

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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

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HEARING ON JURISDICTION AND MERITS

December 7, 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 9:07 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
Assistant to the Tribunal

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PRESIDENT SIQUEIROS: Good morning to all.

If the parties, the Court Reporters, and Interpreters are ready, then we can proceed with the third day of the hearing of the case involving David R. Aven, et al. versus the Republic of Costa Rica.

And I would first ask the parties whether, before we proceed with the examination of Mr. Damjanac, they would like to raise any issues, procedural or otherwise, before we commence.

MR. BURN: I believe there's a small matter relating to exhibits that the Respondent wishes to tender. For the record, we have no objections to those exhibits coming onto the record.

MR. LEATHLEY: Thank you, sir. These are just two exhibits, the bios from Mr. Ortiz and Mr. Morera. We're printing copies so that they're available before Mr. Morera's testimony this morning, and we can give you Mr. Ortiz'. And they will be admitted as, I think, R-522 and 523, but we'll confirm that. Thank you.

PRESIDENT SIQUEIROS: Okay. Thank you very

1 much.

2 Then if Mr. Damjanac is ready.

3 MR. BURN: Can Jovan Damjanac come to the
4 witness desk, please.

5 DAVID JANNEY, CLAIMANTS' WITNESS, CALLED

6 ARBITRATOR BAKER: Chairman, could we ask
7 about the comparative exhibit for the U.S.
8 submissions in Article 10 as well that was discussed
9 at the end of the day yesterday?

10 MR. BURN: Yes, you're quite right. And I
11 defer to Dr. Wieler on that.

12 DR. WIELER: I spoke with Christian about
13 it. He said he might need some time to look at it.
14 So I'm going to be sending it to him this morning,
15 actually. And then--

16 MR. LEATHLEY: Yes, sir. We're very
17 grateful for Mr. Wieler's investment of time in this.
18 It's a comprehensive document, so we would like to
19 take our time to look at it and make sure we agree
20 before it's passed both to the United States and to
21 you.

22 With the best will in the world, that would

1 probably be after this week, if that's acceptable to
2 the Tribunal, just because of the intensity of the
3 week in the meantime.

4 ARBITRATOR BAKER: That's certainly fine by
5 me. I figured I'd see it here or on his website, one
6 of the two.

7 MR. BURN: Could I just have a copy of the
8 Damjanac cross-examination bundle, please.

9 PRESIDENT SIQUEIROS: Good morning,
10 Mr. Damjanac.

11 THE WITNESS: Good morning.

12 PRESIDENT SIQUEIROS: As you are aware, you
13 are here to be examined based on your First and
14 Second Witness Statements that you have submitted in
15 this arbitration.

16 As you have been advised, there will be a
17 short direct questioning on the part of counsel for
18 Claimants to be followed by cross-examination on the
19 issues you have testified by counsel to the Republic
20 of Costa Rica. And, thereafter, if there are any
21 questions relating to the cross-examination that was
22 carried out, counsel to Claimants will proceed.

1 through this just to be sure--copies of your two
2 statements in these proceedings.

3 Behind that, with numbered tabs, are various
4 documents that the Respondent's counsel will take you
5 to during the course of their cross-examination. It
6 will be made clear where you should be looking. Of
7 course, if you can't find a particular document, you
8 should say so. But you should have everything in
9 front of you.

10 Now, if we could, first of all, turn to the
11 document at the top of the file. In my copy of the
12 file, that is a document entitled the "First Witness
13 Statement of Jovan Dushan Damjanac." Is that correct
14 in your file as well?

15 A. Yes.

16 Q. I know it's a reasonably long document. But
17 could you just flick through to the blue page at the
18 back and just check whether that looks like a
19 complete copy of your first statement in these
20 proceedings.

21 A. It looks like a copy of it.

22 Q. Thank you. Do you have any corrections or

1 amendments to make to that statement?

2 A. Well, not without looking through all 48
3 pages. I can't say absolutely but--

4 Q. Okay. But you don't arrive today with
5 anything that you wish to correct to that statement?

6 A. No.

7 Q. Thank you.

8 Could you look on page 49. Is that your
9 signature?

10 A. Yes.

11 Q. Thank you. We just need to repeat that
12 process for the second statement. If you go behind
13 the white tab, you should see--but I'd like you to
14 confirm for the Tribunal--a copy of your second
15 statement in these proceedings. If you could just
16 inspect that document in the same way and confirm
17 whether or not that appears to be a copy of your
18 second statement.

19 A. Yes, it appears to be my second statement.

20 Q. Thank you.

21 Any changes or corrections to make to that
22 statement?

1 A. No.

2 Q. Thank you.

3 And could you just look at page 16?

4 A. Did you say 16?

5 Q. 16. 1-6. Is that your signature?

6 A. Yes.

7 MR. BURN: Thank you. We have no further
8 questions for the witness at this time. Thank you.

9 PRESIDENT SIQUEIROS: Thank you.

10 Mr. Leathley.

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

12 And apologies that I always give the Tribunal my back
13 during the cross-examination.

14 CROSS-EXAMINATION

15 BY MR. LEATHLEY:

16 Q. Good morning, Mr. Damjanac. My name is
17 Christian Leathley. I'm appearing here on behalf of
18 Costa Rica this week. I'd like to ask you some
19 questions about your testimony in these proceedings.
20 And you became involved in the Las Olas project on a
21 formal basis from about September 2009 onwards; is
22 that correct?

1 A. I had been in touch with David Aven prior to
2 September of 2009 also. So one might say that I was
3 involved with Las Olas prior to that also.

4 Q. And in December of 2009, you moved to
5 Esterillos Oeste; is that correct?

6 A. That is correct.

7 Q. Now, you don't have any qualifications as an
8 environmental scientist or environmental manager, do
9 you?

10 A. No technical scientific qualifications.
11 Experiential qualifications.

12 Q. And you're not a lawyer; correct?

13 A. No.

14 Q. Or a wetlands specialist; correct?

15 A. No.

16 Q. But you are licensed to do real estate work;
17 correct?

18 A. I have been licensed in the past to do real
19 estate sales, yes.

20 Q. Now, you say in Paragraph 102 of your First
21 Witness Statement that "there was no wetland on the
22 Condominium Section or the area next to it"; is that

1 correct, sir?

2 A. Statement 102?

3 Q. Yes, sir.

4 A. Sorry. I'm not seeing that. Was that my
5 first statement?

6 Q. Yes, sir.

7 A. Paragraph 102.

8 Q. 102. It's the third line of the four-line
9 paragraph.

10 A. In this paragraph--

11 Q. Yes. I'm just asking you to--

12 A. --I state that on the basis of Mr. Polanco's
13 inspection and in light of Mr. Polanco's report,
14 which stated that there were no wetlands, that there
15 was no wetlands in the Condominium Section.

16 Q. So do you disagree with Mr. Polanco?

17 A. Mr. Polanco stated that there were no
18 wetlands apparent in his visit. I do not disagree
19 with that.

20 Q. Right. So what is your testimony, that you
21 agree or disagree?

22 A. With what?

1 Q. With Mr. Polanco's observation.

2 A. I agree with Mr. Polanco's observation of no
3 wetlands.

4 Q. And the areas next to it would have been the
5 easements; is that correct?

6 A. Could have been, yes.

7 Q. What else could it have been if it's not the
8 easements?

9 A. Could have been the 14,400 meters of
10 commercial property which was also located next to
11 the Condo Section.

12 Q. So there could have been more wetlands on the
13 easement?

14 A. I don't understand your question.

15 Q. Okay. Let's go back to Paragraph 102. You
16 say that Mr. Polanco was reporting "there was no
17 wetland on the condominium section"--these are your
18 words in your witness statement--"or the area next to
19 it."

20 Now, you've included "or the area next to
21 it." I'm trying to understand what you're referring
22 to here. You've, obviously, construed something from

1 Mr. Polanco's inspection, and I'd like to understand
2 what your testimony means.

3 A. Okay. Mr. Polanco's inspection report
4 indicated that there were no wetlands in the
5 Condominium Section or in an area outside of the
6 condominium.

7 Q. That's not what you testified. You say "or
8 the area next to it." You're being very specific.
9 It's quite clear the condominium section could be
10 circumferenced by many different areas. But you're
11 talking about "the area next to it."

12 A. Okay. Well, then I would venture to say that
13 I am referring to the area where the easements are.

14 Q. Okay. Thank you. In Paragraph 102, the
15 same paragraph, the document you cite is the SETENA
16 inspection report. I think that's there at Footnote
17 44. This was undertaken by Mr. Polanco on August the
18 18th of 2010; is that correct?

19 A. I'm not sure exactly what the date was, but I
20 believe that's--that's correct.

21 Q. Well, your footnote refers to August the
22 18th, 2010. Is there any reason why we should

1 question that, sir?

2 A. I don't believe so, no. And the date is on
3 his report.

4 Q. Let's have a look at his report. If you go
5 to Tab 1 of your binder. This is, for the record,
6 C-78. And I wonder if you can go to page 2. And
7 looking at page 2, there's text--printed text on the
8 top half and then there's handwritten text on the
9 bottom half.

10 A. Yeah.

11 Q. And I'd like you to go to the bottom half of
12 that page. And there's some handwritten notes which
13 we assume have been made by Mr. Pacheco. And I'd
14 like you to go to the fifth bullet point. It's a
15 little hard to see the bullet points, but there are
16 little dashes that have been made. I wonder if you
17 can see that, sir.

