
5 Statement?

6 A. I have read it once. Not long ago. Like a
7 month ago. I read it, and that's pretty much what I
8 know about that report.

9 Q. Okay. Thank you.

10 I'd like to show you a document. I don't
11 think we have it in your bundle. This is R-371 on the
12 record.

13 MR. LEATHLEY: Apologies to the Tribunal and
14 opposing counsel. We don't have it on our bundle.

15 ARBITRATOR BAKER: But it is in your big
16 book; right?

17 MR. LEATHLEY: It's in--it's on the record.
18 R-371, yes.

19 BY MR. LEATHLEY:

20 Q. So, R-371, sir, is a list of--this is from
21 the College of Geologists of Costa Rica. And if you
22 turn to page 2, there's a list of hydrogeologists.

1 And if you look in the--it consists of three
2 columns, in the middle of the page, and at the bottom
3 of the third column it has Mr. Protti there. Do you
4 see that, sir?

5 A. Yes.

6 Q. So, he's registered as a hydrogeologist?

7 A. Yes.

8 Q. And that's the same title as
9 Mr. Eduardo Hernandez, who presented a report on behalf
10 of Geoambiente; is that correct?

11 A. Yes.

12 Q. Now, going back to your recital of what the
13 Protti Report found. On Paragraph 13 of your Second
14 Witness Statement--let me just repeat--it was the
15 point I'm--the quote I took from your statement
16 before.

17 "The Protti Report showed," in your words,
18 "an area of poor drainage located on the Condominium
19 Site and the area of the easements"; correct?

20 A. Yes.

21 Q. But that's not exactly what the Protti Report
22 provides, is it?

1 A. That's what I recall.

2 Q. Did you read the--

3 A. It mentioned--it mentioned on a paragraph.
4 That's what it mentioned.

5 Q. Did you read the Protti Report before
6 providing your Witness Testimony?

7 A. Not right now but--

8 Q. No. I'm sorry. When--just before the time
9 you signed on the respective dates you signed your
10 Witness Testimony, had you read the Protti Report?

11 A. Yeah.

12 Q. So, it was a contemporaneous comment in your
13 Witness Statement in that respect?

14 A. Yes.

15 Q. And would you say, sir, someone in your
16 position as an environmental adviser should be very
17 precise in their terminology?

18 A. Yes.

19 Q. So, why did you misquote Mr. Protti?

20 A. In what way?

21 Q. Well, you don't use the correct language that
22 he uses in his report.

1 A. Well, that's what I--that's what I--that's
2 the idea I got from the report. I don't know if
3 that's exact wording that he used. But that's the
4 idea that I got from--from what I read.

5 Q. But you had not been with Mr. Protti when he
6 visited the land back in 2007, had you?

7 A. I'm sorry?

8 Q. You did not accompany Mr. Protti when
9 Mr. Protti visited the site, did you?

10 A. No.

11 Q. So, can we look at the Protti Report
12 together, please.

13 A. Yes.

14 Q. It's in--it's Tab 7 in your binder. This is
15 for the record Exhibit R-11. Please go to page--I'd
16 like to take you to page 3. At the top of the page
17 you'll see "1, 2, 5" written in handwriting.

18 Do you see that, sir?

19 A. Yes.

20 Q. And then the first paragraph at the top, it's
21 starts "TecnoControl"?

22 A. Yes.

1 Q. Then it says--I'm going to read it in
2 Spanish. The Tribunal will be familiar with this
3 section, it having been read in relation to
4 Mr. Mussio's testimony.

5 "The lots for this land show good drainage
6 sections. But towards the central area, they are
7 flooded, swampy areas with poor drainage."

8 A. I think I'm missing the page.

9 Q. Oh, I'm so sorry. I'll give you mine.

10 A. There's no page numbers, so I don't know
11 which ones--

12 Q. So, if you look at the very top of the page,
13 you'll see in the top left corner of each page
14 "Geotest," and you'll see in handwriting--

15 A. All pages say the same. They have "Geotest"
16 on the--

17 Q. Yes. So, just next to that, you'll see the
18 numbers handwritten at the very top. 125 is the page
19 I'd like you to turn to.

20 A. Okay.

21 Q. So, you see the first paragraph and the last
22 two lines of that first paragraph?

1 A. Okay. Yeah. I got it.

2 Q. So, what I just read out there--just take a
3 moment to read it yourself, sir, from "los terrenos"
4 up to "pobre drenaje."

5 A. Yes.

6 Q. And "swampy-type area" appears a number of
7 times throughout his report; is that right, sir?

8 A. Yes.

9 Q. And that would be translated, perhaps, as a
10 swamp-type area; correct?

11 A. Yes.

12 Q. Now, are you familiar with Mr. Barboza?

13 A. No.

14 Q. Mr. Barboza is an expert who is providing
15 testimony in this arbitration on behalf of the
16 Claimants. And I wonder if we can turn up his report,
17 sir, and in particular go to page 13. This is in
18 Tab 8 of the cross-bundle.

19 Do you have that, sir?

20 A. Yes.

21 Q. Page 13 has a long list. And this is
22 Mr. Barboza's report, having visited the site.

1 I beg your pardon. No. This is his first
2 report. And he was summarizing the MINAE Decree 35803
3 Standards. You're familiar with those standards; are
4 you, sir?

5 A. A little bit, yeah.

6 Q. Okay. Look at page 13. And you'll see a run
7 of about seven bullet points.

8 A. Yes.

9 Q. And this is the decree's definition of
10 palustrine wetlands.

11 Do you see that?

12 A. Yes.

13 Q. And just look at the first one, two, three,
14 four, five bullet points.

15 You see the first word that's used?

16 A. Yes.

17 Q. What is that, sir?

18 A. "Pantanos."

19 Q. That's the same word used by Mr. Protti;
20 correct?

21 A. Yes.

22 Q. Now, can you go to page 11 of the Protti

1 Report. This is back to Tab 7 in your cross-bundle.

2 A. Which page? I'm sorry.

3 Q. So, I'm sorry. We're looking at the
4 handwritten numbers at the top. It's 133. Now, this
5 should have a map.

6 Do you see that, sir?

7 A. Yes.

8 Q. And there's a map, and it shows the--would
9 you agree that that shows the dimensions of the
10 Las Olas Project?

11 A. Yes.

12 Q. And that's the totality of the Las Olas
13 Project, not just the Condominium Section; isn't it,
14 sir?

15 A. Yes.

16 Q. And there you see on the left with a little
17 arrow pointing, there's a sort of a differentiation
18 between the--the hashing. There's a sort of a brick
19 trestle pattern.

20 A. Yes.

21 Q. And then there's a left area. And it's
22 called "zona anegada (Aprox)."

1 A. Yes.

2 Q. Do you see that, sir?

3 Now, you didn't mention these references in
4 your Second Witness Statement, did you?

5 A. No.

6 Q. And you say in Paragraph 10 of your Second
7 Witness Statement that SETENA must have known that the
8 Project site was within a few meters of the
9 Aserradero River; correct?

10 A. Yes.

11 Q. Although you qualify, "if that is indeed the
12 case."

13 A. Yes.

14 Q. You don't know yourself whether that's true?

15 A. I don't understand the question.

16 Q. Okay. So, let's have a look at Paragraph 10
17 of your Second Witness Statement. And about halfway
18 down--this is on page 3 of your Second Witness
19 Statement.

20 A. Yes.

21 Q. Okay. So, you should have the
22 top--Paragraph 10 starts at the bottom left of page 2,

1 and then continues on the top of page 3. And about
2 halfway down, you'll see a sentence, "For example."

3 Do you see that, sir?

4 A. Which number?

5 Q. One, two, three--about the eighth line down.

6 And the word actually on the left margin of that
7 paragraph is "project," and then there's a new
8 sentence that says "For example."

9 Do you have that, sir?

10 A. No.

11 Q. Let me read it whilst you're looking, and
12 then you can verify. The sentence reads, "For
13 example, SETENA must have known that the project site
14 was within a few meters of the Aserradero River, if
15 that is indeed the case."

16 Second Witness Statement. I think--

17 A. This is the First Witness Statement.

18 Q. I think you're in the First Witness
19 Statement.

20 Do you have it now, sir?

21 A. Okay. Yeah. I got it.

22 Q. Okay. Great. Thank you.

1 And so, there you say at the end of that
2 sentence--I'm just curious as to why you say,
3 "SETENA"--this is where you're talking about the
4 responsibility for knowing what. You're saying,
5 "SETENA must have known that the project site was
6 within a few meters of the Aserradero River, if that
7 is indeed the case."

8 And I asked you, do you know that yourself,
9 if it is true?

10 A. Yes.

11 Q. You do?

12 A. (Nodded.)

13 Q. So, why were you saying "if that is indeed
14 the case"?

15 A. Is this the English version? Because I
16 believe I wrote this in Spanish, so I don't know if
17 there is--

18 Q. No, sir. If you turn to the last page, you
19 signed this English version.

20 A. Okay.

21 Q. Did you write this statement, sir, or was
22 it--did you have assistance of anyone?

1 A. Yes, I wrote it, but I don't remember this
2 sentence.

3 Q. The point being, sir, if--if SETENA must have
4 known about the river, then presumably the developers
5 also knew; correct?

6 A. Yeah.

7 Q. And so, if you're saying that this serves to
8 suggest that a possible wetland area was a risk, then
9 it should equally have been known to the developers;
10 correct?

11 A. Yeah.

12 Q. Although you don't mention the references to
13 "pantanos" or "zona anegada," you still concluded in
14 Paragraph 16 of your Second Witness Statement--very
15 emphatically you say you do not accept that the Protti
16 Report provides any indication as to the existence of
17 wetlands. That's your statement.

18 A. Yeah.

19 Q. But how--how is this possible, sir? When the
20 very words that the Claimants' expert to define
21 wetlands is this very word that Mr. Protti uses?

22 A. Well, if you see the map that you just--that

1 you just talked about--what it says here is "zona
2 anegada." In Spanish that's--in English that will be
3 flooded zone--

4 Q. Yes, sir.

5 A. --which is not the same as a wetland. You
6 can have a flooded zone that is a wetland, or you can
7 have a flooded zone that it's not a wetland.

8 So, that's why I said that. This is not an
9 indication that there is a wetland. He's just
10 mentioning that probably this could be the wetland--

11 Q. Okay. Thank you.

12 A. --because it gets flooded.

13 Q. So, probably or it could be a wetland?

14 A. It could be, yeah.

15 Q. Thank you, sir.

16 Mr. Bermudez, you testify in both your
17 witness statements that you were Environmental Regent
18 for the Condo Section; correct?

19 A. Correct.

20 Q. And then you say in Paragraph 23 of your
21 First Witness Statement that there were easements to
22 the west of the project site running off the public

1 road; correct?

2 A. Yes.

3 Q. And so, the project site for you was the
4 Condo Section?

5 A. Correct.

6 Q. Okay. And, in fact, you testify in Paragraph
7 17 of your Second Witness Statement that "I am not
8 familiar with the other sections of the Project."

9 Is that correct?

10 A. Correct.

11 Q. And you also say in Paragraph 24 of your
12 First Witness Statement, "As part of this role, I
13 looked at all the condominium properties on the site,
14 except those abutting the public road that were not
15 located on the main project site and were not covered
16 by SETENA's Environmental Viability."

17 Correct?

18 A. Correct.

19 Q. So, there's no Environmental Viability
20 covering the Easement Section; correct?

21 A. Not that I know.

22 Q. And just to be clear, sir, because during the

1 course of this hearing so far, we've heard some
2 different terminology.

3 I'd like to explore the use of the difference
4 between fraccionamiento and fragmentación, which is
5 like the fractioning or subdivision and the
6 fragmentation of property.

7 Are you familiar with these terms, sir?

8 A. In what context? In--

9 Q. In the development of property.

10 A. In the development context, yes.

11 Q. Right. And would you agree with me, sir,
12 that fraccionamiento--so the subdivision of property,
13 which is dividing a given plot of land into particular
14 plots--is perfectly legal?

15 A. Yes.

16 Q. And so, for example, with the Condo Section,
17 that would be dividing it up on a plan as to identify
18 all the condominiums and houses and plots and gardens
19 that would actually be designed; correct?

20 A. Yes.

21 Q. And fragmentación is implicitly an illegal
22 act. Would you accept that, sir? So, it's different

1 from fraccionamiento. Fragmentación/fragmentation is
2 actually embodied in Article 94 of the Biodiversity
3 Law. Are you familiar with that? You said you were
4 familiar with Costa Rican law, so I would assume so.

5 A. Yeah. But, I mean, you can use fragmentation
6 in different contexts. If you use it in the
7 biodiversity context, then you're talking about
8 fragmentation as habitats or whatever. If you use it
9 in the urban planning context, you may be talking
10 about subdivision.

11 Q. Mm-hum. Well, let's try and work our way
12 through that linguistic challenge, sir.

13 Because I'd like to take you to Article 94 of
14 the Biodiversity Law. This is in Tab 4 of your file,
15 hopefully, in the cross-bundle.

16 Do you have that there, sir, Article 94?

17 A. Yes.

18 Q. So, just checking. The Tribunal has a huge
19 bundle, so it's very heavy going.

20 I'd like to read that to you because
21 Article 94 is about the stages of evaluation of the
22 environmental impact. That's the title there. Would

1 you say that's a fair translation? I'm reading a
2 Spanish version like you.

3 A. Yeah.

4 Q. And then I'm going to read it into the record
5 and, hopefully, then the translation can be--can be
6 communicated, which is, "The assessment of the
7 environmental impact in the area of biodiversity
8 should be carried out completely, even if the program
9 is scheduled to be carried out in stages."

10 Do you see that, sir?

11 A. Yes.

12 Q. So, let me try and paraphrase and let's see
13 if we agree. That's saying that the environmental
14 impact evaluation in terms of biodiversity and
15 environmental assessments, essentially, should be
16 undertaken in its totality, as a whole, even when the
17 Project is being programmed to be developed in stages;
18 correct?

19 A. Yes.

20 Q. And this project, Las Olas, was to be
21 developed in stages, notably the Concession, which
22 was--I don't know if you recall. The Concession was a

1 little bit down by the beach.

2 A. Yes.

3 Q. The Condominium Section, of course, that you
4 are familiar with and then the Easement Section.

5 And so, the mere division of those lands
6 within themselves--so just the condominium--let's just
7 focus on the condominium. Dividing that up into the
8 little houses, the little plots, that would have been
9 fraccionamiento. Perfectly fine.

10 Would you agree with that, sir?

11 A. Yes.

12 Q. But to divide the entire plot with the
13 purpose of avoiding the environmental obligations and,
14 therefore, to divide the Environmental Viability
15 applications would not be permissible according to
16 Article 94.

17 Would you agree with that?

18 A. No.

19 Q. You would not?

20 A. Well, actually, I'm not an urban planner.

21 That's their--that's not my--not my specialty. I'm a
22 biologist. And I--I know some things about the urban

1 planning and the urban planning laws.

2 What I know about these laws is that
3 easements are figures that allow people to segregate
4 small portions of the property in lots.

5 And according to the regulations, this figure
6 doesn't need an Environmental Impact Assessment
7 because of the size of the--of the--of the project
8 itself.

9 But when you talk about the Condominium
10 Project that is largest and that it's going to have a
11 more impact on the--on the--on the environment, then
12 you--you're talking about a bigger project, and then
13 you need an Environmental Impact Assessment.

14 Q. Right, sir. But I'm interested in what
15 Article 94 tells us. Because in this proceeding,
16 we've heard from a lawyer on behalf of Costa Rica, who
17 now is currently the attorney general. His testimony
18 is that this provides that you cannot divide up a
19 property along the lines of--as the Las Olas Project
20 has been done--easements, condo, concession in order
21 to avoid the Environmental Viability process. And--

22 A. Well, from my knowledge, I would think that

1 the easements are a separate project from the Condo
2 Project.

3 Q. They are adjacent to one another, sir.

4 Would you agree with that?

5 A. They are adjacent. And there are other
6 projects adjacent to the Las Olas Project. That
7 doesn't mean it's the same project.

8 Q. But they're all owned by the same entities,
9 correct, or the same groups of investors?

10 A. I'm not sure.

11 Q. So, there may be different entities--

12 A. There may be different owners or same owners,
13 but they are different projects.

14 Q. Were you aware that the easements were owned
15 by Mr. Aven and his colleagues?

16 A. That's what I understand.

17 Q. And you're aware that the condominium was
18 owned by Mr. Aven and his colleagues?

19 A. Yes.

20 Q. So, this whole Las Olas Project included the
21 Easements, the Concession, and the Condominium;
22 correct?

1 A. For me, Las Olas Project is the Condo
2 Project.

3 Q. Right. That's the title that it was given in
4 some of your reports. But the Las Olas Project as a
5 whole included the Easements and the Concession
6 Project.

7 Do you recall that, sir?

8 A. Later on, I was a little bit confused of--of
9 that. But later on, I--I realized that the Condo
10 Project was another thing separate from the easements.

11 Q. So, would your understanding of how
12 Article 94 operates change if I were now to tell you
13 that the Las Olas Project actually included the
14 Concession, the Condominium, and the Easements? And,
15 in fact, that's exactly what the Claimants describe as
16 their project.

17 A. Yeah. For me it's three different
18 projects: the Concession, the Condo, and the
19 Easement. The Concession had a different process. It
20 got Environmental Viability. It was close to the
21 Condo Project. The Condo Project is another one. And
22 the Easement is another figure.

1 And there were other numerous projects
2 adjacent to Las Olas that were already
3 construct--built there.

4 Q. Let's go back to the wording of Article 94.
5 Could you read it again, sir, and tell me what you
6 think it tells you.

7 A. Yeah, I read it. I'm familiar with
8 that--with that article.

9 That means that you cannot divide a project
10 in smaller fractions. For example, if--if the
11 developer wanted to develop the Las Olas Condo Project
12 in different phases--let's say one portion then and
13 then one portion another--still they should
14 have--submit the Project as a whole because that's one
15 project.

16 Q. And so, by the same measure, taking the
17 Las Olas Project as a whole, the logic applies the
18 same to protect the environment because the
19 environment is being protected by Article 94 so that
20 you don't slice up the land and then decide, well,
21 this part needs an Environmental Viability but this
22 part does not. Article 94 is getting at the whole--it

1 says "en su totalidad," in its entirety; correct?

2 A. Not if it's the same project.

3 Q. Right. So, if you'd agree that if you--

4 A. The same project--I mean, when I talk about
5 the same project, it's that it's a group of activities
6 that are going to take place in one site at one
7 time--one particular time.

8 Q. Okay. So, who defines whether it's the same
9 project or not? Is it the developers?

10 A. Yeah, the developer.

11 Q. Okay. Thank you, sir.

12 A. And SETENA also.

13 Q. Really, sir?

14 A. They can--they can, for example, have a--two
15 different projects submitted at the same time. And
16 they--they can say, okay, this is a different project
17 from the other. Or--or this is a whole project.

18 Q. Right. Absolutely. And that's the
19 precautionary principle, presumably?

20 A. Yeah.

21 Q. But SETENA doesn't actually tell Mr. Aven and
22 his colleagues how to divide up Las Olas Project.

1 That was presumably their decision, correct--

2 A. Yeah. Yeah.

3 Q. --and their ownership decision.

4 A. (Nodded.)

5 Q. Okay. Thank you.

6 Yes. I'm sorry. You nodded. And I just
7 wanted to check that there were--yeah. So, you were
8 in agreement with my last question? Were you, sir?

9 I'm sorry. I'm just reminded that you're
10 nodding, but we actually need audible responses for
11 the record.

12 A. I agree that one project cannot be fragmented
13 in different projects. But I do not agree that the
14 Las Olas Project is the same project as the easement.

15 Q. What do you base that on, sir?

16 A. Just common sense.

17 Q. According to you, on what logic?

18 A. On the logic that the Condominium Project is
19 going to take place in different time, in different
20 context of the other projects, whether that's the
21 Concession or the--the easements.

22 Q. So, the condo was going to be realized in a

1 different stage to the easement; correct?

2 A. That's my--my knowledge.

3 Q. Which is the language in Article 94; correct?

4 A. Yeah.

5 Q. So, okay. Let's leave it there, sir. I
6 think we've got the point. I hope we have.

7 And you were agreeing a moment ago, sir, that
8 there was no EV obtained in relation to the easements
9 section; is that correct?

10 A. Not that I know.

11 Q. And you're aware of this fact because, as you
12 explain in Paragraph 24 of your First Witness
13 Statement, you were only involved as Environmental
14 Regent on the condominium section; correct?

15 A. Correct.

16 Q. And in Paragraph 11 of your Second Witness
17 Statement, you refer to the Environmental
18 Contingencies Plan for land movements prepared by
19 DEPPAT for the Claimants on the 22. Of July 2010; is
20 that right?

21 A. Yeah. That's correct.

22 Q. Let's go to that document. It's R-42. And

1 that's Tab 10 in the cross-bundle.

2 (Pause.)

3 BY MR. LEATHLEY:

4 Q. Do you have that document with you, sir?

5 A. Yeah.

6 Q. So, you prepared this plan--it's only a few
7 pages--you prepared this plan for the purpose of the
8 construction works that were to be undertaken in the
9 Easement Section of the Las Olas project; correct?

10 A. Actually this--this document, for what I
11 recall--David told me that their--that the
12 Municipality wanted a mitigation plan for the land
13 movements of the project itself. And at that time, I
14 wasn't familiar with what the Condo Project was and
15 what the Easement Project was. So, I got kind of
16 confused when I prepared this document because I was
17 just getting familiar with the--with the project.

18 Q. So, let's go to page 1 of R-42. So, that's
19 the document you have there.

20 And I'd like you to look at the first two
21 paragraphs. There should hopefully be a translation
22 behind the blue page. And I'll read the translation.

1 I'm happy for you to look at either version.

2 It says: "This document contains an
3 environmental assessment for the earth movement works
4 and construction of access easements for the Villas
5 La Canícula project.

6 "It's important to note that the project as a
7 whole has respected Environmental Viability granted by
8 SETENA. However, only by--only one of the components
9 of the project is evaluated in this report, which is
10 the access easements for the public street in the
11 western zone of the property."

12 Do you see that letter?

13 A. Yes.

14 Q. And just pausing there for a moment, you're
15 referring to the project as a whole in that second
16 paragraph; correct?

17 A. Yes.

18 Q. And you're including both the Condominium and
19 the Easements there--

20 A. Yes.

21 Q. Now, you say here in paragraph 24 of your
22 first Witness Statement that the Easement Section was

1 not covered by the EV issued for the Condominium
2 Section--and this is something you've affirmed a
3 moment ago; correct?

4 A. Yes.

5 Q. In fact, the Easement Section wasn't covered
6 by the EV issued for the Condominium Section at all;
7 correct?

8 A. Correct.

9 Q. But, in the July 2010, this environmental
10 contingencies plan, you're telling the--the
11 Municipality the opposite; right?

12 A. Yeah. As I told before, that was a mistake,
13 because I thought that was just one project as a
14 whole. But then after I got familiar with the
15 project, I realized that one thing was the Condo
16 Project and the other thing was the easement. And
17 that the Environmental Viability only included the
18 Condo Project.

19 Q. So, you were confused, which obviously you
20 must have meant the Municipality was misled in this
21 regard; correct?

22 A. No, not really, because I believe the

1 Municipality had clear that there was the Condo
2 Project and then the Easements.

3 Q. Well, off the back of that, sir--off the back
4 of this plan, which--you didn't correct your
5 understanding, did you, sir, with--you say you're
6 confused, but there was no correction to this report.

7 A. No.

8 Q. So, the Municipality would remain confused if
9 there was a confusion.

10 A. I believe there was no confusion.

11 Q. But you just testified there was a confusion
12 for you.

13 A. For me on the--on the wording.

14 Q. Yes, there was a confusion as between the
15 condo and the easements.

16 A. Yes.

17 Q. That's what you said a moment ago.

18 A. Now I'm clear that this document was probably
19 requested by the Municipality to--to the developer in
20 order to cover the--the easement because since the
21 easement doesn't have any environmental impact
22 assessment as of the regulations--that's what the

1 regulation says, they wanted some environmental
2 management of these activities, so that's why they
3 asked for this document.

4 Q. That's right, sir. And, in fact,
5 construction permits were issued off the back of this
6 document; correct? Because the Municipality had
7 understood that there was an Environmental Viability
8 in place.