18 A. I see the dashes.

19 Q. I'm going to ask you to read it out in
20 Spanish. I wonder if you could read it out for us,
21 please, sir.

22 A. The fifth bullet point?

1 Q. Yes, sir.

2 A. I believe that starts with "the area."

3 Q. No, the next--

4 A. "There is no presence of bodies of water
5 (lakes) in the project area."

6 Q. Thank you, sir. I wonder just for the
7 benefit of the non-Spanish speakers in the room,
8 could you translate what that means?

9 A. The presence of bodies of water are not
10 present in the area of the project.

11 Q. Thank you. And that is what you're referring
12 to when you say in Paragraph 102 of your witness
13 statement that there were no wetlands; correct?

14 A. Correct. One of the notes. And, also,
15 taking into consideration that I spoke with
16 Mr. Pacheco personally on that visit too.

17 Q. Now, you know Mr. Mussio; is that right?
18 Mauricio Mussio?

19 A. I know of Mr. Mussio. And we've spoken a few
20 times on the phone. I don't know--I don't know him
21 personally.

22 Q. And you're aware he has provided a witness

1 statement in these proceedings?

2 A. Yes.

3 Q. And Mr. Mussio testifies that he's familiar
4 with the characteristics of wetlands.

5 A. Okay.

6 Q. And he goes on to say--referring to paragraph
7 48 of his witness statement, he said that "'Wetland'
8 is a technical term."

9 Would you agree with that?

10 A. Yes.

11 Q. And yet you take from what Mr. Pacheco says
12 in the SETENA report--where he specifically does not
13 refer to wetlands, you conclude that he actually
14 means wetlands; is that right?

15 A. Okay. Could you repeat that, please, that
16 assertion.

17 Q. Sure. You take from what Mr. Pacheco says,
18 what you're looking at where your left thumb is,
19 where he says there's no bodies of water in the
20 project area.

21 A. Mm-hum.

22 Q. You conclude--and we're going back now to

1 Paragraph 102 of your witness statement, your First
2 Witness Statement, that what Mr. Pacheco is referring
3 to is wetlands. That's your conclusion. Is that
4 correct?

5 A. Let me just read this again.

6 Q. Please do.

7 A. I would say that from Mr. Polanco's statement
8 in his report, yeah, in my statement, I'm concluding
9 that Mr. Polanco found no wetlands. And I'm also
10 making this statement in Paragraph 102 after speaking
11 with Mr. Polanco on the site. And, you know, when he
12 came to inspect the property and he had finished, he
13 sort of looked at me and he shook his head, and he
14 said, you know, "There's no wetlands here."

15 Q. That's interesting, sir. It's not in your
16 witness statement, though, is it?

17 A. Well, I believe I covered it in my witness
18 statement when I said that there was no wetlands
19 according to Mr. Polanco's visit. And I believe at
20 one point I did indicate in my witness statement that
21 Mr. Polanco said that to me.

22 Q. Right. So you had the opportunity to include

1 this. But at Paragraph 102 you specifically say, "I
2 recall at some point shortly after Mr. Polanco's
3 visit reading a document from SETENA confirming, on
4 the basis of his inspection, that there was no
5 wetland."

6 Now, you would agree with me that
7 Mr. Polanco doesn't actually refer to wetlands in his
8 report, does he?

9 A. No, not necessarily. I wouldn't agree to
10 that.

11 And I do believe in another part of this
12 statement I mentioned that Mr. Polanco on that visit
13 asked me if we had any neighbors that had some sort
14 of grudge against us.

15 Q. Yes. Thank you, sir.

16 We can talk about what Mr. Polanco may or
17 may not have discussed, and you can talk about the
18 neighbors with Claimants' counsel if you wish.

19 Let's go to Paragraph 152 of your witness
20 statement--your First Witness Statement. And there
21 you talk about the INTA report prepared by
22 Mr. Cubero. This is the May 2011 report from INTA.

1 And in this Paragraph 152--in the second
2 half of that paragraph, you testify that "the mere
3 presence of water, or a wet area, does not lead to
4 the classification of a wetland, especially when the
5 soil analysis provides no evidence of a wetland, as
6 in the case of Las Olas property."

7 Do you see that, sir?

8 A. Let me take a moment, please. Okay. I see
9 that.

10 Q. And then the last sentence in Paragraph 152
11 says, "There is indeed a difference between a 'wet
12 area' and a wetland."

13 Is that still your testimony?

14 A. Yes.

15 Q. So in order to find a wetland, you decidedly
16 do have to use the specific term. But in order to
17 discount their existence, you do not need to use the
18 specific term. That seems to be your test. Is that
19 right, sir?

20 A. Please repeat that statement.

21 Q. Yes. In order to find a wetland, you have to
22 use the specific term "wetland." But in order to

1 discount their existence, you do not need to use the
2 specific term.

3 A. I don't understand that statement. In order
4 to find a wetland, I have to use the term "wetland"?

5 Would you say that one more time, please.

6 Q. Yeah. It seems to be your testimony that in
7 order to find a wetland, one has to decidedly say
8 the--use the specific term "wetland."

9 A. Okay. In order--

10 Q. But in order to discount--let me finish the
11 question, sir.

12 But in order to discount their existence,
13 you do not need to use the specific term. That's
14 your testimony?

15 A. Yeah. I don't understand what you mean "in
16 order to discount their existence."

17 Q. In order to conclude that there is no
18 wetland. That's what I mean.

19 A. Okay. In order to conclude there is no
20 wetland what?

21 Q. In your testimony, sir, you have concluded
22 from Mr. Polanco that notwithstanding the absence of

1 a reference to wetland, you can conclude there is no
2 wetland. However, in order to establish that there
3 is a wetland, you need to find--you need to have the
4 specific term referenced. It's an inconsistent
5 analysis, sir.

6 A. I believe there is a three-prong approach to
7 establishing whether an area is a wetland or not.

8 Q. And from your analysis of Mr. Polanco's
9 report, without the reference to wetland, you're
10 concluding there is no wetland. Is that still your
11 testimony today from his SETENA inspection report?

12 A. I am not an expert in wetlands. Of course,
13 we all know that. However, I would say that my
14 conclusion was based on Mr. Polanco's statement to me
15 on the site that there were no wetlands, and also
16 Dr. Cubero.

17 Dr. Cubero's testimony in our initial trial,
18 he stated that without soil markers for wetlands, the
19 area can't be a wetland. So I guess that's what I
20 was basing my statements on.

21 Q. And so being aware of this three-prong test,
22 you had also been aware that it wasn't in

1 Mr. Polanco's ability to conclude on that inspection
2 that there was no wetland.

3 A. Well, I trusted Mr. Polanco's ability to
4 observe wetlands and conclude--he was the technical
5 expert on wetlands and represented the country's
6 foremost authority on environmental issues at SETENA,
7 and I also respected Dr. Cubero's opinion. And
8 that's what I based my statement on.

9 Q. And these are the same institutions which
10 today conclude that there are wetlands; correct?

11 A. That is not correct. I do not admit that
12 those institutions have said there are no--there are
13 wetlands on the property.

14 Q. You don't accept that authority of those
15 institutions?

16 A. Excuse me?

17 Q. You don't accept the authority of those
18 institutions?

19 A. That's not what I said.

20 Q. That's my question.

21 A. Okay. I--please rephrase your question.

22 Q. No, sir. My question is what it is.

1 Do you respect the authority of the
2 institutions which have the authority to determine
3 whether there are wetlands or not? That's my
4 question.

5 A. Well, I respect the laws of Costa Rica and
6 have always.

7 Q. Okay. Let's go to Paragraph 23 of your
8 Second Witness Statement.

9 In this paragraph, you say--and I'm going to
10 read it, "I have never refused to sign for any
11 documents or sign my acknowledgment of reports that I
12 actually have received. In fact, I had specific
13 instructions from Mr. Aven to accept any and all
14 documents delivered to our office and immediately
15 forward such documents to him."

16 Do you see that, sir?

17 A. Yes.

18 Q. And do you stand by that testimony today?

19 A. Yes.

20 Q. And I wonder if we can go to Tab 3 in your
21 binder. This is in the cross binder. This is
22 Exhibit C-125. And this is a letter from the

1 Municipality to SETENA dated the 12th of May 2011.

2 Do you see that, sir?

3 A. Yes.

4 Q. Please have a look at the second paragraph.

5 It says here--we provided a translation in the--in
6 this section. I'm going to read from the
7 translation.

8 "The project was first notified to Mr. Jovan
9 Damjanac who identified himself to the offices
10 located as Jovan. He is the person in charge of the
11 office in Esterillos Oeste and the person who had
12 always attended visits by representatives of the
13 Municipality, and he is also the same person who had
14 gone before the Municipality to undertake the
15 requisite construction permits procedures. He was
16 the only project representative on the site during
17 the notification process, and he refused to
18 acknowledge receipt of the notification.

19 "The municipal officers, Gerardo Godinez
20 Chinchilla, and Alexander Elizondo, requested the
21 police presence. As such, Police Officers Mauricio
22 Quesada Mora and Mario Vargas Alvarez were present

1 when the notification officers handed Mr. Jovan
2 Damjanac, who identified himself only as Jovan, the
3 notification.

4 "The notification process started at
5 9:30 a.m. on May 11, 2011, when the notification
6 officers presented themselves at the Las Olas
7 Condominium Project offices. The process concluded
8 at 11:50 a.m. that same day when the police officers
9 present gave Mr. Damjanac SETENA's resolution and the
10 Municipal provision."

11 Do you see that, sir?

12 A. I see it in Spanish, yes.

13 Q. Right. Is that a fair translation?

14 A. No, that's a false--that's a false statement.
15 I was never involved in obtaining permits for the
16 project. I was the sales manager and on-site
17 manager. The permit processing was done by Mr. Aven
18 and our then-project manager Sebastián Roldán Vargas.
19 I never went into the Muni for any kind of
20 permitting.