9 A. I'm not familiar with the construction
10 permits process, so...

11 Q. Well, according to Paragraph 11 of your
12 second Witness Statement, the July 2010 Environmental
13 Contingency Plan was, according to Mr. Aven, required
14 by the Municipality of Parrita before construction
15 could commence.

16 A. Yeah.

17 Q. Right.

18 A. That's what David told me, but I'm--I'm
19 not--I'm not sure what was the process if--if the
20 Municipality used this document or not for the
21 process.

22 Q. But really, the construction was for the

1 easements; right?

2 A. Yeah.

3 Q. Which is why you were referring to the
4 easements having the Environmental Viability of the
5 Condominium Section.

6 A. Yes.

7 Q. Because you thought they were all one
8 project.

9 A. Yeah.

10 Q. So, the easement's construction work was
11 portrayed by you as part of the construction works for
12 the Condo Section; albeit you--you say you
13 misunderstood--you--you mistook this.

14 A. I'm sorry?

15 Q. The easement's construction work was
16 portrayed--was represented by you as part of the
17 construction works of the Condominium Section.

18 A. No. What do you mean with "portray"?

19 Q. Let's go back to this document, sir.

20 Here, you're talking about the construction
21 works of the easements. I'd like to get us very
22 clear, sir, because this is hopefully not a

1 complicated point.

2 The first two paragraphs that you had read
3 from that document, R-42, suggested that the easements
4 benefited from the Environmental Viability of the
5 project as a whole. That's correct; right? That's
6 what these two paragraphs are saying?

7 A. Yes.

8 Q. And you also testified a moment ago that only
9 the Condominium Section had an Environmental
10 Viability; correct?

11 A. Yes.

12 Q. So, the easements that you were applying for
13 construction works for did not have an Environmental
14 Viability; correct?

15 A. Correct. Right.

16 Q. So, you were, then, misleading the
17 Municipality, because they had understood that the
18 easements benefited from an Environmental Viability
19 when they did not.

20 A. No, because if the Municipality thought that
21 the easements needed Environmental Viability, they
22 should have asked for one. And they issued the

1 permits without--as I understand, without asking for
2 Environmental Viability. They only asked David for an
3 environmental management plan for the earth movement,
4 and that's--

5 Q. And that's the--

6 A. That's the--that's the document that I
7 prepared for him.

8 Q. But you'd understood before--in fact, it was
9 your testimony that the responsibility's on the
10 developer; correct--

11 A. Yes.

12 Q. --for the environmental obligations that you
13 have to exercise; correct?

14 A. Yes.

15 Q. And it's also your testimony that it was
16 SETENA to review the information they received, and
17 presumably the same would be for the Municipality, to
18 review the information they receive.

19 A. Yes.

20 Q. So, when they receive something from you that
21 tells them that there's already an Environmental
22 Viability for the easements, then they could be just

1 as confused as you; correct? In fact, you testified
2 today that you were confused.

3 A. I was confusing identifying the different
4 components of the project. And I believe the
5 Municipality was clear that for the easements, they
6 don't have to ask for Environmental Viability because
7 of the size of the--of the project.

8 Q. How could they be clear about that from your
9 first two paragraphs, sir? Because you say exactly
10 the opposite.

11 A. Because that was a mistake.

12 Q. Did you correct it? Your testimony a moment
13 ago was that you did not.

14 A. No.

15 Q. Okay. Thank you, sir.

16 And the--Mr. Bermudez, going back to the
17 Environmental Regent's duty to inform SETENA of the
18 activities and the construction work that you
19 undertook as a--that was undertaken by the developer,
20 in Paragraph 19 of your second Witness Statement, you
21 deny that the Claimants kept engaging in construction
22 works after they were ordered to stop all works by

1 Costa Rican agencies.

2 That was your testimony; correct?

3 A. Yes.

4 Q. And in the same paragraph, you refer to your
5 bimonthly reports that you prepared on your visits as
6 Environmental Regent for the Condo Section. Correct?

7 A. Yes.

8 Q. And these along with your notes and your
9 logbook and your other records is what you maintained
10 in your files on the Las Olas project; correct?

11 A. Correct.

12 Q. But, Mr. Bermudez, you testify on
13 paragraph 20 of your second Witness Statement that
14 your files were destroyed because the file was
15 inactive; is that right?

16 A. The physical files.

17 Q. Yes. So, you had electronic versions of the
18 files.

19 A. Of--of the reports? Yes.

20 Q. Yes. Okay. So, can we--what was the point
21 of your referencing about whether the physical files
22 were destroyed? Why did you testify to that if you

1 had an electronic copy?

2 A. I believe somebody asked that--if we can--if
3 we could provide all the physical files of the
4 project.

5 Q. Uh-huh. Have you provided all of those to
6 counsel to the Claimants?

7 A. I provided them the--the digital files.

8 Q. Okay. And you mentioned that only the works
9 that were undertaken were minor maintenance works; is
10 that right, sir?

11 A. Yes.

12 Q. And I'd like you to go to Exhibit C-112.
13 This is Tab 11 of the cross-bundle.

14 This, while you're pulling it up, is the
15 SINAC injunction issued by Mr. Luis Picado Cubillo on
16 the 14th of February 2011 against the Las Olas
17 Project; is that right, sir?

18 A. Yes.

19 Q. And given your testimony regarding what you
20 saw as the site at the time, you're Environmental
21 Regent, and you've just submitted your report before,
22 you saw the site now as the Condominium and the--the

1 Easement Section as well; right?

2 A. No. I was the Environmental Regent for the
3 Condo Project.

4 Q. For the Condo Project?

5 A. So, I--my inspections were covering all the
6 duties that happened inside the Condo Project.

7 Q. Okay. So, let's go back one step.

8 You had said in your plan--mitigation plan
9 that you were requesting permit--construction permits.
10 That was the purpose of the mitigation plan. Correct?

11 A. Yeah.

12 Q. And that was for the Easement Section.

13 A. I guess--

14 Q. And so, presumably following--I am sorry. I
15 needed to let you answer. I didn't let you answer.
16 That was a "yes"?

17 A. Yeah, I suppose it was for a construction
18 permit.

19 Q. And so, with a construction permit, that
20 would have been with the purpose to construct; would
21 you agree?

22 A. Yes.

1 Q. Right.

2 And so, at that point in time, sir, you've
3 got the Condominium Section that's being built on, and
4 you've then got works on the Easement Section that's
5 being built on; correct?

6 A. No, not that I recall. Because when I got to
7 the property in--for my first inspection, I noted that
8 there were two easements already built.

9 Q. Thank you, sir.

10 Now, the Government order issued by
11 SINAC--excuse me, sir.

12 The Government order issued by SINAC was
13 mandatory; would you agree with that, sir?

14 A. Yes.

15 Q. Which must have meant the suspension of all
16 works; correct?

17 A. In the Condo Project.

18 Q. In the condominium. But although the
19 construction works had been granted, the permits had
20 been granted for the easements; correct?

21 A. Yeah.

22 Q. Off the basis of your mitigation plan?

1 A. I guess so.

2 Q. Okay.

3 A. Once again, I--the easement construction
4 process was not covered by the environmental
5 inspections, because there's no Environmental
6 Viability for that part.

7 Q. Absolutely.

8 A. So--so, that's why my inspections were for
9 the Condo Project, not for the easements.

10 Q. Okay.

11 A. And also, when I got there in June 2010, I
12 noticed that there were already two easements built.
13 That reinforced my--my knowledge that this was a
14 separate--this was a separate segregation or
15 fragmentation that was already done, and that the
16 Condo Project was another--another project that was
17 going to--to start from that time.

18 Q. And I want to take you through some of the
19 minutes of inspections. Before I do, just to confirm,
20 though, the construction work that you had seen on the
21 easements was for Easements 8 and 9; right?

22 A. I don't know the number of them.

1 Q. Were they down in the southwest corner of the
2 plaza?

3 A. They were down in the southwest.

4 Q. Okay. Thank you.

5 I wonder if you can go to Exhibit R-510.

6 510. It's at Tab 12 in the cross-bundle.

7 This is--do you have that there, sir?

8 A. Yes.

9 Q. 510. This is a minute of inspection Number 3
10 dated April 12, 2011.

11 Do you have that, sir?

12 A. Yes.

13 Q. And so, this is after the date of the SINAC
14 injunction.

15 A. Yes.

16 Q. And this is a construction log for the
17 Las Olas Project; correct?

18 A. Yes.

19 Q. And you can see from the document that it was
20 prepared by an engineer, Mr. Manuel Calvo; is that
21 right?

22 A. Yes.

1 Q. And this construction log documented works on
2 the project site on the 12th of the April; and if you
3 go to page 1 of this document--I don't believe we have
4 a translation, so, I'd like to read onto the
5 record--yes. I'm sorry. We do have a translation.

6 And so, I'm going to read out the
7 observations--this is the project progress of the (in
8 Spanish ["avance de obra"]).

9 Do you see that, sir?

10 A. Yes.

11 Q. And here it says: "Work is being done on
12 embankments in lots on Street Number 1, and work is
13 being done on pipes and potable grid in Easement
14 Number 7."

15 A picture is attached that details the
16 installation of a valve cover. And we've already
17 encouraged the Tribunal just to look at the photos in
18 the original language version.

19 Is that all correct, sir? Does that look
20 like your logs?

21 A. Yes.

22 Q. And these are contemporaneous photos of the

1 work undertaken at the time.

2 And then also--just turn the pages, if I can
3 ask you to do the same, R-511--that's Tab 13--and
4 R-512--that's Tab 14--similar reports. And if I might
5 just say, just sort of similar work to what was being
6 undertaken in April.

7 R-511, that's Tab 13, is from April 18, and
8 R-512 is the minutes of inspection from May 2nd.

9 Is that correct, sir?

10 A. Yes.

11 Q. And so, you agree that this construction log
12 documented any works on the project site after the
13 SINAC injunction; correct?

14 A. I believe it's related to the easement, not
15 the Condo Project. Because there was some photos of
16 the easement that--one easement that was being built
17 at that time.

18 Q. That's right, sir.

19 A. Yeah.

20 Q. Without the Environmental Viability.

21 A. Yeah.

22 Q. Now, I wonder if we can go to Paragraph 20 of

1 your first Witness Statement, and you refer to how you
2 helped Mr. Aven apply for the Environmental Viability
3 for the Concession site; is that right?

4 A. The Concession.

5 Q. Uh-huh. And in the same paragraph you
6 mention that DEPPAT was also retained by Mr. Aven to
7 act as the Environmental Regent for the Concession
8 site; is that right, sir?

9 A. Yes.

10 Q. And so, the same Paragraph 20, you mention
11 that after DEPPAT was retained as Environmental Regent
12 for the Concession site, Mr. Aven hired someone else
13 to do the job; is that right?

14 MR. BURN: I've just been informed that the
15 Spanish feed may not be working. It obviously doesn't
16 affect you and the witness, but I'm not sure that
17 everybody's getting this.

18 MR. LEATHLEY: May I ask Professor Nikken--
19 (Comments off microphone.)

20 MR. BURN: This is not my original
21 observation, but--

22 MR. LEATHLEY: I would say the most important

1 lady in the room is the lady sitting behind Mr. Burn,
2 in terms of Spanish.

3 (Comments off microphone.)

4 BY MR. LEATHLEY:

5 Q. So, let me repeat the question, sir, because
6 I've actually forgotten the question.

7 In the--we're in Paragraph 20 of your first
8 Witness Statement, and in that same paragraph, you
9 mentioned that after DEPPAT was retained as the
10 Environmental Regent for the Concession site, Mr. Aven
11 hired someone else to do that job; correct?

12 A. That's what I understand, yeah.

13 Q. And so, in fact, Mr. Aven replaced DEPPAT for
14 another consultancy company to act as an environmental
15 regent; right?

16 A. I believe so. I'm not sure about it,
17 but--that's what I--that's what I understand.

18 Q. Yes, and you don't mention that in your--in
19 your statement.

20 But I'd like to take you to Exhibit R-36,
21 Tab 15 in the cross-bundle. And this was a request to
22 replace DEPPAT as the Environmental Regent dated the

1 1st of June 2010.

2 I'd like you to go to Paragraph 3 of the
3 letter where it starts with (in Spanish [nuestra
4 solicitud]).

5 A. Yes.

6 Q. And it says here--I'm afraid we don't have a
7 translation so I will read this onto the record. (In
8 Spanish [nuestra solicitud])--and I hope actually now,
9 Mr. Baker, you can hear it.

10 "Our request is based on the omissions and
11 breaches which the Environmental Regent has incurred
12 within his or her management; and because of the
13 character of the responsible, pertinent environmental
14 laws and regulations that regulate the environmental
15 matters that the Regent must know, recommend, and
16 execute, and also follow up on, this situation exposes
17 our business to--well, it could actually compromise us
18 with regard to acquired environmental commitments,
19 which we want to ensure their compliance."

20 And this letter explains the reason why
21 DEPPAT was replaced as the Environmental Regent for
22 the Concession site; correct, sir?

1 A. It only kind of copy/paste the
2 responsibilities of the Environmental Regent. It
3 does--I don't see any particular reason or explanation
4 of--of what were these omissions.

5 Q. Uh-huh. Okay.

6 MR. LEATHLEY: Thank you, sir. I don't have
7 any further questions.

8 MR. BURN: Sir, just a couple of things I
9 would like to take the witness back to very briefly.

10 PRESIDENT SIQUEIROS: Okay.

11 REDIRECT EXAMINATION

12 BY MR. BURN:

13 Q. Mr. Bermudez, you--you'll recall that you
14 looked at the so-called "Protti Report."

15 A. Yes.

16 Q. A report made by a Mr. Roberto Protti.
17 That's at Tab 7 in the file. If you could turn back
18 to it.

19 And, at the same time, can you just go back
20 to Paragraph 13 of your Witness Statement--your second
21 Witness Statement. You were asked questions in
22 relation to the Protti Report, and your

1 characterization of the Protti Report at Paragraph 13
2 of your second Statement.

3 So, keep your finger at Tab 7 so that you can
4 move between the two.

5 A. Yeah.

6 Q. And looking at Paragraph 13, can you just
7 remind yourself of what you said in that paragraph
8 very quickly. You don't need to read it out loud, but
9 I just want you to have in mind what he said in that
10 paragraph.

11 A. Yes. I read it.

12 Q. Okay. Now, if you could go back to the
13 Protti Report at Tab 7.

14 Now, this isn't your fault, because--but I'm
15 not going to spend an enormous amount of time going
16 through the precise text, because the Tribunal and
17 everybody else in the room has already done that once
18 today.

19 But I do want to give you a fair chance,
20 given the challenge that was made to the way in which
21 you described the Protti Report, to have a quick look
22 at the report in order to answer a question on it.

1 So, what I would invite you to do, again,
2 without reading this onto the record, is to read as
3 quickly as you can, but read it, especially the second
4 page, you'll see the--the handwritten numbering at the
5 top starts 125. If you could just read down that
6 page, just remind yourself what is said in that--I'm
7 going to ask you to read a couple of other sections in
8 this report, and then I'm going to ask you a question.

9 A. 125?

10 Q. Yeah. Just quickly read through that.

11 (Pause.)

12 BY MR. BURN:

13 Q. And then once you've done that, if you could
14 turn over to page 128.

15 (Pause.)

16 THE WITNESS: 128.

17 BY MR. BURN:

18 Q. Yeah. If you'd go right down about
19 two-thirds of the way down, three-quarters of the way
20 down, you'll see there's a paragraph beginning (in
21 Spanish [se deduce de la aplicacion]).

22 Just start reading from there, and then over

1 the page, and read to the end of Section 7. Again,
2 reasonably quickly, if--if you can.

3 A. I'm sorry--

4 Q. Starting--starting from (in Spanish [se
5 deduce de la aplicacion]). You see that paragraph
6 there? And if you just read everything from there
7 on--until the end of Section 7, which is over on
8 page 130.

9 A. Okay.

10 (Pause.)

11 THE WITNESS: Yes. You've--yeah.

12 BY MR. BURN:

13 Q. Okay. Having reread those sections which
14 together constitute a fair chunk of this document, do
15 you think your characterization in Paragraph 13 of
16 your second Statement is a fair one or not?

17 A. Yes.

18 Q. You think it's a fair one?

19 A. Yeah.

20 Q. What do you think this report is about?

21 A. This is a geological survey of the--of the
22 property; geological and hydrological survey of the

1 property.

2 Q. Now, if you could just go back to the page
3 marked "125," you'll remember that Mr. Leathley took
4 you specifically to a phrase that appears in the very
5 first part that both he and I have taken you to.

6 So, if you look in that section near the top
7 which in the sentence starting (in Spanish [Los
8 terrenos en estos]) at the top of 125; do you see
9 that? If you go back to 125.

10 A. Yeah.

11 Q. Now, the phrase that Mr. Leathley took you to
12 is right near the end. He referred to the phrase
13 "People (in Spanish [tipo pantanoso])." You remember
14 that?

15 A. Yes.

16 Q. The point that was put to you was by--by
17 reference to Mr. Barboza's expert report was that
18 there was some precise technical meaning to be taken
19 from Mr. Barboza's analysis, and that that should
20 inform the understanding here.

21 Do you accept that? Did you accept
22 that--that the use of that phrase in this document has

1 the same technical meaning that Mr. Barboza adopts in
2 his Expert Report?

3 A. No.

4 Q. Looking at the reference there in that entire
5 sentence, and also looking a bit further down the
6 page, to the paragraph starting (in Spanish), what
7 would you say he--Mr. Protti was saying?

8 A. I believe that means Mr. Protti was saying
9 that this specific area has poor drainage,
10 because--well, he doesn't mention the--the reason, but
11 he said that for some reason, this area has poor
12 drainage and that this is a swampy kind--kind of
13 swampy area. That's--that's what I get from this
14 paragraph.

15 Q. Indeed.

16 And you see at the--near the bottom--I think
17 this is what you have in mind, but perhaps you would
18 like to confirm. He talks about swampy-type area
19 perhaps caused by the drainage problems in this
20 sector.

21 That's what you had in mind.

22 A. Yeah.

1 Q. Okay. And did you--you visited the site for
2 the purposes of your duties as Environmental Regent on
3 a fairly regular basis. Did you ever observe any
4 evidence of potential wetland?

5 A. No. Not in the Condo Project. I did observe
6 that there was some area with poor drainage and that
7 the water was not--the runoff water was not being
8 evacuated because maybe previous water from the main
9 road that goes to Esterillos that kind of created like
10 a--like a dam effect that didn't allow the runoff
11 water that's coming from the land--from the hill, from
12 the hillside, to run off this way through the--through
13 the road. That's what I believe was creating this
14 poor drainage area.

15 Q. Thank you.

16 Just one last point, and then we'll be
17 done--subject, of course, to the Tribunal's right to
18 put questions to you.

19 You remember that Mr. Leathley put some
20 question to you--questions to you with respect to the
21 relationship between the Easements and the Condominium
22 Section.

1 You recall that you were asked various
2 questions on that topic?

3 A. Yeah.

4 Q. And in terms of relationships with the
5 Municipality, would--do you think they would have
6 known there was a relationship between the Easements
7 and the Condominium Section?

8 A. No.

9 Q. Do you think SETENA would have known?

10 A. Relationship in which way?

11 Q. That's--that the project was being developed
12 with--in one part, in this condominium part, that
13 there was also an easement part--that--would those
14 agencies have been aware that these different projects
15 were happening at the same time?

16 A. No.

17 Q. If you don't know, that's fine, but--

18 A. Yeah. I--I couldn't tell, because I was not
19 involved in all the permitting--construction permits
20 processing.

21 MR. BURN: Okay. I have no further
22 questions. Thank you very much.

1 THE WITNESS: Yeah.

2 PRESIDENT SIQUEIROS: Pedro, do you have any
3 questions?

4 QUESTIONS FROM THE TRIBUNAL

5 ARBITRATOR NIKKEN: Yes. I have a couple of
6 questions.

7 When it comes to strictly legal matters,
8 there is some confusion about easement. An easement
9 is a functional relationship between two properties,
10 one that is dominating and one is a servant, and the
11 owner of the dominant has the right to get some
12 use--utilities from the servant.

13 One of these important easements is that of
14 passage. When the lot is enclosed, they have the
15 right to go through the others to reach the public
16 area or public road.

17 Now, here, "easements" is being used in one
18 sense--and perhaps you can correct me if I'm mistaken,
19 but--as synonymous as an internal communication of
20 internal roads, an internal network of passages.

21 And that would actually be common to all
22 owners or those who had an interest, either through

1 the Concession or the condominium.

2 So, in that sense, it's somewhat difficult to
3 understand how one can view that the road project is
4 different from the rest of the subdivision into lots.

5 Perhaps you could explain why they're
6 different, because roads obviously could neither be
7 sold nor rented, nor can they be subject to any right
8 different to the common right of all condominium
9 holders.

10 How can one then understand that it is
11 something different?

12 THE WITNESS: Well, first, let me make it
13 clear--I'm not--neither architect nor engineer.

14 My specialization is not in the subdivision
15 of a land, but I do have some knowledge. My knowledge
16 about how land is subdivided in Costa Rica is that it
17 can be done through an easement. This is a road of no
18 longer than 60 meters long that makes it possible for
19 owners of the parcels resulting from the subdivision.

20 And, as I said, they cannot be more than 60
21 meters in length. That is how we understand easement
22 for the subdivision of parcels--into parcels in Costa

1 Rica. Now, in a condominium project, there may be
2 internal roads or what--the size required to segregate
3 the number of lots desired.

4 So, in this sense, the notion of "easement"
5 is very different to condominium when you're talking
6 about the subdivision of land.

7 In the specific case of Las Olas--and here
8 again, let me make it clear that I don't clearly
9 understand the process of the easements, because I
10 didn't fully participate in that development. But I
11 understand that the easements were to provide access
12 to lots that were abutting the public road, whereas
13 it--they might want to have roads in the internal and
14 divide it into the amount of lots that they wanted in
15 the subdivision.

16 So, the easement streets are not connected to
17 the condominium streets. They are separate. That,
18 for me, is the chief indicator that these are two
19 different projects.

20 I hope I answered your question.

21 ARBITRATOR NIKKEN: No, but as you say,
22 you're not an expert, but you have made some

1 statements but--it doesn't matter.

2 Now, the other thing I'd like to hear from
3 you is how many times have you been appointed, or your
4 company--were you appointed--and I believe that your
5 company was appointed, then you quit because there
6 hadn't been an approval, and then once you were later
7 on, again, appointed--according to what I've read in
8 the documents.

9 Tell us a little bit about the history behind
10 this.

11 THE WITNESS: Well, actually, I--my knowledge
12 is from 2010 forward. Prior to 2010, I was not
13 involved to a great extent with these matters of the
14 company.

15 My understanding is that the company was
16 appointed as Environmental Regent for the Hotel
17 Project in the Concession area on the coast area. One
18 thing is to be appointed as Regent; another thing is
19 to act--or work as Regent. I can be appointed Regent,
20 but perhaps I'll never be acting as such, as in this
21 case.

22 So, we were appointed Regent for the

1 Concession areas, but we never actually worked as
2 Regents. Why? Well, because we never conducted
3 project inspections. There was no activity as Regent,
4 as--contrary to what happened in the condominiums,
5 because there, we were told that the works were
6 beginning, and we conducted inspections.

7 I have no idea why they changed us and
8 removed us as being the Concession's regents, but I do
9 know for sure that we were appointed; but before we
10 started working as Regents, they changed us out.

11 ARBITRATOR NIKKEN: But your
12 resignation--why? Because the work hadn't
13 begun--well, I don't have it here--I didn't make a
14 clear notation of that.

15 THE WITNESS: I believe it was 2009. Yes, it
16 would seem to be that.

17 ARBITRATOR NIKKEN: You resigned in 2009--in
18 April 2009.

19 THE WITNESS: I think it refers to something
20 that was prior. My understanding--because here again,
21 I was not personally involved, but this project at La
22 Canicula was a different project. It was prior to the

1 Las Olas Condominium. It's on the same property, the
2 same land, but it was a different project.

3 ARBITRATOR NIKKEN: Yes, I understand.

4 THE WITNESS: We were appointed as
5 Regent--that's my understanding, but since the
6 project--well, we were never told if it was going to
7 begin or not. We decided to send a letter saying that
8 we wouldn't act as Regents.

9 ARBITRATOR NIKKEN: And following the acts of
10 1 June 2010, when the--I don't know what the correct
11 word was, that you were separated or terminated
12 or--you stopped being the Regents. What happened
13 after that?