21 Q. So you're contesting the veracity of this
22 document; are you, sir?

1 A. Yes, I am. Emphatically.

2 Q. .

3 Let's go to the next document where you--in
4 Tab 4 of this folder, Exhibit R-110. This is a
5 letter from the Municipality notifying you and
6 Mr. Aven of complaints of neighbors and requesting
7 documentation. This is dated the 8th of July, 2011.
8 And you can see a handwritten note on the left-hand
9 side of the document near the official stamp of the
10 municipality; correct?

11 A. Uh-huh.

12 Q. Now, we provided a translation behind the
13 blue page. And I wonder if, for benefit of the
14 record, you can read out the translation.

15 A. Okay.

16 "Dear Sirs: Esterillos Oeste; these
17 emergencies were reported by area residents and the
18 Community Police--

19 Q. No. Sorry to interrupt you, sir. I think
20 you've got the wrong document. Let me just confer.

21 Ah, yes, in the left-hand margin. You were
22 in the correct page. But there's a block on the

1 left-hand margin which is the translation of text the
2 handwritten annotation.

3 A. Okay. Got it.

4 "At the moment of delivery, Mr. Jovan
5 Damjanac indicated that because of recommendation of
6 his lawyer, he could only receive the document but he
7 could not sign it."

8 Q. I wonder if you can go back to the Spanish
9 original and just confirm if you think that is an
10 accurate translation, sir.

11 A. I guess it is, yes.

12 Q. So according to this second public record,
13 you refused to receive this notification from the
14 Municipality officers; correct?

15 A. According to this note, that is what they are
16 attesting. But I don't agree with it. I always
17 received notices and signed for them.

18 Q. Let's have a look at Exhibit R-396. This is
19 behind Tab 5 of your cross-bundle there. And I'd ask
20 you to look at the--there's a translation as well. I
21 think it's behind the blue page. But, obviously,
22 please look at the original if you wish.

1 This is a letter from the Municipality to
2 Jorge Alvarez Mondragón. Do you know who he is, sir?

3 A. Oh, yeah, I know who that guy is.

4 Q. And he's the director of the Municipality of
5 Urban Development; correct?

6 A. Not anymore.

7 Q. This is a letter dated the 11th of August,
8 2011. And the first paragraph of this letter--I'm
9 reading from the translation--says, "On August 10 of
10 this year, a visit was made to the offices of the
11 project horizontal condominium Las Olas. The intent
12 was to deliver documentation sent by your Department
13 to the project's representatives. When the delivery
14 was made, we were seen by Mr. Jovan Damjanac, who
15 stated to us that at the recommendation of his
16 attorney, Mr. Sebastián Vargas, he could only receive
17 the documents but not sign the copies as received.
18 The attorney told us this by phone at the time. He
19 also stated that at the time their position was not
20 to provide information requested in the document
21 delivered to the Department of Urban Development of
22 the municipality of Parrita."

1 So according to this public record, you
2 refused to effectively receive documents from
3 municipality inspectors; is that right?

4 A. According to this public record, but it is
5 not correct that I didn't agree to receive documents
6 and sign for them.

7 Q. So you contest also the veracity of this
8 document?

9 A. Yes, I contest it emphatically. I've always
10 received documents, and I always signed for documents
11 and I believe there are a number of documents and
12 records that show that I did, in fact, receive them
13 and signed for them.

14 Q. You also contest the veracity of injunctions,
15 sir?

16 A. The veracity of injunction? I don't
17 understand that question.

18 Q. Let's go to Paragraphs 50 to 51 of your
19 Second Witness Statement.

20 A. Okay.

21 (Pause.)

22 BY MR. LEATHLEY:

1 Q. Here, you refer to a report from the
2 Municipality of May the 13th, 2011. And I wonder if
3 you can go to Exhibit R-270. This is Tab 7. You may
4 want to just keep--if you want to keep a pen or a
5 finger in that page of your Witness Statement.

6 R-270, the Document in Tab 7, is an
7 Inspection Report prepared by the Municipality
8 regarding works being conducted on the Las Olas
9 Project site dated the 12th of May 2011; is that
10 correct?

11 A. Well, I see--this is Exhibit R-270?

12 Q. Yes, sir.

13 A. And I see a date of the 13th of May 2011.

14 Q. Yes. And in the first line of the letter, it
15 says (in Spanish)el dia jueves 12 de mayo.

16 A. Okay.

17 Q. And this is a report that you're referring to
18 in--in Paragraphs 50 to 51 of your Witness Statement,
19 your Second Witness Statement.

20 A. Okay.

21 Q. Correct?

22 A. Okay.

1 Q. So, let's read from the first paragraph of
2 that Exhibit R-270, which says--and I'm going to read
3 from the translation: "That on Thursday, May the
4 12th of the present year, at 2:00 p.m., a follow-up
5 inspection was carried out at the site of Las Olas
6 Condominium Project located in Esterillos Oeste."

7 And then I'm going to skip a paragraph, and
8 then in your translation, it's the next paragraph
9 that's there, the only other paragraph that's there.
10 It says: "The presence of a backhoe was witnessed,
11 which was performing leveling of the ballast on the
12 roadways. Also during the visit a light truck
13 proceeded to leave more ballast at the site, which
14 was then leveled by the aforesaid machine. The
15 respective photographs are attached to the report."

16 Do you see that, sir?

17 A. Yes, I see that statement.

18 Q. And then if you turn the pages of the
19 original R-270--and I think hopefully the next page,
20 you can see some color photos showing the truck
21 leaving the ballast at the site.

22 Do you see that, sir?

1 A. Yeah.

2 Q. Although you say in Paragraph 50 of your
3 Second Witness Statement that this does not show
4 anything, and it's, quote, "impossible to respond."

5 That is what you say in Paragraph 50 of your
6 Second Witness Statement; is that correct, sir? It's
7 the last line of Paragraph 50.

8 A. Okay.

9 Q. Is that still your testimony today?

10 A. I will say that there is no evidence that
11 these photos were actually taken on the date
12 indicated here in the Report. This --we always came
13 across photos or--photos were always submitted in
14 this case, and there were never any definite markers
15 or verification on the photos as to when work was
16 done or when these photos were taken. So, I don't
17 remember--or I don't know when these photos were
18 taken. They could have been submitted into this
19 Report after having been taken much earlier than
20 this--the Report.

21 Q. Although on the last page where we have the
22 color photographs, there's a stamp with the date of

1 13th of May 2011; is that right?

2 A. Well, anybody could make a stamp on a
3 document. That doesn't verify that these photos were
4 taken on the 13th or the 12th of May.

5 Q. Did you or your lawyer challenge this Report?

6 A. I'm not sure if our attorneys did challenge
7 it or not, but I know once we--when we received
8 Notice of the Injunction, we stopped working on the
9 site.

10 Q. Can I represent to you, sir, that from the
11 evidence that's been put in this Arbitration, neither
12 you nor your lawyer challenged this report at the
13 time or any time since until your testimony in this
14 Arbitration?

15 Could that be true?

16 A. I don't know.

17 Q. Could it be true?

18 A. That--whether our--could it be true that I or
19 our attorney challenged this Report prior to this
20 Arbitration?

21 Q. No. The evidence at this Arbitration shows
22 that you did not--or neither did you nor your lawyer

1 challenge this Report that is identifying works being
2 undertaken on the property.

3 A. I really can't answer that because I would
4 assume that we did challenge it because we never did
5 any work after any kind of injunction was issued.

6 So, in that respect, I believe we've always
7 challenged that assertion.

8 Q. Okay. Well--

9 A. That assertion, excuse me.

10 Q. Very good.

11 Well, then, let me represent to you that the
12 record does not show that, and your testimony is
13 saying that it's impossible to respond to those, but
14 your perfect response would have been evidence of
15 that challenge; correct?

16 A. This is getting a little confusing for me.
17 Sorry.

18 Q. That's okay. Let me take a step back to
19 assist you, sir.

20 Your testimony in Paragraph 50 is that you
21 cannot respond, it's impossible to respond to this
22 evidence of works being undertaken after the date of

1 the SINAC injunction. That's obviously the focus.
2 That's why we're talking about this works; right?

3 A. I believe what I was saying is, given the
4 photos, it is impossible to ascertain whether
5 those--these photos represent work being done on that
6 date.

7 Q. Understood, sir. And the date stamp on the
8 document is from--from May 2011, which is also when
9 it would have been all produced and stamped. And if
10 you had disagreed with the date of those photos, you
11 could have challenged or your lawyer could have
12 challenged that, but you did not do that.

13 A. I believe I disagreed with the date on a
14 number of photos submitted. Whether it was here or
15 in another part of this testimony, I don't recall.
16 But in recollecting, I do believe that I did not
17 agree with dates of photos submitted in this case.

18 Q. So, you are operating in contravention of an
19 injunction, but you don't challenge the evidence
20 which is showing that you're operating in
21 contravention of an injunction.

22 A. We never operated in contravention of an

1 injunction, sir.

2 Q. Well, that's not what this document is
3 telling us. This document is showing works--excuse
4 me--works being undertaken during the period that the
5 property was subject to the SINAC injunction.

6 A. Well, this document is showing photos of a
7 truck laying gravel and another machinery--another
8 machine on the road; but it doesn't--I don't agree
9 with your statement that work was being done after
10 the injunction, because all I know is, the minute we
11 received the injunction, we stopped working.

12 There may have been a backhoe--a backhoe
13 moving around the project from time to time after the
14 injunction. There may have been basic maintenance
15 work being done, like the clearing of trees.

16 Sometimes we'd have very bad wind storms, and there
17 would be branches and trees falling, and removing
18 debris does not constitute construction work.