14 THE WITNESS: Well, after that--I had no
15 knowledge about that till recently. But after that,
16 we never had anything to do with the Concession
17 Project. Nonetheless, in late 2010, if I recall
18 correctly, Mr. David Aven asked us to prepare a report
19 on the current status of the Project.

20 ARBITRATOR NIKKEN: When was that, please? I
21 don't know if I heard you.

22 THE WITNESS: I believe it was in August or

1 September 2010.

2 ARBITRATOR NIKKEN: Despite the fact--

3 THE WITNESS: Yes, despite the fact that we'd
4 been--they changed us. I don't really understand why,
5 but I do recall that he asked us to prepare a report.

6 ARBITRATOR NIKKEN: Mr. Aven never notified
7 you of this letter that had been sent to the Regent,
8 to Mrs. Sonia Espinosa?

9 THE WITNESS: No.

10 ARBITRATOR NIKKEN: That letter--

11 THE WITNESS: You mean the one signed by
12 Paula Murillo?

13 ARBITRATOR NIKKEN: Yes.

14 THE WITNESS: No. We never knew about that
15 letter.

16 ARBITRATOR NIKKEN: Well, thank you very
17 much.

18 ARBITRATOR BAKER: Can you help me understand
19 what the environment--where the Environmental Regent's
20 primary duty lies? You're hired by the developer,
21 you're paid by the developer; but the law says your
22 first duty is to whom?

1 THE WITNESS: Yes.

2 ARBITRATOR BAKER: To who? The developer
3 or--

4 THE WITNESS: To SETENA.

5 ARBITRATOR BAKER: To the environmental
6 agency?

7 THE WITNESS: To the environmental agency.

8 ARBITRATOR BAKER: So, we can get a clear
9 record, so, the law says, as I understand it--and I'm
10 asking you for your understanding, not as a lawyer but
11 just as someone who's been doing this for a long
12 period of time--that your duty--first duty of
13 allegiance runs to the environmental agency; is that
14 correct?

15 THE WITNESS: Yeah, my main role is to make
16 sure that all the environmental measures that were
17 presented to the--to the environmental agency are
18 complied with by the developer.

19 ARBITRATOR BAKER: So, when you would file
20 your periodic reports with the agency, did you ever
21 have discussions, did anyone from the agencies ever
22 call you to discuss the reports?

1 THE WITNESS: No. Oh, I'm sorry, yes.

2 After the first or two inspections that
3 when--I believe there was a--there was a complaint
4 before SETENA for alleged environmental damage of the
5 project. Then SETENA review my--my reports and send
6 like a feedback of--of the reports, saying some things
7 that needed to be adjusted or updated to the reports.
8 And we complied with that.

9 ARBITRATOR BAKER: So, that was a change in
10 the way in which they wanted you to report the
11 information that you were sending to them on a monthly
12 basis.

13 THE WITNESS: Yeah.

14 ARBITRATOR BAKER: Is that unusual, for an
15 Environmental Regent to never get a site visit or to
16 never get an in-person inspection from the
17 environmental agency?

18 THE WITNESS: It's--it's usual to not get
19 inspections from SETENA unless there is a complaint.
20 Usually, when--if the process goes--all along the
21 construction project without complaints or things that
22 need to be reviewed by SETENA, they don't go to the

1 site.

2 ARBITRATOR BAKER: And the reason for that is
3 because they are, in principle, relying upon the
4 reports that you're sending them each month.

5 THE WITNESS: Yes.

6 ARBITRATOR BAKER: Okay.

7 With respect to--I think it is Respondent's
8 Exhibit 42, which is behind Tab 10 in your hearing
9 bundle. You had some discussions with counsel about
10 that earlier.

11 But he didn't ask you the following question,
12 and so, I'd like to, and that is: After this report
13 was prepared at Claimants' request, as you've told us,
14 did you ever personally have any discussions with,
15 either on the telephone or in person, with anyone from
16 the Parrita Municipality who received this report?

17 THE WITNESS: No, sir.

18 ARBITRATOR BAKER: That's it for me,
19 Chairman. Thank you.

20 PRESIDENT SIQUEIROS: I have one final
21 related question.

22 In respect to that mitigation plan that is in

1 the record as R-42, you were mentioning earlier that
2 this was at the original stage of your involvement
3 with the project; is this correct, when you prepared--

4 THE WITNESS: That's correct.

5 PRESIDENT SIQUEIROS: Okay. Because you
6 started working in the Las Olas project in June/July
7 2010?

8 THE WITNESS: That's correct, yes.

9 PRESIDENT SIQUEIROS: You describe in this
10 mitigation plan how the project consists of a
11 condominium, residential condominium, of approximately
12 300 homes plus a segregation of 72 lots where there
13 will be urban easements developed.

14 THE WITNESS: Yes.

15 PRESIDENT SIQUEIROS: So, at this stage--at
16 least at this stage in time, and when you submitted
17 this report, which was one whole development with
18 different entrances, as you describe, but it was your
19 view that this was--and the view of the developers,
20 that this was one project? And the mitigation was to
21 apply with respect to both projects, the condominium
22 and the easements?

1 THE WITNESS: What I understand now is
2 that--well, at that time, I didn't know there was two
3 separate projects.

4 PRESIDENT SIQUEIROS: Yeah. But at that
5 time--

6 THE WITNESS: Now I understand that there
7 were two separate projects.

8 PRESIDENT SIQUEIROS: At that time--I want to
9 understand when you submitted this report in 2010 what
10 you understood back then.

11 THE WITNESS: I understood the easements were
12 part of the--of the whole project, but--because I
13 didn't know the nature of the project. Now I
14 understand that this mitigation plan was only for the
15 easements. Right?

16 PRESIDENT SIQUEIROS: But the mitigation
17 addresses mitigation of the building--or the
18 construction, I'm sorry, of roads, the entry roads,
19 for the condominium and also the roads for the
20 easements.

21 THE WITNESS: Yeah, because this is a general
22 plan that can applied to the easement and to the

1 condominium project as well.

2 This is just a general plan for earth
3 movement. It's not a complete evaluation of the
4 project or a complete management plan for a project.

5 PRESIDENT SIQUEIROS: No, I understood. But
6 it does have very specific measures that would be
7 taken in order to mitigate any impact for the whole
8 project.

9 THE WITNESS: Yeah, it can be applied
10 for--for any project, because this is a general plan
11 for earth--earth movements. It's not specific for the
12 earth movements of the easements or the earth
13 movements of the--of the condo.

14 But now I understand that this was used only
15 for--you know, in purpose for--for the easements works
16 that were going to be done.

17 PRESIDENT SIQUEIROS: Just so I understand
18 your response correctly, so, when you prepared these
19 mitigation measures, they were not mitigation measures
20 for this project. You would have said the same thing
21 for any other project?

22 THE WITNESS: Yeah. It was

1 general--that's--that's what I was asked to do. I
2 mean, it was supposed to be just general measures to
3 mitigate effects of earth movements of any kind.

4 PRESIDENT SIQUEIROS: That would apply to any
5 other project?

6 THE WITNESS: Yeah.

7 PRESIDENT SIQUEIROS: Okay. I have no
8 questions. Thank you.

9 No follow-up questions on the part of
10 Claimants or Respondent?

11 MR. BURN: Nothing from the Claimant, sir.

12 MR. LEATHLEY: Nothing from the Respondent.
13 Thank you.

14 PRESIDENT SIQUEIROS: Thank you very much.
15 Thank you very much, Mr. Bermudez.

16 THE WITNESS: Thank you.

17 PRESIDENT SIQUEIROS: You are free to leave
18 now.

19 Would the Parties be ready to continue?

20 Well, Mr. Minor Arce, would you like a break?
21 It's 5:30.

22 MR. BURN: I think we're in--we would put

1 ourselves in the hand primarily of the Tribunal, but
2 frankly the Respondents as well. 5:30 is late in the
3 day on the one hand; and on the other hand, there were
4 originally scheduled to be six witnesses heard today,
5 and we've only heard from four.

6 Mr. Minor Arce has been waiting all day. So,
7 I'm sure he would be perfectly happy to come now; but
8 really, I'm in your hands as to whether we should
9 begin in the hope of at least achieving something or
10 whether we should wait until tomorrow morning. We're
11 pretty relaxed. As I say, we would invite comments
12 from Respondent's counsel at this time.

13 PRESIDENT SIQUEIROS: I think it would be
14 preferable that his testimony not be divided; but
15 having said that, we do have a very full schedule this
16 week, so, preferably, if the Court Reporters and
17 Interpreters would allow--I'm not sure--I would have
18 to ask Mr. Leathley and his team how much time they
19 would expect this examination to take.

20 MR. LEATHLEY: Thank you, sir. I--

21 PRESIDENT SIQUEIROS: And based on that, we
22 can check the availability and resistance of the

1 group.

2 MR. LEATHLEY: No, thank you, sir, and we
3 appreciate the quandary.

4 I think the examination would take only 30
5 minutes, so, we can try to aim for that. Ms. Paez
6 would be conducting the examination.

7 I share your sentiment, Mr. President,
8 that--well, and actually that of Mr. Burn, we do have
9 a full week, and so, half an hour may become very
10 valuable come Friday evening and Monday evening. And
11 so--but I'm conscious of the sequestration and, you
12 know, what that means for the gentlemen.

13 PRESIDENT SIQUEIROS: I would ask--I have
14 more concern over Interpreters and Court Reporters.
15 Would you like to take a five-minute break or would
16 the Parties wish to continue?

17 Okay. Why don't we take, then, five minutes,
18 but let's try to be punctual. Five minutes.

19 Thank you.

20 (Brief recess.)

21 PRESIDENT SIQUEIROS: Are the parties ready?
22 Court Reporters and Interpreters?

1 MINOR ARCE, CLAIMANTS' WITNESS, CALLED
2 PRESIDENT SIQUEIROS: Mr. Arce, good
3 afternoon. I will try to briefly give you some
4 indications regarding the statement and examination on
5 the basis of your statement that the parties will
6 carry out.

7 As you've probably been told by the
8 representatives of the Claimants, they have the right
9 to first do a brief examination, to be followed by a
10 small--a brief cross-examination on your statements to
11 be carried out by the Respondent.

12 After that, the Claimant will be able to ask
13 you questions related directly to those that you
14 answered during the cross-examination.

15 The Tribunal can at any point ask questions,
16 although it will probably only do so at the end if it
17 has any.

18 And, finally, I would like to point out that
19 if you have any questions regarding a question, that
20 is, any doubts regarding a question, please don't
21 hesitate to ask for clarification.

22 And once you hear the question, first answer

1 the question. And then if you would like to make a
2 clarification, you can do so.

3 And before giving the floor to Mr. Burn, you
4 will find the document in front of you. Please read
5 it aloud so that it is recorded.

6 THE WITNESS: "I solemnly declare upon my
7 honor and conscious that I shall speak the truth, the
8 whole truth, and nothing but the truth."

9 PRESIDENT SIQUEIROS: Very well. Thank you.

10 DIRECT EXAMINATION

11 BY MR. BURN:

12 Q. You will see to your right there is a file.
13 I would like you to take that file, please.

14 Now, at the top of that file there are going
15 to be copies of your two Witness Statements in these
16 proceedings.

17 As a matter of procedure, we need to have you
18 confirm these statements.

19 So, if you could take the first document,
20 which is the original Spanish version of your First
21 Statement, I believe. But I'd like you to just flick
22 through the document and let the Tribunal know if the

1 document does, indeed, appear to be a copy of your
2 First Witness Statement in these proceedings.

3 You do not need to do it in detail.

4 A. Yes, it is the first one.

5 Q. Do you have any corrections or changes to
6 make to this First Statement?

7 A. No.

8 Q. Looking at the last page there, on page 11,
9 does that appear to be your signature?

10 A. Yes.

11 Q. Thank you.

12 We just need to repeat the exercise for your
13 Second Statement. So, if you just go over the white
14 tab--I think you're now looking at the English
15 translation of the First Statement.

16 If you could pass the white tab, you'll see,
17 I hope, Spanish-language version of your Second
18 Statement. If you could just flick through that and
19 let the Tribunal know if that appears to be a copy of
20 your Second Statement in these proceedings.

21 A. Yes, that's correct.

22 Q. Do you have any changes or corrections to

1 make to this statement?

2 A. No.

3 Q. Thank you.

4 Finally, on page 12, last page of the
5 document, does that appear to be your signature?

6 A. Yes, that is correct.

7 MR. BURN: Thank you, Mr. Arce. I have no
8 further questions at this time.

9 CROSS-EXAMINATION

10 BY MS. PAEZ:

11 Q. Good afternoon, Mr. Arce.

12 Mr. Arce, you were hired by the
13 Respondents--sorry, by the Claimants for this
14 procedure to do an initial visit to the site; correct?

15 A. Yes.

16 Q. And you produced a report in September 2010?

17 A. Yes, that is correct.

18 Q. That is Annex 082 on Tab Number 1 of this
19 binder. Can you confirm that that is the report that
20 you prepared for the Las Olas Project developers?

21 A. Well, it is somewhat--the pages are somewhat
22 not in order, but I have the impression that it is. I

1 simply don't know if it is there in its entirety.

2 Q. That is the report that was annexed to your
3 Witness Statement. Did you not review this report
4 when you prepared your statement?

5 A. What I wish to say, actually--and maybe you
6 misinterpreted what I wanted to say--is that page 1
7 appears there. That is--but it says there Number 10.
8 And then the one that says--well, the next one there
9 is not really--does not correspond to that point. It
10 is simply another aspect.

11 What I mean is that there's some kind
12 of--well, the order seems to have been inverted there.
13 You may see--I don't know if you have it there--that
14 the conclusions are not at the end, which is why I
15 have the feeling that when the photocopy was made,
16 some kind of mistake was made.

17 Q. Mr. Arce, I will guide you on the basis of
18 the numbers that appear on the top of the document,
19 10.2--that is 10, 10.2, 10.3, and 10.4.

20 On Page 10.2 of your report, you recommend to
21 the developers that--that is in the first
22 paragraph--that for the building of internal roads in

1 the property, you say that one can request a small
2 permit in the MINAE offices of Parrita; correct?

3 A. Yes.

4 Q. And in that same paragraph, in parenthesis,
5 you recommend to the developer that if more than ten
6 trees should be cut, you need to do a procedure with a
7 forestry professional; correct?

8 A. If I may, I would need to explain a bit about
9 what the process is.

10 Q. The explanations, you can give them later.

11 These are questions only to be answered yes or no.

12 Then in the last paragraph of page 10.2--in
13 the last paragraph you state and you recommend to the
14 developer that the permit can only be done once a year
15 and, therefore, a small permit can be requested for
16 internal roads to be built that year; correct?

17 A. That's what it says there, yes.

18 Q. These were the recommendations that you made
19 to the developer in September 2010; correct?

20 A. It is part of the recommendations, yes.

21 Q. Thank you.

22 Finally, we go, now, to Page 10.4 of your

1 report.

2 In the last paragraph you mention that the
3 Forestry Law establishes protection areas where even
4 if there are trees for which no permits are required,
5 these cannot be eliminated; correct?

6 A. The Forestry Law establishes different types
7 of protection areas which, undoubtedly, are protected
8 and one cannot do any kind of intervention in these
9 protected areas. That is completely correct. And
10 that's what I state there.

11 It is indicated in Article 33 and 34 of the
12 7575 Forestry Law.

13 Q. Thank you.

14 I'm glad you mentioned that Forestry Law
15 because we can then go to the next annex, which is the
16 Forestry Law.

17 A. Correct.

18 Q. Annex C-170. And Article 33(a) establishes
19 as protected areas those areas that border--or
20 Article 33(b), rather--strip of 50 meters in the rural
21 area and 10 meters in the urban area measured
22 horizontally at both sides in the riverbanks of the

1 rivers, creeks; correct?

2 A. Yes, correct.

3 Q. Mr. Arce, care to explain what is the
4 importance of the protection of these areas under the
5 Forestry Law?

6 A. The importance of areas indicated by the
7 Forestry Law basically is--or it's based on two
8 things. The effort to protect part of the environment
9 involves the following: First, strips of land are
10 created around the water flows--the permanent
11 waterways that here are 15 meters, or it could even be
12 up to 50 meters.

13 And these strips are places where we will
14 still have biodiversity and certain types of flora and
15 fauna that need to be protected. Part of that is
16 also--has also to do with the protection of waterways,
17 of water resources.

18 And another essential aspect associated
19 mainly to social and cultural aspects is that these
20 strips are also protection against roads, that is,
21 against the growth of flows, which is why they are
22 established, so that there will be no construction

1 there or any other kind of infrastructure.

2 Basically, that is the purpose that we have
3 there for these protection areas. Not only of these
4 types, but in everything having to do with protection
5 areas.

6 Q. Thank you.

7 And do you agree with me that Article 33 does
8 not mean--is not conditioned to the fact that these
9 areas be wetlands?

10 A. I don't think it is mentioned here.

11 Q. It does not speak about wetlands, does it?

12 A. No, I have not seen it. At least I don't
13 remember now that it speaks of wetlands because it
14 speaks about water banks, rivers, creeks, streams, and
15 then lakes and ponds in subparagraph (c).

16 Q. Thank you.

17 So, it does not refer to wetlands; correct?

18 A. No, not here. At least not here.

19 Q. But the protection does not depend on these
20 rivers, streams, or creeks be wetlands?

21 A. I don't understand what you mean.

22 Q. The protection of these three, rivers,

1 creeks, and streams, does not depend on the fact that
2 these are wetlands; correct?

3 A. I'm not an expert in wetlands. I simply
4 wanted to say that, at least in practice, we do not
5 necessarily equate rivers and wetlands or creeks and
6 streams because these are sources of water that
7 permanently circulate. In other words, they have
8 movement.

9 So, I don't think--well, I don't think we
10 want to apply or decide that a river, creek, or stream
11 is a wetland. I'm not an expert, but I don't think
12 that a river, a creek, or a stream is a wetland.

13 Q. Thank you.

14 Mr. Arce, in paragraph 11 of your First
15 Witness Statement you say that the first time you
16 visited the Project, you walked near the southwest of
17 the property next to the public road; correct?

18 It's Paragraph 11 of your First Witness
19 Statement. The southwest area of the property;
20 correct?

21 A. Yes.

22 Q. Mr. Arce, I'm going to show you Figure Number

1 2 of the Second Report by Kevin Erwin which shows the
2 image of the Project.

3 It is in this area here, the southwest area,
4 around which you walked in September 2010; correct?

5 A. Yes, correct.

6 Q. And for the record, I am--or the witness has
7 mentioned that the area where he walked in is the
8 area--it's in the southwest area of the property.

9 Mr. Arce, do you agree with me when I say
10 that in this area is where Mr. Erwin identified what
11 he calls Wetland Number 1?

12 A. No, I don't handle that information.

13 Q. Could you please--could you go to Tab
14 Number 3 where we have Kevin Erwin's report.

15 In this image--well, this is Figure 2 that
16 has been projected on the large screen. There it's
17 shown as a wetland. That is the area where you just
18 indicated that you walked about during your visit in
19 September in 2010. It has been indicated it is a
20 wetland; correct?

21 A. It's correct.

22 Well, basically, it was on the banks or next

1 to the Project, and it's really next to the highway
2 that goes to the town or to the beach.

3 Q. Thank you.

4 If we can go back to the first page of your
5 report, 10.2. You point out that for purposes of the
6 soils, there is accumulation of humidity in this area;
7 correct?

8 In the second-to-the-last paragraph, you said
9 that for purposes for formation of soils, there is
10 accumulation of humidity; is this correct?

11 A. Well, I'm going to tell you about this
12 paragraph. What there is, is a very flat topography.

13 Q. But the question was, did you mention that
14 there is accumulation of humidity during the visit?

15 A. If you would allow me, I wanted to clarify
16 just one point for you. Since it's a very flat
17 topography and it's very close to the coast and since
18 it was the rainy season, it's possible that it--at any
19 part of the property or properties there is
20 accumulation of water. So--and that's what I
21 indicated.

22 So, because of the fact that the slope was

1 very flat, there was accumulation of humidity and
2 precipitation at some point.

3 Q. In paragraph 9 of your First Declaration you
4 say DEPPAT contacted you so you could visit Las Olas;
5 is that correct?

6 A. Yes, that is correct.

7 Q. When you refer to "DEPPAT," are you referring
8 to Mr. Esteban Bermudez?

9 A. I can't confirm that because the business
10 DEPPAT is made up of several persons. One of them
11 contacted me, but I can't tell you if it was Esteban.

12 Q. You never did--you didn't do any forest
13 surveys before this on this property?

14 A. Well, I went to do a very specific surveyor
15 study.

16 If you notice, that in the first report I
17 made, it was a specific report about the need of
18 felling trees. And I said that in keeping with
19 legislation and regulations that are applicable in the
20 country, they had no problem in felling the trees that
21 were next to--

22 Q. Well, you're not responding to my question.

1 The question is whether you--before your visit, had
2 you ever seen any of the forest study?

3 A. No, since I was doing a specific study, I had
4 no need to look at any other studies.

5 Q. So, DEPPAT did not show you any other studies
6 about the property?

7 A. No. The work I was going to do was so
8 specific, and I knew it very well, and so I had no
9 need to look at anything else. That's all.

10 Q. So, you don't know whether, before you
11 visited the property, if the developers had spoken
12 with another forest engineering consultant?

13 A. No, I don't know.

14 PRESIDENT SIQUEIROS: Excuse me. Mr. Arce,
15 if you could speak a bit louder or get closer to the
16 microphone, because those who are taking it down, the
17 transcription and for the interpreters, it would be
18 helpful.

19 BY MS. PAEZ:

20 Q. Mr. Arce, in paragraph 6 of your First
21 Statement, you said frequently you work with different
22 environmental businesses to prepare documents to

1 obtain Environmental Viability from SETENA; is that
2 correct?

3 Paragraph 6 of your First Witness Statement.

4 A. It's correct.

5 Q. So, you know how the application process
6 works with regard to Environmental Viability; is that
7 right?

8 A. Well, I only do the forestry component. I do
9 not part--I collaborate with different businesses. I
10 just do the forest component when it's necessary for
11 whatever paperwork they want to do.

12 Q. And so, did you see--well, you did the forest
13 component for the application for the condominium
14 section of Las Olas; correct?

15 A. No. I was not hired to do a study for any
16 kind of environmental paperwork. I went and you can
17 see why I went in my report.

18 Q. And when DEPPAT and the developer--when you
19 contacted them, they didn't tell you that there was a
20 study of this kind; is that right?

21 A. A study of what kind?

22 Q. The one you mentioned that is done with

1 regard to vegetation coverage in order to apply to
2 SETENA?

3 A. No. I went to do a specific study that had
4 to do with felling trees, and it's not related to
5 that. They asked me--well, can we cut that tree? Yes
6 or no.

7 Q. Thank you. You responded to my question.

8 Let's go to Annex C-52. It's under Tab 4 in
9 the binder. This is the Environmental Viability that
10 was granted for the horizontal condominium project,
11 Las Olas. The first page you can see that it is
12 Environmental Viability for the Residential Horizontal
13 Condominium Project, Las Olas; correct?

14 The title is "Las Olas Residential Horizontal
15 Condominium Project"; correct?

16 Can you look at the next page and look at
17 Point 7, please. And I'm going to read 7.

18 "The basic studies conducted establish a
19 series of recommendations that must be followed as
20 indicated as part of the environmental commitments of
21 the project. If removal of any trees is required, the
22 appropriate permit must be obtained from the MINAE

1 office."

2 The Environmental Viability requires that the
3 Claimants obtain a permit from MINAE if they removed
4 any tree; is that correct?

5 A. I should indicate that the legislation--

6 Q. My question is yes or no.

7 What does this Environmental Viability set
8 forth? It indicates that it has to get permits to cut
9 trees.

10 A. Well, the question calls for an explanation,
11 not a yes-or-no answer because the legislation--

12 Q. Well, you can explain that later, Señor Arce,
13 when our counterpart asks questions.

14 I want to know whether this requires that the
15 developers have a permit to cut any kind of tree
16 within the property.

17 A. I cannot answer that question because this is
18 part of what is provided for in all environmental
19 resolutions that are provided, but the legislation
20 indicates that there are trees that do not need a
21 permit to be cut down.

22 So, given that condition, if there is a tree

1 that doesn't need any kind of permit to be felled--and
2 let me explain this to you--then no paperwork needs to
3 be done before any agency because the legislation is a
4 novel or new one that indicates that trees that have
5 been grown or planted, that have been regenerated do
6 not require any kind of permit to be cut down or to be
7 harvested or to be transported, even to be processed
8 in industrial process or to be exported, and that is
9 indicated by Article 28 of Law 7575.