19 And if you have a machine and you can do it
20 in ten minutes as opposed to four hours with two
21 laborers, it--you know--I don't believe there was a
22 law whereby we couldn't use our backhoe. As long as

1 we weren't building or constructing the project, I
2 don't believe there was a law that said our driver
3 couldn't go onto the property with our backhoe.

4 And--

5 Q. You were taking legal advice at the time,
6 were you, sir?

7 A. Yes, I always conferred with our project
8 manager and attorney, Sebastián Roldán Vargas, at the
9 time, and never did anything without conferring with
10 him and David.

11 Q. Mr. Damjanac, how old were you when you moved
12 to Costa Rica in late 2005? If you don't mind me
13 asking.

14 A. 48, 49.

15 Q. And you were paid for your work between
16 September and December 2009; is that correct?

17 A. For which work?

18 Q. In relation to the Las Olas Project.

19 A. In 2008, 2009?

20 Q. And--I'm sorry. Between--I beg your pardon.

21 Between September and December 2009.

22 Apologies if I misspoke.

1 A. I was paid for my work. Which work are you
2 referring to?

3 Q. Well, maybe you can help me. What work were
4 you doing at that time, sir?

5 A. At that time, I was a real estate broker,
6 selling property. And I was also doing, like,
7 marketing consulting and analysis work.

8 Q. Were you paid a salary or an hourly rate or a
9 commission?

10 A. I don't recall exactly, you know, what I was
11 earning in that particular time period.

12 At times, I did earn a consultant's fee for
13 work that I did. Other times, I was strictly
14 compensated on results, and those results being
15 sales. In most of my career, that's the only way I
16 made money, when I made sales.

17 Q. You testify in Paragraph 42 of your First
18 Witness Statement that based on your telemarketing
19 calls, Mr. Aven decided to reopen Las Olas in January
20 of 2010; correct?

21 A. I don't see that. Paragraph 42 of my First
22 Statement?

1 Q. Yes, sir. It's the fourth line.

2 "David and I would have daily conversations
3 about the progress of my marketing efforts. I was
4 generating a lot of interest in the Las Olas Project.
5 This was very encouraging to David, who soon decided,
6 along with the other U.S. investors, to reopen the
7 Las Olas Project in January of 2010."

8 It's the first part of that Witness--of
9 Paragraph 42. Do you see that, sir?

10 A. Uh-huh.

11 Q. And you also testify in Paragraph 41 of the
12 same First Witness Statement that it was your opinion
13 that as of year-end 2009, people were willing to pay
14 from 175,000 U.S. Dollars to 400,000 U.S. Dollars for
15 a two-bedroom condo near the beach in Costa Rica
16 which was half the pre-2008 crash price; is that
17 correct?

18 A. I don't believe so. I'm looking at Paragraph
19 41, Page 9, and--wherein, it says: "David had
20 acquired a number of marketing lists, potential U.S.
21 buyers."

22 Q. Uh-huh.

1 A. "Went to David's place, started making
2 marketing calls."

3 Q. Do you remember how many sales you made in
4 those three months between September and December of
5 2009?

6 A. I made no sales between September and
7 December of '09 at Las Olas.

8 Q. And in Paragraphs 15 and 17 of your First
9 Statement, you testified you worked for about a year
10 on a sale that failed to close in 2006; correct?

11 A. I'll have to check that.

12 Q. Please do.

13 A. Yes, I see what you're referring to there,
14 yep.

15 Q. And you also testified that this was a
16 22-story beach project where you say you found a
17 buyer but the seller decided not to sell; correct?

18 A. Yes. Yep.

19 Q. And the seller was, in fact, the developer
20 you were working for; right?

21 A. One of them.

22 Q. And, so, in that case, I'm guessing you were

1 simply unable to find a price that a willing buyer
2 would pay to the willing seller; correct?

3 A. No. In this particular instance, I found a
4 willing buyer for the project, but it was before the
5 economic collapse of 2008, and the seller was
6 anticipating that he would be getting a lot more for
7 the property. He had no idea of the crash that was
8 coming, so, he let this deal fall by the wayside.

9 But it was a great deal for the guy. If he
10 would have taken it, he would have done a lot better
11 than he's doing right now.

12 Q. And when you moved out of Mr. Aven's house in
13 December of 2009, you became the marketing and sales
14 director and site manager, moved into the office that
15 was on the Las Olas site; correct?

16 A. Yes.

17 Q. And in 2010, you were compensated by
18 commission?

19 A. That is correct.

20 Q. Can we turn to Tab 10 of your binder.

21 This is Exhibit C-98. And if you can look
22 at the first page, Mr. Aven reported in this

1 letter--it's a letter to investors--prospective
2 investors, reported in the letter that for the whole
3 of 2010, a total of 16 lots were sold; correct?

4 A. Letter dated December 12th; correct?

5 Q. Yes, sir.

6 A. Yeah, that's correct.

7 Q. And so, \$875,000 for the total sales divided
8 by 16, I calculate just under \$55,000 per lot. Would
9 you agree?

10 A. On average?

11 Q. Uh-huh.

12 A. Uh-huh.

13 Q. And you were paid commission on all of those
14 sales?

15 A. That's correct.

16 Q. And what percentage commission were you
17 receiving, sir?

18 A. 5 percent.

19 Q. And you testified that you moved to live in
20 Las Olas' office over the holidays in 2009, and you
21 offered your business plan on December 20th of 2010.

22 So, it took you a year to create that plan;

1 correct?

2 A. No, I don't believe so. Can you refer me to
3 the documents associated with that statement?

4 Q. Sure. If you go to Tab 9 in your folder
5 there. This is CLEX-16.

6 A. Tab 9? Okay.

7 Q. Tab 9 is your business plan. At the top in
8 the blue and black block, at the top of the page,
9 says "December 20th, 2010."

10 Do you see that, sir?

11 A. Huh-uh.

12 Q. And you'd moved to the site in the end of
13 2009.

14 A. Uh-huh.

15 Q. Mr. Damjanac, we need you to say a "Yes"
16 rather than an "Uh-huh." I'm sorry. It's just for
17 the transcribers.

18 A. Oh.

19 MR. LEATHLEY: I don't mean to say "just for
20 the transcribers." I apologize. That came across
21 very badly. The most important people in the room.

22 Just for the transcripts. The ladies are

1 the most important people here with respect to the
2 Tribunal.

3 (Comments off record.)

4 BY MR. LEATHLEY:

5 Q. Please turn back to Mr. Aven's Christmas
6 letter. This is the letter you saw before. I think
7 it was Tab 10. This is the 12th of December 2010.

8 Now, eight days before your plan that we
9 just saw, Mr. Aven says in the second paragraph of
10 his letter, "This was the most difficult year to be
11 selling real estate down here."

12 Do you see that, sir?

13 A. In the second paragraph?

14 Q. Yeah. So, if you go to the front of
15 that--the first page of Tab 10. There you go.

16 A. Okay.

17 Q. Second paragraph--I beg your pardon, no;
18 second page.

19 A. Second paragraph, second page.

20 Q. No, sorry. I'm misleading you. My
21 apologies.

22 Second page, and the penultimate paragraph;

1 so, the last-but-one on the bottom.

2 A. Uh-huh.

3 Q. There, you see Mr. Aven says, "This was the
4 most difficult year to be selling real estate down
5 here."

6 A. Yes.

7 Q. However, in Paragraph 41 of your Witness
8 Statement--this is your First Witness Statement--and
9 I would encourage you to turn to Page 10 of your
10 First Witness Statement.

11 Do you have that, sir?

12 A. Page 10 of my First Witness Statement. Yes.

13 Q. Yes. So just at the top, you can see the
14 remaining--the continuation of what is Paragraph 41,
15 and it says that from your telemarketing, quote,
16 "Demand for the properties was still there and
17 increasing by the day."

18 Correct? That's your testimony?

19 A. Yeah. Uh-huh.

20 Q. And you also say that you were generating
21 lots of interest, and on your advice, Mr. Aven
22 decided to reopen the project on January 10--sorry,

1 January 2010; correct?

2 A. Yes.

3 Q. But according to Mr. Aven, the demand was not
4 there, was it?

5 A. Well, this paragraph and Mr. Aven's statement
6 are not mutually exclusive. The fact is, the market
7 was very difficult, and it was a very bad time to be
8 selling property. It's just that we were doing it
9 better than most.

10 Q. So, you are saying that Mr. Aven was correct
11 in saying it was the worst year, but it was--there
12 was still demand there. You can reconcile those two?

13 A. Yes. It was a very bad market. Practically
14 no one was selling stuff but us.

15 Q. And by "selling stuff," you mean 16 lots?

16 A. Lots, yes. Properties.

17 Q. Which was 16 for the year.

18 A. Yeah.

19 Q. Okay. Thank you.

20 MR. LEATHLEY: I don't have any further
21 questions, sir.

22 PRESIDENT SIQUEIROS: Thank you.

1 Mr. Burn?

2 REDIRECT EXAMINATION

3 BY MR. BURN:

4 Q. Mr. Damjanac, just a few questions by way of
5 reexamination.

6 You will recall that Mr. Leathley took you
7 to a report of a Mr. Polanco. That was in reference
8 to your Paragraph 102 in your First Statement.

9 And the Report itself is behind Tab 1 in the
10 file.

11 First of all, just for clarity's sake, who
12 is Mr. Polanco?

13 A. Mr. Polanco was a representative of SETENA
14 and an inspector. He came out to inspect the
15 property after the initial complaint against the
16 property was filed, and he had also come to the
17 property one or two times afterwards.

18 He was a SETENA authority.

19 Q. Right. And now, you'll recall that Mr.
20 Leathley put a great deal of weight on the manuscript
21 notes that appear on Page 2 of the Report for Mr.
22 Polanco and the specific words that were used.

1 You remember the line of questions on that?

2 A. Yes.

3 Q. You made various references to conversations
4 with Mr. Polanco during his visit.

5 A. Yes.

6 Q. Mr. Leathley didn't take you to Paragraph 101
7 of your Statement. I'd like you to just have a look
8 at that and see if you wanted to expand your answers
9 relating to Mr. Polanco's visit.

10 A. Yes.

11 Q. Is there anything you'd like to say on the
12 topic of that site visit, what was discussed during
13 it, and how you interpret Mr. Polanco's Report?

14 A. Yes. I believe this is the statement I was
15 referring to when I said to Mr. Leathley that I had
16 indicated this information in another part of this
17 report.

18 Mr. Polanco was a very nice gentleman, and
19 he basically--you know, I remember his looking at me
20 and shaking his head like, you know, it was--this is
21 like a witch hunt, so to speak. He was not surprised
22 that we had this problem, and he actually attributed

1 it to a--maybe a disgruntled neighbor, because he
2 asked me, you know, "Do you have anybody that's an
3 enemy? Or, "Do you have a neighbor that's an enemy?"

4 And he just seemed to be sort of--it was
5 sort of an empathic kind of response from him. He
6 understand--he understood the problems we were
7 having, and he sort of conveyed the idea that he was
8 sorry about it and just shook his head and said,
9 "There's no wetlands here. You guys don't have any
10 wetlands."

11 But he understood why we could be facing a
12 charge like this due to a disgruntled neighbor, and
13 the fact that in Costa Rica, it is very easy for
14 someone to make a claim that's unsubstantiated, but
15 then it gets the ball rolling on a denuncia process
16 that could leave you in a legal quagmire for the next
17 15 years.

18 So--but he seemed to--Mr. Polanco was a very
19 nice guy. He seemed to relate to what we were going
20 through.

21 Q. Thank you.

22 And just before we leave the Report, under

1 Tab 1, if you want to turn back to it, on Page 3, do
2 you see your signature?

3 A. Yes.

4 Q. So you received a copy of this report?

5 A. Yes, and I signed for it.

6 Q. Thank you.

7 Mr. Leathley took you to a document behind
8 Tab 5.

9 Just a quick question. You'll remember that
10 there was reference to Mr. Jorge Alvarez Mondragón.

11 A. Yes.

12 Q. Do you know what has happened to Mr. Alvarez
13 Mondragón?

14 A. Not exactly, but I understand he left the
15 muni or was fired, so...

16 Q. If you don't know, you don't know.

17 A. I don't know.

18 Q. And finally, you were--a series of questions
19 was put to you about the marketing efforts in the
20 aftermath of the financial crisis.

21 You described a situation in which you said
22 to Mr. Leathley that you were more successful than

1 others in the area in making sales in a difficult
2 market.

3 Why were you more successful?

4 A. Well, I would say for a number of reasons,
5 one of which was our project was very well-located.
6 It was very attractive property on the beach.

7 You know, on that coast coming from Jaco,
8 down to our property, some 25 minutes, is all flat
9 wetland area. Then you hit Esterillos, which is
10 characterized by rolling hills. And then past
11 Esterillos, further south towards Quepos, again, you
12 have flat, sort of wet terrain.

13 So, our property characteristics were very
14 attractive, and we were very close to the city,
15 within an hour and a half of San Jose and the
16 airport.

17 So, okay, we had superior location, for one.
18 We also had a superior beach. It's many people's
19 opinions that our beach is perhaps the nicest beach
20 on the Central Pacific. Our water quality was higher
21 than other beaches.

22 Like, for instance, Jaco Beach, which is one

1 of their most developed beach towns--it's a beautiful
2 beach, but, you know, there's very marginal water
3 quality. You have no central sewage system in Jaco,
4 and there's all kinds of waste and debris that is
5 seeping out to the beach.

6 So, we didn't have those issues. So, for
7 one thing, we had a superior location.

8 Secondly, we had the best-priced product on
9 the Central Pacific.

10 Mr. Aven is a very good businessman, and
11 unlike many of the competitors around our Project who
12 had gone belly-up after the economic crash because
13 they were in debt, we had no debt on the Project, and
14 we weren't, you know, shackled by mortgage payments.
15 So--and we had--Mr. Aven also did a very good job at
16 buying the property at a good price, so we could
17 afford at that time to come down in our pricing on
18 our lots and still be profitable; whereas, other
19 projects and even our projects before the
20 crash--before the crash I think we sold a number of
21 lots for \$130- to \$160,000. Many projects were at
22 that level before the crash.

1 When the crash came, people weren't paying
2 \$130- to \$160,000 for lots anymore. So, the projects
3 that had debt and that were required to sell their
4 properties that level of pricing, they couldn't make
5 it after the crash.

6 But we were able to lower our prices, still
7 make money, and address the new market that had come
8 to be after the crash. We dropped our prices 50,
9 60 percent, and were able to meet the market and the
10 demand. So, that's another reason why we were
11 successful.

12 And I think another reason was that the
13 buyers who purchased from us or my marketing efforts
14 and my interactions with them, the buyers believed
15 in me and the project, and I wanted to take care of
16 these people. I wanted to give them something good.

17 Q. Thank you.

18 MR. BURN: I have no further questions for
19 you, Mr. Damjanac, but you're not finished yet.

20 The Members of the Tribunal may have some
21 further questions for you before we finish.

22 Thank you, Mr. President.

1 QUESTIONS FROM THE TRIBUNAL

2 ARBITRATOR BAKER: Could you tell me
3 how--the profile of the 16 buyers that you had in
4 your last set of lot sales? Is there a standard
5 profile that you were looking at and found?

6 THE WITNESS: I would say a commonality
7 among all of them were that they were probably in
8 their early 50s, mid 40s. They were people that were
9 going to be retired soon. They weren't--they were
10 looking for a place to retire to, a nice place at the
11 beach.

12 A lot of them weren't fully retired yet, but
13 they anticipated to be retired, you know, maybe three
14 to eight years later, and they were looking to buy
15 the property and maybe build a house within a few
16 years thereafter and come down to vacation as well
17 as, you know, retire someday.

18 They were active people. They enjoyed the
19 beach. They enjoyed surfing and the beauty and, you
20 know, the abundant nature of Costa Rica.

21 And, you know, they were also pretty savvy
22 people, very--a lot of them were entrepreneurial

1 backgrounds, and they had shopped quite extensively,
2 and they knew the country, and they knew the
3 different projects and areas; and after reviewing a
4 number of different offerings, they chose to buy from
5 us.

6 ARBITRATOR BAKER: Did that profile change
7 over time? You told me what it was in the last set
8 of sales; but when you started your marketing
9 efforts, was that your intended audience as well?

10 THE WITNESS: Yeah, I--I would say that was
11 the audience--that was our--one of our main targets,
12 yes. Uh-huh.

13 ARBITRATOR BAKER: Were most of the buyers
14 financing this, or were they paying cash, or how was
15 it--

16 THE WITNESS: Most were paying cash.
17 Whether they were financing their purchase in the
18 States through, like, the refinancing of their
19 existing property up there, I'm not--I can't say for
20 sure. Maybe a few of them did, but I--I'd say the
21 majority of them were paying cash.

22 ARBITRATOR BAKER: So, as part of your sales

1 program, you did not have relationships with local
2 banks, as some developments did, in order to
3 encourage local financing?

4 THE WITNESS: No. Bank financing in Costa
5 Rica is--

6 ARBITRATOR BAKER: --hard.

7 THE WITNESS: --hard, if not null, and bank
8 rates in Costa Rica are much higher than those in the
9 States and other countries.

10 So--well, it's very difficult to get
11 financing in Costa Rica, and when a buyer was able--a
12 lot of private financing available, but then you're
13 looking at rates of 14, 18 percent. And when a lot
14 of our educated buyers from up North came to the
15 property, they weren't about to pay those kinds of
16 rates.

17 So--we, at times, offered
18 financing--in-house financing, to people with enough
19 money down.

20 ARBITRATOR BAKER: You made the comment in
21 response to one of counsel's questions earlier about
22 the difficulties that come from complaints being made

1 against development properties in Costa Rica.

2 Are you aware of other such complaints
3 affecting other properties?

4 THE WITNESS: Absolutely. Many such
5 complaints.

6 ARBITRATOR BAKER: Would you give me a brief
7 description, just for comparison?

8 THE WITNESS: Oh, well, you know, I know
9 there's one gentleman by the name of Sheldon
10 Haseltine, who I know is in the newspaper down there,
11 amcostarica.com, and he is sort of spearheading a
12 whole movement in Costa Rica to seek justice for
13 people that have been shut--projects that have been
14 shut down.

15 His project was shut down, and then he had a
16 bunch of squatters on his land which seemed to have
17 been orchestrated--that whole squatter situation,
18 Sheldon Haseltine claims was orchestrated by some
19 not-so-nice, powerful, rich people down there.

20 I believe there was one project in Northern
21 Guanacaste which was owned by a gentleman named James
22 Salter from CMI Construction, and he was doing a

1 project called Canyon Ranch. Canyon Ranch is a big,
2 high-end luxury resort, holistic health and
3 wellness-type resort, and he had spent a lot of money
4 and gotten approvals for his project, and had started
5 building, and then he got shut down by the
6 authorities.

7 I believe there's another project revolving
8 around a gold mine that was given a concession to
9 mine gold, and then afterwards, the gold mine was
10 closed down by the Government.

11 I believe there's a wealth of information on
12 the--there was a company named Millicom--I mean,
13 you'd have to, like, research this yourselves. I'm
14 not absolutely completely positive of all of the--all
15 of the things that happened in that case.