10 Q. I'm sorry to interrupt you. But that is the
11 exception to the general rule. Usually you need a
12 permit. That is an exception to the general rule.

13 A. Yes, this is in the section about tree
14 permits for felling.

15 Q. Mr. Arce, have you ever seen any permit to
16 cut down trees that were obtained by Las Olas Project
17 or by its developers?

18 A. No, I don't know that.

19 Q. So, you never saw any permit to cut trees
20 that was obtained by Las Olas Project; correct?

21 A. I haven't seen it, and I would repeat that
22 some trees, even the ones I recommended that could be

1 cut down, do not require any permit to be cut down.

2 Q. The developers never hired you to obtain
3 permits from MINAE to cut down trees; correct?

4 A. No, not for that.

5 Q. And they didn't hire you as a forest regent
6 either.

7 ARBITRATOR BAKER: Excuse me, Counsel.
8 Because you're doing this in Spanish, you're speaking
9 so quickly over, the Interpreters cannot keep up with
10 you. So it's--just give it a second before you go to
11 the next question.

12 Thank you.

13 MS. PAEZ: Sorry about that.

14 BY MS. PAEZ:

15 Q. Just to repeat the last question.

16 Didn't they hire you--did they hire you as a
17 forest regent during the development of the project?

18 A. The figure of the forest regent--I don't know
19 if this is understood.

20 Q. You can explain it later.

21 Did they hire you or not to be a forest
22 regent?

1 A. No, not as a forest regent.

2 Q. Mr. Arce, in Paragraph 26 of your second
3 statement, you refer to a report from SINAC,
4 3rd January, 2011, paragraph 26.

5 You refer to the SINAC report from 3rd
6 January 2011; is that correct?

7 A. Yes, that is what it says.

8 Q. And you say afterwards that this report is
9 about the illegal felling of approximately 400 trees
10 at Las Olas Project; is that correct?

11 A. Yes, that is correct.

12 Q. And the Environmental Viability required that
13 the developer had a permit in order to fell any tree;
14 is that correct?

15 A. Well, I should explain, first of all, that
16 this is a report--well, I--I didn't say they were cut
17 down, as it says here in this report. And, as I
18 stated, there are trees that can be felled without a
19 permit and thereafter. Since there is no information
20 about the trees that were cut down, there's no kind of
21 information about them. And we just have an
22 approximation of trees.

1 Well, it's very subjective. There are trees
2 that do not require a felling permit. And there are
3 places where you can clear the land when it's used,
4 for example, for cattle. If you don't clean or clear
5 the land for the cattle, you won't be able to use it.
6 And so, that might have been part of it. Since
7 there's no information about what is the size of the
8 trees, the species, how high, the diameters, I don't
9 know how to define this.

10 Q. Mr. Arce, let's go back to your report from
11 September 2010. You have testified that you
12 recommended that if more than ten trees were going to
13 be felled in a year, a permit from MINAE was required.
14 You just said that 10 or 15 minutes ago; is that
15 correct?

16 A. Yes. That was my recommendation.

17 Q. And the report from January 2011 after that
18 reported that there had been 400 trees cut down;
19 correct?

20 A. I did not report that.

21 Q. No. The MINAE report from January 2011?

22 A. It's just what I explained. This report is

1 not conclusive. It doesn't say what kind of species
2 there are. And what it does even is say--well,
3 approximately how many trees were cut down? But it
4 doesn't specify. There are species that do not
5 require permits to be felled. There are species that
6 can be considered trees when they're not really trees.
7 And then--so there are no parameters indicated here.
8 And since they don't exist, that's the issue. We
9 don't know if a permit was required or not.

10 Q. Mr. Arce, you made recommendations for the
11 southwest part of the property; is that right? That's
12 what you stated?

13 A. You're talking about--

14 Q. Your report from September 2010. You refer
15 to the southwest part of the property; is that
16 correct?

17 A. Yes, that is correct.

18 Q. Please, now look at Annex R-626, this is
19 Tab 5 in the binder.

20 MR. BURN: R-262?

21 MS. PAEZ: Right.

22 BY MS. PAEZ:

1 Q. This is the report from SINAC of January 3,
2 2011, that you looked at to prepare your statement; is
3 that correct?

4 A. Yes.

5 Q. Mr. Arce, this is the report that you
6 reviewed when you had to prepare your witness
7 statement?

8 A. Yes, it's correct.

9 Q. If you could look at the first observation in
10 the report it says, first, that in those inspections
11 and on that residential project, we walked around the
12 southeast thereof.

13 Do you agree with me that the southeast part
14 is on the opposite side of the property from where you
15 visited? And do you agree that this is the part that
16 I'm indicating in--on the map, that this is the
17 southeastern part of the project here on the map,
18 approximately, let's say.

19 Q. It is not the part that you visited in
20 September 2010; is that right?

21 A. I went to the southwest. No, it's not the
22 same.

1 Q. So, you did not verify the area? You didn't
2 visit the area where it was reported that there had
3 been 400 trees felled in 2011?

4 A. Well, the first time I went it was just to
5 look at the cutting of trees in the southwest ever
6 area; that's all.

7 Q. Thank you.

8 PRESIDENT SIQUEIROS: Just for the record,
9 you mentioned the report of 3 January 2010.

10 But it was really 2011; is that correct?

11 MS. PAEZ: Yes.

12 BY MS. PAEZ:

13 Q. Mr. Arce, I want to refer to your Second
14 Witness Statement where you refer to the report
15 prepared by Ms. Mónica Vargas from the Parrita
16 Municipality.

17 In paragraph 12 of your Second Witness
18 Statement, you say that you have reviewed some
19 complaints that were submitted to the municipality in
20 2009; is that correct?

21 A. It's correct.

22 Q. And in the same paragraph, you say that they

1 were presented by residents of La Parrita, the third
2 line of paragraph 12.

3 A. What I understand is that the complaint was
4 filed by the resident--residents of Parrita.

5 Q. Thank you. Yes.

6 You also mention in Paragraph 12(b) that the
7 complaints referred to the felling and burning of
8 trees; correct?

9 A. It is correct.

10 Q. And in 12(a), you say that the complaint
11 doesn't mean that these residents are experts in
12 forests or wetlands; is that right?

13 A. Yes.

14 Q. Mr. Arce, let's look at tab 8, and we're
15 going to look at Exhibit AR-214--or R-214.

16 This is the Costa Rican constitution. And
17 I'd like to have you look at article 50 of the
18 constitution.

19 Q. I'm going to read Article 50 of the
20 constitution.

21 Article 50: "The State will seek the
22 greatest well-being to all inhabitants of the country

1 organizing and stimulating the production and the most
2 appropriate distribution of its wealth. Everyone has
3 a right to a healthy environment that is ecologically
4 balanced. For that, everyone has standing to file a
5 complaint about acts that would violate this right and
6 to claim reparations for damage caused."

7 Q. Article 50 of the constitution does not
8 impose any restrictions on those who file complaints
9 with regard to violations regarding the environment;
10 is that right?

11 A. I cannot answer that question because I must
12 refer to the context of what was stated here.

13 Q. Well, let's talk about the context. There
14 was a complaint that was filed with the municipality
15 of residents of Parrita. We agree with that; correct?

16 A. Yes. But if you would allow me--excuse me.
17 We only read one part of the 12 paragraphs in
18 my statement.

19 So--and we just read two sentences.

20 Q. But the important thing, Mr. Arce, is that
21 you have accepted and you have stated that you
22 criticized the complaints because the neighbors--or

1 excuse me--the residents did not have any kind of
2 technical qualifications.

3 A. If you would allow me to conclude.

4 Q. Well, you can give explanations later when
5 our counterpart asks questions.

6 I don't need you to explain anything to me.
7 Just after having read Article 50 to you, can you tell
8 me whether Article 50 of the constitution requires a
9 complainant to have technical qualifications to file a
10 complaint for environmental damages?

11 A. If you would allow me--I have not questioned
12 that.

13 What I'm questioning here--well--well--that
14 the trees--it's indicated here they were cut down, but
15 we don't know what trees were cut down.

16 Q. But according to Article 50, everyone has a
17 right to file a complaint about an event that might be
18 illegal; correct?

19 A. Yes.

20 Q. I understand that completely, but I don't
21 think that there's any basis to say that someone
22 committed an infraction or violation because they

1 can't. And that's what the institutions are for.

2 A. Yes.

3 Q. Now, in Paragraph 8 of your Second Witness
4 Statement, you said that during your visit in
5 September 2010, at paragraph 8--you do not see any
6 sign of burning or any burnt material. You just saw
7 that there had been clearing of weeds; correct?
8 Paragraph 8 of your Second Witness Statement.

9 A. Yes. What I saw was that they were actually
10 clearing out pastureland.

11 Q. And you only went there for a day.

12 A. Yes, only a day.

13 Q. Mr. Arce, in Paragraph 12 of your Statement,
14 you refer--of the Report of Ms. Mónica Vargas from 26
15 April 2009; is that correct?

16 A. Yes, that is the date that appears here.

17 Q. Thank you.

18 And in Paragraph 12, too, which is on page 4
19 of your Witness Statement, you say that--with regard
20 to Figure 4, you say you--you reviewed Figure 4 of
21 Mónica Vargas's report from 2009; is that right?

22 MR. BURN: I think the reference, just so

1 the--second Witness Statement Paragraph 12(d) sub para
2 2, if I'm correct.

3 BY MS. PAEZ:

4 Q. Yes. Paragraph 2, you said that you referred
5 to Mónica Vargas's Report of April 2009.

6 Let's look at this Report. It's
7 Exhibit R-26, and it's under Tab 11--no, excuse me,
8 Tab 10 in the binder.

9 If you can please go to the last page, where
10 we have Figure 4 from the report, and this is also on
11 the screen.

12 Mr. Arce, can you see that the terrain has a
13 gray color or a dark coffee color?

14 A. Correct.

15 Q. And you can see that some parts of the
16 terrain, they are white portions that look like ash.

17 A. I don't know what it's from, but yes, I see
18 this white part.

19 Q. Could these areas be that color because trees
20 have been burned? If the terrain is dark and then
21 there are gray areas, could we say that there had been
22 a burning of that vegetation, based on your

1 observation of this photo?

2 A. It's possible.

3 Q. Thank you, Mr. Arce.

4 However, in Paragraph 14--no, 18 of your
5 second Witness Statement, you refer to Figure 4, and
6 you say that it does not show any sign of burning; is
7 that correct?

8 A. Quite honestly, what this paragraph says
9 needs to be viewed in the context, and based on my 52
10 years' experience working as a forestry expert, with
11 this image, I can determine whether there is a forest
12 on the sector or not.

13 Q. Yes, sir, but I'm not asking you whether
14 there's a forest or not. What you say in Paragraph 18
15 is that there are no traces.

16 A. Well, referring to the existence of a forest.
17 What I was really trying to say is that what cannot
18 see that there has been burned forest, because
19 Figure 4 says, one can see here that there was
20 tree-burning in the back, and I don't see any. And
21 that is why it was very difficult for me to say that
22 it was a burned-down forest in here.

1 Q. Well, perhaps you can see because it was
2 burned.

3 A. No, because the structure does not indicate
4 that there was a forest. To say there's a forest, we
5 really need to conduct an exhaustive analysis of a
6 number of characteristics. And we have a doubt that
7 this is a forest.

8 Q. But you never conducted that detailed
9 analysis in Las Olas; you never did this analysis you
10 just mentioned. You never did one in the Las Olas.

11 A. I do not understand you.

12 Q. You never did a technical analysis that
13 required surveying lots and measuring tree diameters;
14 is that correct?

15 A. The studies that I conducted were very
16 specific. I explained the first one; and the second
17 one was based on information provided by MINAE.

18 Q. To answer my question, you did not measure
19 tree diameter. You didn't take any samplings on the
20 project; is that correct?

21 A. Well, in my second report, I did gather
22 information as to diameter, species, et cetera.

1 MS. PAEZ: Thank you. No further questions.

2 PRESIDENT SIQUEIROS: Thank you.

3 Mr. Burn?

4 MR. BURN: Thank you.

5 REDIRECT EXAMINATION

6 BY MR. BURN:

7 Q. Now, just a couple of questions, Mr. Arce.

8 You've been taken by Ms. Paez to various
9 issues relating to your understanding of Forestry Law
10 and forestry regulations.