16 But, for instance, Millicom came into Costa
17 Rica. They created infrastructure for
18 telecommunications with the anticipation that they
19 would be able to make money in that market; and after
20 they completed their infrastructure, Costa Rica
21 kicked them out of the country.

22 And then at one point, Costa Rica was

1 looking for some financing from The World Bank, and
2 Millicom had lobbied with the bank, and Costa Rica
3 allowed Millicom to come back into the country and to
4 continue operations.

5 Costa Rica received a loan from The World
6 Bank, and then shortly thereafter, Costa Rica kicked
7 Millicom out of the country again.

8 If you do a Google search, I'm sure you'll
9 find dozens of instances where people profess
10 grievances against the Government of Costa Rica
11 regarding business practice.

12 ARBITRATOR BAKER: Has this pattern that
13 you've been describing been going on a long time?

14 THE WITNESS: Yeah, I believe it has. Yeah.

15 ARBITRATOR BAKER: So, was it going on
16 before Mr. Aven bought this property?

17 THE WITNESS: Probably, yes.

18 ARBITRATOR BAKER: Okay.

19 Thank you, Chairman.

20 PRESIDENT SIQUEIROS: I have no questions,
21 Mr. Damjanac. Thank you very much.

22 THE WITNESS: Thank you, gentlemen.

1 PRESIDENT SIQUEIROS: Can we take a break, a
2 10-minute break?

3 MR. BURN: Indeed, sir. We'll return with
4 the next witness, Mr. Néstor Morera.

5 PRESIDENT SIQUEIROS: Fine. Thank you.

6 (Brief recess.)

7 PRESIDENT SIQUEIROS: If the parties, the
8 Court Reporters, and Interpreters are ready, may we
9 proceed?

10 ARBITRATOR BAKER: We need a witness.

11 PRESIDENT SIQUEIROS: Indeed.

12 ARBITRATOR BAKER: Technicality.

13 NÉSTOR MORERA, CLAIMANTS' WITNESS, CALLED

14 PRESIDENT SIQUEIROS: Mr. Morera, I
15 understand you will be testifying in English?

16 THE WITNESS: No, sir. No, Señor. Español.

17 PRESIDENT SIQUEIROS: In Español?

18 THE WITNESS: Sí.

19 PRESIDENT SIQUEIROS: Okay. Your Witness
20 Statements had been submitted in English, so I had
21 assumed that you would be testifying in English.

22 THE WITNESS: Español.

1 MR. LEATHLEY: So sorry. Yes. I'm sorry to
2 interrupt. We also anticipated it would be in
3 English, given his testimony is in English. We also
4 have an email from the Claimants confirming this.
5 So, we think it a little irregular to change the
6 language at this stage.

7 PRESIDENT SIQUEIROS: Okay. So I think the
8 Respondents do have a case that they had prepared
9 themselves to make the cross-examination in English.
10 We do notice that you had an opportunity to prepare
11 your witness statement in Spanish as, I believe,
12 Spanish is your mother tongue.

13 But the fact that you made it in English and
14 that counsel to Claimants did confirm that you would
15 be testifying today in English, is there a major
16 objection on your part to testifying in English?

17 THE WITNESS: Good morning to everyone here.
18 Indeed, I do feel more comfortable expressing myself
19 in my native language, Spanish. I've only litigated
20 in Spanish and no other language.

21 And, yes, I do know English, but I wouldn't
22 dare to think that I speak perfectly or that I can

1 express specific legal terminology in English, which
2 I think that the parties would be interested in me
3 expressing.

4 So I'd like to insist on the importance with
5 regard to the effectiveness of my statement that I do
6 so in Spanish.

7 PRESIDENT SIQUEIROS: I have to say that you
8 write in English very, very well.

9 THE WITNESS: I don't think that I speak as
10 well, sir.

11 MR. LEATHLEY: So could I make a suggestion?
12 Could we proceed in English. And if Mr. Morera has
13 any difficulty with any particular words--if there
14 are words, although I don't think we be will be using
15 any words that are beyond the remit of his testimony,
16 that he can then consult with translators?

17 PRESIDENT SIQUEIROS: Do you have a comment
18 on that, Mr. Burn?

19 MR. BURN: Well, just as a preliminary
20 matter, I don't think there is any irregularity to be
21 alleged here. The language is of the arbitration all
22 Spanish and English. It is absolutely common and

1 routine for somebody to have a second language which,
2 for conversational purposes and in many contexts,
3 they're very comfortable.

4 But when it comes to oral testimony, the
5 precision of the matter, the fact that that it
6 happens in the public domain, the fact there are
7 legal consequences attached to giving oral testimony
8 might prompt that witness, even with in this case
9 very comfortable capability with English, to prefer,
10 just for the sake of certainty, to use a native
11 tongue.

12 It is, of course, the case that Mr. Morera
13 speaks very good English. But he simply seeks to
14 make sure that he uses precisely the correct
15 language/terminology in his responses in a process in
16 which he could, in theory, be held responsible.

17 It's no more/no less than that. I don't
18 think there's any prejudice to be suffered with
19 acceding to his request. Maybe I'm speaking for him.
20 I'm sure he would--if the Tribunal feels it's
21 appropriate to invite him to default to English, I'm
22 sure he will take that invitation.

1 But in truth, I don't think there's any
2 irregularity either on the part of the Claimants or
3 on the part of the witness.

4 PRESIDENT SIQUEIROS: Let us confer at this
5 point.

6 (Tribunal confers.)

7 MR. LEATHLEY: Mr. President, with the
8 greatest apologies for interrupting the
9 deliberations, we have the email from the Claimants
10 which confirmed the November 17--thank you, sir.

11 ARBITRATOR BAKER: That's what we were
12 looking at.

13 MR. LEATHLEY: Thank you, sir.

14 PRESIDENT SIQUEIROS: The Tribunal
15 understands that native tongue for Mr. Morera is,
16 indeed, Spanish. But we defer also to the
17 expectation of Respondent's counsel to examine
18 Mr. Morera in English, taking into consideration,
19 however, that Mr. Morera may at some point feel more
20 comfortable to have a response be expressed in
21 Spanish rather than in English.

22 If a specific issue is to be discussed, then

1 what the Tribunal decides is that Respondent's
2 counsel may cross-examine in English. If Mr. Morera
3 has a specific question as to a specific term or
4 issue that has been addressed, maybe he can wait for
5 the translation or listen to the translation in the
6 meantime.

7 But the examination should proceed in
8 English. And if you, Mr. Morera, should feel
9 comfortable or more comfortable to respond for
10 specific reference in Spanish, then you can proceed
11 with that language. But, clearly, you did issue a
12 witness statement in English. Your command of the
13 language in written form at least is quite good.

14 And the expectation in this case was for
15 Respondent to examine in Spanish (sic). We also take
16 note of the fact that even though we could have
17 proposed at a certain other point in time to move
18 your testimony to a different point, the fact that
19 the next witness is precisely the last fact witness,
20 Mr. Aven, then the order would become strongly
21 affected.

22 THE WITNESS: May I answer the questions in

1 Spanish? Or part of them? I would feel more
2 comfortable.

3 PRESIDENT SIQUEIROS: Indeed, Mr. Morera, I
4 think you understand English, no matter what. So,
5 let's be frank. If you think you can respond
6 correctly in English, we would ask you to answer in
7 English. If there is some specific point with regard
8 to which you feel more comfortable responding in
9 Spanish, then go ahead and do it.

10 But we would ask you that you seek to be
11 genuine. If you understand the question in English
12 and you can answer in English, please do. The
13 expectations of the counsel for Costa Rica is that
14 based on what was told to them by the Claimant and
15 the fact that you had your statement in English,
16 well, they expected you to speak English.

17 THE WITNESS: Thank you very much, sir. I
18 will do that.

19 PRESIDENT SIQUEIROS: Thank you, Mr. Morera.
20 And one point before we begin. I will
21 address this in English for the record as well.

22 You have probably been advised by counsel to

1 Claimants that the order will be that they will
2 address a few questions from you initially. Counsel
3 to Respondent will then proceed to examine you on the
4 basis of your testimony to be followed by Claimants'
5 redirect questions exclusively on the issues
6 addressed by Mr. Leathley and his team.

7 We would ask that you respond first to the
8 question. There will be time to make any
9 clarifications, if you wish. And, of course, as we
10 have commented before, if there is an issue that you
11 do not understand to the question, feel free to ask
12 clarification.

13 THE WITNESS: Thank you.

14 PRESIDENT SIQUEIROS: And, also, there is a
15 statement that should be on the table to your right
16 on a card--printed card to your right. Would you
17 please read that statement in English or in Spanish
18 to your right, the card that is--that one there.

19 THE WITNESS: I'm going to read it in
20 English following the instructions on the decision of
21 the Tribunal. It says, "Witness Declaration. I
22 solemnly declare upon my honor and conscience that I

1 shall speak the truth, the whole truth, and nothing
2 but the truth."

3 PRESIDENT SIQUEIROS: Thank you, Mr. Morera.
4 Mr. Burn.

5 DIRECT EXAMINATION

6 BY MR. BURN:

7 Q. Mr. Morera, you have a file just to your
8 right. You have your hand on it. Fantastic. I just
9 need to take you to your two statements in these
10 proceedings and ask you to verify the copies you have
11 in front of you.

12 If we could go, first of all, to the top of
13 the file to a document in my copy that is entitled
14 "First Witness Statement of Néstor Morera Víquez."

15 Do you see that?

16 A. Yes, sir.

17 Q. Could you just quickly flick through the
18 document down to the blue page and confirm whether
19 that appears to be a good copy of your first
20 statement in these proceedings. You don't need to
21 read every word. Just check that it looks like the
22 right one. That's it. You got to the blue page

1 there?