11 You've been taken to the report at Tab 1 in
12 the file that you appended to your first Statement.

13 One of the references you were taken to in
14 your--in this Report, on the page marked "10-3,"
15 referred to your recommendation in the third bullet
16 point, to the--the developers not cutting more than
17 ten trees per year. You--you see that recommendation
18 in your Report?

19 Just the third bullet point down. So, if you
20 look at the Conclusions, and in the third bullet
21 point...

22 A. I see it, and I see it correctly. But--well,

1 yes, I see it, but--I don't know what your question
2 is.

3 Q. Fantastic.

4 From your point of view, as a forestry
5 expert, as somebody with five decades of experience in
6 forestry work in Costa Rica, what does the term "tree"
7 mean?

8 A. Well, first, let me say, it's not that many
9 decades. Despite me looking that old, it's only been
10 three decades.

11 Next, the law is clear. We have to take into
12 account one issue. The Forestry Law in Costa Rica is
13 a very specific law. It's a law that focuses on
14 forests and on trees, and very specifically on
15 forestry trees. Obviously, we're talking about the
16 Forestry Law and forest trees.

17 In that context, we needed to refer to the
18 definitions that exist under the law as to what a
19 forest tree is. And that means--and I'd like to
20 explain a little bit here--that this law does not
21 include--and of course, it cannot include a fruit tree
22 or an ornamental tree or any other kind of tree that

1 is not an actual forest tree.

2 Why? Because the law, being so specific,
3 refers just to these trees. And it clearly defines
4 what is a forest tree. It's a ligneous plant with
5 ligneous trunks, certain height, more than 2 meters,
6 and it is important because it is the source of raw
7 material for industries such as sawmills or timber
8 plants or whatever the law indicates. And therefore,
9 it defines what a forest tree is.

10 I would also like to refer to this--because
11 there's a confusion about getting permits and cutting
12 down more than ten trees, et cetera.

13 In Costa Rica, you can obtain a permit to cut
14 down as many trees as you wish. We're not limited to
15 ten trees at all. There is no limitation.

16 If you comply with all the requirements under
17 the law, you can fell as many trees as you wish. But
18 the only thing is--and here, we mentioned the ten
19 trees because the formality for cutting or felling ten
20 trees is different to that of felling more than ten
21 trees. If you're going to cut down 11 trees, there's
22 a different kind, and it is what we saw earlier when

1 we spoke about the forestry regent.

2 So, when you want to cut ten trees, all you
3 need to do is present a request at the Forestry Office
4 of the State. This office issues a permit without
5 there being any need to have an external professional
6 involved.

7 If you need to present a formality, or the
8 paperwork, for cutting 11 or more trees, then you need
9 an external professional to conduct the necessary
10 studies so that they may be submitted to the Forestry
11 Office of the State that will then review the document
12 presented by the professional in his quality as Regent
13 and then will grant the permit or will maybe request
14 some corrections to be made. That is the only
15 difference.

16 Why do I talk about ten trees here? Well,
17 I'm saying that if you don't need to cut more than ten
18 trees, then it is a very easy formality that you can
19 do on your own. But if you need to cut more than ten
20 trees, you can do it, you are able to do it; but the
21 paperwork is a little bit more costly, because you
22 need to hire a Forestry Regent, and it takes a little

1 bit longer to process.

2 In this case in the Project, not many trees
3 needed to be felled, and that is why we made this
4 recommendation. One can only obtain one permit per
5 year. That is why this is mentioned here.

6 It says here: This year you can ask for ten;
7 next year, if necessary, you can ask permission for
8 another ten.

9 So, I think that helps to clarify this
10 section.

11 Q. Thank you. It does.

12 You were also asked various questions by Ms.
13 Paez in relation to the Report at Tab 10 in the file.

14 Now, what I'd like you to do, sir, is to turn
15 to Tab 10, but also to keep a finger in your second
16 Statement so that you can go between the two.

17 I apologize. There's a fair amount of paper
18 in the file, but I think it is manageable.

19 So, if you just keep your finger there where
20 you are with your Statement, and go to Tab 10. It's
21 most of the way through the file.

22 (Pause.)

1 BY MR. BURN:

2 Q. So, you'll recall that you were asked
3 questions in relation to Figure 4, which is on the
4 last page of this--this exhibit. And you were asked
5 questions in relation to Paragraph 18 of your second
6 Statement.

7 Now, you said in Paragraph 18 that "Forest in
8 the background"--which is the legend
9 underneath--anyway, in your--in Paragraph 18, you said
10 forest in the background is not technically correct to
11 state that. "The area in question is a forest since
12 there is no evidence whatsoever to determine the legal
13 requirements are met for such conclusion."

14 And then you go on to say in Paragraph 18:
15 "From an examination of Figure 4, no forest can be
16 observed, and there are no signs of burning."

17 When you were answering questions from Ms.
18 Paez, you agreed that it was possible that the patch
19 of white over on the left-hand side of Figure 4 might
20 relate to burning. How do you explain the--what you
21 have said at Paragraph 18 of your second Statement and
22 what you have said in relation to that little patch of

1 white in that photograph?

2 MR. LEATHLEY: Mr. President, we'll let that
3 slightly leading question go on this occasion, but if
4 we can raise the red flag for the next type of
5 question.

6 MR. BURN: I've asked him how he--this is not
7 a leading question. These matters were taken to--he
8 was taken to in cross-examination. I've not led him
9 to an answer at all.

10 MR. LEATHLEY: But you're taking him to two
11 pieces and to draw the lines between them.

12 MR. BURN: The question is related to
13 Paragraph 18. The question is in relation--related to
14 Paragraph 18. Direct connection. It's a perfectly
15 legitimate reexamination topic. There's no leading
16 whatsoever.

17 PRESIDENT SIQUEIROS: Please go ahead and
18 respond, sir.

19 THE WITNESS: What I am indicating here is an
20 important aspect. We have the problem of attaching
21 some--too much importance to certain some aspects; and
22 sometimes, we think any type of vegetation is a

1 forest, and we have a tendency to overvalue the
2 concept of "forest."

3 However, the concept of "forest" is clearly
4 defined in the law. So, it is not a romantic concept.
5 It is a legal concept. It is not a technical concept.
6 It is a legal concept. Sometimes, we look at it a bit
7 differently.

8 I was born in a forest. I studied this
9 career, and I have practiced it for 32 years. I love
10 forests. But I have to abide by what is indicated in
11 the law; and sometimes, thinking about that--I have to
12 say, there is no forest here, because the law does not
13 allow me to say that there is a forest, although that
14 is what I would like to do.

15 So, after having lived all my life with the
16 forest and in forests, I have to do that because that
17 is imposed on me by law.

18 Law tells me that in order for there to be a
19 forest, three basic conditions need to be met. There
20 has to be a type of vegetation. Three parameters need
21 to be considered:

22 1, that it be a native autochthonous

1 ecosystem with over 2 hectares of area; next, it must
2 have mature trees of different species, different
3 sizes, covering--one or two canopies covering over 70
4 percent of the surface; and 3, it must have more than
5 60 trees per hectare with a diameter greater than
6 15 centimeters at breast level, which we know as the
7 DBH.

8 Sometimes, we want to force the issue that a
9 certain type of vegetation is not a forest, and with
10 simple observation, this cannot be done. With a
11 simple photograph, we cannot do it. Why? Because I
12 cannot say with this same photograph that I took today
13 that this vegetation--yeah though I would like it to
14 be a forest, I can't say it's a forest, because I have
15 to stick to the definition provided in Article II of
16 the Forestry Law and Article 3 of the regulations of
17 that law.

18 So, that is what I'm referring to here. I
19 cannot with certainty say that this photograph--not
20 even I, who have spent 32 years looking at forests, I
21 cannot say that this is a forest that somebody burned.
22 I cannot say that. Looking at the vegetation, I can

1 practically say, looking at it, that it is not a
2 forest.

3 MR. BURN: We have no further questions.

4 QUESTIONS FROM THE TRIBUNAL:

5 PRESIDENT SIQUEIROS: I had just one
6 question.

7 You indicated that the concept of "tree" has
8 a very precise definition. Where does that definition
9 arise from?

10 THE WITNESS: It is in Article 3 of the
11 regulations of the Forestry Law, if I'm not mistaken.

12 Perhaps somebody would need to verify that or
13 correct me.

14 There are just two articles that define
15 things in the forestry legislation, and it's
16 Article II of Law 7575 and Article 3--3 of its
17 regulation.

18 It's in one of the two. But it's
19 well-defined. A forest tree is this--a forest tree.

20 PRESIDENT SIQUEIROS: Very well. Thank you
21 very much.

22 If there will be no further questions from

1 the Parties, and before we close for the day, are
2 there any procedural issues the parties would like to
3 address? From the side of Claimants?

4 MR. BURN: No, sir. Not now, sir.

5 PRESIDENT SIQUEIROS: On the side of
6 Respondent?

7 MR. LEATHLEY: No, sir, just for the
8 accommodation to go a little later due to the
9 Reporters and the Translators.

10 PRESIDENT SIQUEIROS: Especially the
11 Interpreters and Reporters. We appreciate very much
12 their time.

13 It was well over half an hour, but it--I'm
14 glad that we did it today.

15 Thank you much, and then we continue tomorrow
16 morning at 9 o'clock in the morning.

17 Thank you very much, Mr. Arce.

18 MR. BURN: Sorry to interrupt, sir. I
19 slightly misspoke. There is one small point that Dr.
20 Weiler needs to address in relation to the submission
21 to the United States. I think it's a--it's a minor
22 practical matter, but he nonetheless needs to address

1 it.

2 PRESIDENT SIQUEIROS: Okay. Please.

3 DR. WEILER: I've had a little time on my
4 hands today, and so, to save the U.S. some effort and
5 to assist everybody, I looked up U.S. submissions, and
6 I then color-coded where they overlapped or didn't
7 overlap.

8 And what I'd like to do--oh, and then I also
9 added--found the--the awards for each and coordinated
10 the awards so that you can just click on and link it
11 and get from one to the other.

12 What I would suggest to do first, though, is
13 that I give this large file to my friends so that they
14 can confirm my work and make sure that I've not made
15 any mistakes; and if it's suitable, then you can just
16 have it.

17 So, it's just one big PDF file that allows
18 you to click on whatever the reference is. And I only
19 did it, obviously, for 10.5 and one 10.7. The U.S.
20 only ever made 10.7 submission, but there was four
21 10.5 submissions.

22 They were in Corona this year, Spence last

1 year, and Railroad Corporation, and then one other
2 that's escaping me, but--

3 PRESIDENT SIQUEIROS: That's all right.

4 MR. BURN: --there were four.

5 PRESIDENT SIQUEIROS: We should also give
6 opportunity to the U.S.--

7 DR. WEILER: I can forward it to Patrick as
8 well.

9 PRESIDENT SIQUEIROS: Okay. Thank you.

10 MR. LEATHLEY: Excuse me, just to say I look
11 forward to getting the document first before it goes
12 anywhere beyond Respondent. I've not quite grasped
13 what your document is and--thank you.

14 MR. BURN: So, sir, just to confirm, we will
15 be presenting Mr. Jovan Damjanac at the beginning of
16 Proceedings tomorrow, and we will then have Mr. Nestor
17 Morera and Mr. David Aven.

18 PRESIDENT SIQUEIROS: Perfect.

19 MR. LEATHLEY: Can we just confirm the time
20 with the Secretary--we can do that offline, and then
21 if there's a dispute, we can raise it.

22 PRESIDENT SIQUEIROS: The time that we--

1 MR. LEATHLEY: The time remaining.

2 PRESIDENT SIQUEIROS: Okay.

3 SECRETARY GROB: Sure. So, the Claimants,
4 they have used today 1 hour and 53 minutes, and the
5 Respondent--the Respondent has used 3 hours and 53
6 minutes.

7 So, in total, Respondent has used 7 hours and
8 1 minute; and the Claimants, 4 hours and 57 minutes.

9 (Whereupon, at 6:51 p.m., the Hearing was
10 adjourned until 9:00 the following day.)

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CERTIFICATE OF REPORTER

I, Michelle Kirkpatrick, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



Michelle Kirkpatrick

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I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARGIE R. DAUSTER