2 A. This is my first statement.

3 Q. Let's stop there.

4 Do you have any changes, corrections, or
5 amendments to make to your first statement?

6 A. Yes. A couple of clarifications, if
7 possible, at this moment.

8 Q. Sure.

9 A. Thank you. It's--okay. Here. Paragraph 15.

10 Q. Yes.

11 A. It says that "The strategy in this case is to
12 intervene in this hearing and offer new arguments
13 stating that this conflict is of commercial or civil
14 nature rather than criminal."

15 I would like to change "commercial" and
16 "civil" for--how do you say "contencioso
17 administrativo" (contentious administrative)? Public
18 branch or the way you call it. But it's not
19 commercial or civil nature.

20 PRESIDENT SIQUEIROS: Administrative,
21 litigious.

22 THE WITNESS: Okay. Yeah. That, I think,

1 precisely.

2 A. And in Paragraph 29, I want to make a
3 clarification regarding--regarding this.

4 "Prior to the trial, Mr. Ventura and I went
5 to a very strange meeting with Sergio Baldelomar,
6 head of the Environmental Prosecution Unit. He
7 suggested that Mr. Aven's case was an important one
8 for the Unit, and that they could not retreat from
9 prosecuting it. He stated that the community was
10 affected and that the prosecution's role was to
11 protect communities."

12 Okay. Here I just--to put like--in the
13 right--to put it in the right place in the chronology
14 of facts, that this was prior to the second trial I
15 had, which was the one only of Jovan Damjanac.

16 Q. Could you just clarify precisely the textual
17 change you wish to make to this paragraph?

18 A. I will--I will add "prior to the second
19 trial" only.

20 Q. And where does that text go?

21 A. It is just at "prior to the trial." I would
22 like to add "second" before the word "trial."

1 Q. Right. Thank you. I was being a bit dense.

2 A. And those would be my only clarifications.

3 Q. Okay. Just so we're clear, Paragraph 15,
4 you're replacing the words "commercial" or "civil"
5 with the words "administrative litigious"?

6 A. Right.

7 Q. And in Paragraph 29, you're inserting the
8 word "second" before trial--

9 A. Yes.

10 Q. --in the phrase "prior to the trial"?

11 Okay. Are there any other corrections or
12 amendments that you need to make to this statement?

13 A. No, sir.

14 Q. Could you go to the signature page at the
15 back? So it's not on a numbered page, but it's page
16 20.

17 Is that your signature?

18 A. It is.

19 Q. Thank you. Let me just repeat the process
20 for your second statement. So, if you go over to the
21 white tab.

22 A. That's my name, yes.

1 Q. Okay. Does that appear to be your second
2 statement in these proceedings? Are you sure you're
3 looking at the right--I think you may be looking at
4 the Spanish version of the first statement.

5 A. Yes.

6 Q. Over the white tab. There you go.

7 A. Yes. Thank you.

8 Yes, this is my--my second statement.

9 Q. Are there any corrections or amendments to
10 make to this second statement?

11 A. Not in this one.

12 Q. Can you go to page 7?

13 A. Yes.

14 Q. Is that your signature?

15 A. Yes.

16 MR. BURN: Thank you very much.

17 I have no further questions for you at this
18 stage. Mr. Leathley will have some questions for you
19 by way of cross-examination. There isn't much by way
20 of documentation, but he may take you to the document
21 that appears in that file just behind.

22 But your obligation here is very simple.

1 It's to answer all the questions that are put to the
2 best of your ability, whether they come from
3 Mr. Leathley, Members of the Tribunal, or from me.

4 I have no further questions now. I'll hand
5 it over to Mr. Leathley.

6 THE WITNESS: Thank you.

7 MR. LEATHLEY: Thank you. I would just
8 introduce Ms. Paez, who will be conducting the
9 cross-examination.

10 CROSS-EXAMINATION

11 BY MS. PAEZ:

12 Q. Good morning, Mr. Morera.

13 A. Morning.

14 Q. Mr. Morera, please go to Exhibit 523 on the
15 first tab of the binder. This is the bio at your law
16 firm's website. Page 2 describes your practice areas
17 as--

18 A. Which page? Sorry.

19 Q. Page 2. Page 2, Paragraph 2, describes your
20 practice areas as intellectual property rights,
21 prosecution, and litigations; correct?

22 A. It's not accurate at this moment, but it was

1 at--one of the ones I used at that moment, which was
2 2012.

3 Q. This is your--this is the bio that appears in
4 your law firm's website? This is the--

5 A. I no longer work in this law firm, so that
6 can be one of the reasons.

7 Q. And you did not clarify that when counsel
8 asked you to amend any of the statements in your
9 First Witness Statement where you say you work at
10 Bufete Morera & Morera; right?

11 A. Yeah. My statements were rendered in a date
12 in which I still worked at that law firm.

13 Q. But now you did not clarify that to the
14 Tribunal; right?

15 A. I can clarify to you. I--I moved from that
16 law firm in April 2016 because that was a family law
17 firm owned and controlled by my dad. And now I
18 work--well, even worse--with my wife. Yeah. Yeah.

19 (Laughter.)

20 THE WITNESS: There's a TV? Oh.

21 (Laughter.)

22 THE WITNESS: Sorry. Sorry about that.

1 Okay.

2 ARBITRATOR BAKER: Now we see why you wanted
3 to speak in Spanish.

4 THE WITNESS: Yeah. Yeah.

5 BY MS. PAEZ:

6 Q. So, Mr. Morera, the bio on Paragraph 2 of the
7 Exhibit R-523, then, reflects that it was true until
8 April 2016; correct?

9 A. It was true in 2012.

10 Q. But you haven't changed--that hasn't changed
11 to date; correct?

12 A. It has changed. Yeah. It has more--more
13 things. And--I mean, those were my--let's say my
14 things to show. At the moment, especially for about
15 my experience--the only thing that, of course,
16 remained the same is my--my academic education. My
17 postgraduate education and intellectual property,
18 yes, that, of course, remains the same.

19 Q. So, you would admit that your area of
20 expertise is IP law more than criminal law?

21 A. No. The academic one. But not my litigation
22 one. There are no--we don't--we don't receive--we

1 don't have education, intellectual property. Not
2 even in the best University of Costa Rica. That is
3 the University of Costa Rica.

4 So I was granted on a scholarship in 2003 to
5 study intellectual property. But I haven't--I never
6 stopped practicing criminal law. For instance, at
7 this moment, I do--my--my biggest area of practice is
8 anticounterfeiting, which are criminal offenses
9 against intellectual property--how do you
10 say?--holders. Yes.

11 My--my legal law firm is the leader in Costa
12 Rica in criminal anticounterfeiting. So I--I do
13 criminal law every day, yes.

14 Q. That's not what the bio reflects. But let's
15 move on. Paragraph 56(b) of your First Witness
16 Statement, please.

17 A. 56 what? (D)?

18 Q. 56(b) of your First Witness Statement.

19 A. (b). Okay. Yes.

20 Q. You say that the prosecutor--this is your
21 final impressions in your witness statement. And in
22 56(b), you say, "The prosecutor failed to make a

1 good-faith effort to settle the case at the proper
2 stage for settlement"; right?

3 A. Yes.

4 Q. And in Paragraph 27 of your First Witness
5 Statement--

6 A. Hold on, please. Can I read it, the full
7 paragraph?

8 Q. I'll read it for you.

9 A. Yes.

10 Q. You can read the full paragraphs, but I'll
11 read what you say.

12 "Mr. Aven did not want to settle anything as
13 a matter of pride."

14 A. Uh-huh.

15 Q. Right?

16 A. Yeah, because--there were two moments. I
17 have to put that in context.

18 Q. No. No. I'm not asking for any
19 explanations. I'm just asking you if you say that
20 Mr. Aven did not want to settle anything as a matter
21 of pride; right?

22 A. I said it in the second moment, not in the

1 first one, which is important to take into account,
2 yes.

3 Q. And you'll be able to explain to your counsel
4 on redirect when counsel asks you.

5 A. Okay. Yes.

6 Q. Mr. Morera, in paragraph 7 of your First
7 Witness Statement--

8 A. 7.

9 Q. Paragraph 7, you say you started representing
10 Mr. Aven and Mr. Damjanac in the middle of 2012;
11 correct?

12 A. Yes.

13 Q. This was in the middle of the proceedings;
14 correct?

15 A. It was at the end of the first stage, at the
16 end of the investigation stage. Yeah. Almost--let's
17 say three weeks before the preliminary hearing,
18 around that more or less, yes, which is the second
19 stage.

20 Q. And you know Mr. Aven was represented by
21 other attorneys before in these proceedings; right?

22 A. Yes. Yes.

1 Q. In fact, Mr. Aven was always represented by
2 counsel in these proceedings; correct?

3 A. That's what I recall, yes.

4 Q. Thank you. And, indeed, you did not file any
5 motion for lack of legal representation--

6 A. No.

7 Q. --correct?

8 A. No.

9 Q. Thank you.

10 Now, Mr. Morera, in your two witness
11 statements, you do not speak about any violations to
12 Mr. Aven's due process rights; correct?

13 A. In--in--where again?

14 Q. In any of your witness statements, you do not
15 talk about violations of due process to Mr. Aven's
16 rights; correct?

17 A. I did it--I did it in the preliminary hearing
18 and in the trial as a--as a part--as part of the
19 strategy because as defend--the defensor--the
20 defendant--is that the way? Defendant, let's say.
21 I--I have the right to choose proper moments to do
22 that. And then those can be more effective if the

1 process is more advanced, in fact. Yeah.

2 Q. Yeah. But in your witness statements, you
3 did not mention any violations to Mr. Aven's due
4 process rights; correct?

5 A. I do mention some. I don't recall it very
6 well, but I--I think I did, yes.

7 Q. Okay.

8 A. Yeah. I don't recall everything I said, but
9 I--I think I did, yes.

10 Q. So you had an opportunity to raise any
11 violations of due process during the criminal
12 proceedings; correct?

13 A. The ones I considered important, yes.

14 Q. Thank you.

15 A. The ones I considered important.

16 Q. And, Mr. Morera, you do not say that Mr. Aven
17 was convicted without attending a trial; correct?

18 A. Sorry?

19 Q. You do not say that Mr. Aven was convicted
20 without attending trial; correct?

21 A. Convicted?

22 Q. He was not judged in absentia. He was always

1 present during trial; correct?

2 A. Yes. Yes, yes.

3 Q. And now the decision on a potential
4 conviction of Mr. Aven is contingent on his return to
5 Costa Rica; correct?

6 A. I would like a translation for this. Can you
7 repeat the question, please.

8 Q. The decision of a potential conviction is
9 contingent in his return to Costa Rica?

10 A. What do you mean by "contingent" in this
11 case? What? What?

12 Q. It's pending.

13 A. Pending. Yes, pending.

14 Q. Or it depends on it; correct?

15 A. Yeah.

16 Q. It depends on his return to Costa Rica;
17 correct?

18 A. Yes.

19 Q. Thank you.

20 And, also, Mr. Morera, you do not say that
21 Mr. Aven was not provided English translations during
22 the proceedings; correct?

1 A. According to me, the translation he received,
2 especially when he rendered the declaración
3 indagatoria--I don't know how to say that in English.
4 His declaration--David Aven rendered a declaration,
5 was not very accurate. Yes.

6 Q. But you were not present in that--

7 A. No.

8 Q. --procedure elect; correct?

9 A. Yeah, but I can read it. It's in the file.
10 Yes.

11 Q. But no motion was filed against--

12 A. No motion, but I did mention it in the
13 closing statements of the first trial. Yes.

14 Q. Thank you.

15 Mr. Morera, let's go to Paragraph 13 of your
16 First Witness Statement.

17 A. 13.

18 Q. You explain that after the investigation
19 stage is over and the judge considers there's enough
20 evidence to present the case to trial, he calls for a
21 preliminary hearing; correct?

22 A. Correct.

1 Q. And in Paragraph 14, you say that after the
2 preliminary hearing, a judge decides if the case
3 merits going to trial or not; correct?

4 A. It's part of what Paragraph 14 mentions, yes.

5 Q. Thank you.

6 In Paragraph 32 of your witness statement,
7 you say that Mr. Martinez did not have a case to go
8 to trial because Mr. Aven was granted the permits for
9 the development of the Las Olas Project; right?

10 A. That's what I--that's what I still think.

11 Q. And, in fact, in the same paragraph, you say
12 that Mr. Martinez had no evidence of intent of
13 Mr. Aven to commit the crime he was accused of;
14 right?

15 A. That's the gross mistake Martinez did. Yes.

16 Q. And in Paragraph--however, in--and in
17 Paragraph 25 of your Second Witness Statement--

18 A. 30--30-what?

19 Q. 25.

20 A. Ah, 25. Hold on, please.

21 Q. You say that Mr. Aven (sic)Martinez acted
22 improperly in charging Mr. Aven with a crime, given

1 the lack of evidence against him--

2 A. Yes.

3 Q. --correct?

4 A. I still think that, yes.

5 Q. Yes. However, in the preliminary hearing
6 after the prosecutor and the defense presented the
7 arguments to the intermediate judge, the judge
8 allowed the case to go to trial; correct?

9 A. It's a very bad decision, but a judge did
10 believe that.

11 SECRETARY GROB: Mr. Morera, could you
12 please put your headset on the table because you're
13 holding it too close to the mic.

14 THE WITNESS: Okay. Sorry.

15 SECRETARY GROB: Thank you. Sorry.

16 BY MS. PAEZ:

17 Q. Mr. Morera, today the proceedings against
18 Mr. Aven have not gone into the retrial stage;
19 correct?

20 A. I no longer represent him on the criminal
21 matters, and I'm not up to date. I'm not informed
22 about what's happening right now with regard to the

1 criminal liability and even the process against Aven,
2 but that is my understanding, yes?

3 (Overlapping interpreter with speaker.)

4 Q. --to Costa Rica; correct?

5 COURT REPORTER: The question again, please.

6 A. I don't know.

7 COURT REPORTER: Please could you allow some
8 time between question and answer.

9 A. I did not have further contact with David
10 since--it could be around 2014, maybe. And I no
11 longer represent him. I did represent Jovan in--on
12 the second trial, but I'm not in the position to say
13 more information about this ongoing trial on behalf
14 of David Aven because I no longer represent him
15 officially in the file, yes.

16 Q. Mr. Morera, but you agree with me that the
17 only authority that can decide upon Mr. Aven's
18 criminal liability is a Costa Rican criminal law
19 judge; correct?

20 A. Correct. The Tribunal.

21 Q. And that has not happened yet; correct?

22 A. That has--that's what I understand, yes.

1 Q. And that is because Mr. Aven absconded from
2 the proceedings; correct?

3 A. That's because Mr. Aven fears for his safety,
4 which is a normal thing to happen.

5 Q. But the criminal trial has not restarted
6 because Mr. Aven is not in Costa Rica; correct?

7 A. Yes. And, moreover, they haven't provided
8 what I specifically asked at a moment that was for
9 security measures, given the fact that he received
10 six shots that I saw myself because that was the
11 night that the car was inspected. So we asked and
12 also tried--

13 Q. Mr. Morera, sorry to interrupt you, but that
14 was not my question.

15 My question was if the proceedings are
16 pending upon Mr. Aven's return to Costa Rica, and you
17 already said yes.

18 A. And I say yes, but it's pending his security
19 guarantees as well.

20 Q. Thank you.

21 A. Yes.

22 Q. Mr. Morera, in Paragraph 16 of your first--

1 A. 16, yes.

2 Q. --16 of your First Witness Statement--

3 A. Uh-huh.

4 Q. --you explain that a decision from the
5 first--from the criminal court can be appealed to a
6 superior tribunal; right?

7 A. Let me read it, please.

8 Yes, it can, indeed.

9 Q. In the same paragraph, you also say that the
10 appeals decision of that superior tribunal can be in
11 turn upheld to the third chamber of the Supreme Court
12 of Justice; correct?

13 A. (In Spanish. "[recurso de casacion]"))

14 Yes, it's like an extraordinary appeal.

15 Q. And neither of these appeals proceedings have
16 taken place in Mr. Aven's case; correct?

17 A. No. I am not aware because I was stopped in
18 the--I mean, my participation stopped during the
19 process while the process was in the criminal
20 tribunal of Quepos. So I haven't raised by myself
21 any other appeals before higher judges.

22 And the appeal--I mean, let me--let me

1 explain that a little bit, if it is important. The
2 appeal is--once you have a decision. And--

3 Q. Mr. Morera, let me cut you off there. We
4 don't have a decision yet; correct?

5 PRESIDENT SIQUEIROS: If we could, I think
6 it would be interesting for the Tribunal to listen to
7 what the process would be.

8 THE WITNESS: Thank you. Yes. I really
9 appreciate it.

10 Yes, there must be a decision that assesses
11 all the merits, all the grounds, all the substantive
12 issues. And in--in the moment I was still
13 representing David Aven, there was no such--such a
14 decision. That was the big problem, in fact, that
15 the process was suspended more than ten days; and
16 after that suspension, he--he received the shots, six
17 shots.

18 Okay. If there was a decision taken by--by
19 a court, such a decision can be appealed.

20 And on top of that court, which is a higher
21 one, there is the highest, and that's what we call
22 recurso de casación, which is like an extraordinary

1 appeal, yes. Yes.

2 BY MS. PAEZ:

3 Q. Mr. Morera, so hearing to your explanation,
4 everything is still in process in Mr. Aven's case;
5 correct?

6 A. That's--that's what I understand. But as--as
7 I told you before, since I am no longer his criminal
8 lawyer, I cannot say or assure 100 percent to you.
9 That's what I understand, yes.

10 MS. PAEZ: Thank you. No further questions.

11 THE WITNESS: Thank you.

12 (Pause.)

13 MR. BURN: Thank you for your patience,
14 Mr. President.

15 REDIRECT EXAMINATION

16 BY MR. BURN:

17 Q. Just a few questions, Mr. Morera.

18 A. Yes.

19 Q. You'll recall that counsel for the Respondent
20 began the cross-examination of your evidence with
21 some questions relating to your experience and your
22 professional background?

1 A. Uh-huh.

2 Q. How many criminal files are you handling
3 right now?

4 A. Only in the anticounterfeiting practice, we
5 have like 80. Okay?

6 And besides that we have other kinds--other
7 types of criminal litigation, environmental. I still
8 have a couple of cases of homicides, lesiones--I
9 don't know how to say "lesiones." Like--yes, damages
10 to the health of somebody. I mean, I--I do a lot of
11 criminal litigation. The only--the only crimes I
12 don't like to handle are drug dealing cases. I don't
13 like that. It's very profitable, but I don't like
14 it.

15 And sexual cases, I--I don't do that.

16 Besides that, I have already done, I think,
17 all the other fields of the criminal law--possible
18 criminal law, litigation in Costa Rica, yes.

19 Q. Thank you.

20 And how often are you in criminal courts?

21 A. Every week or every couple of weeks at least.
22 At least every couple of weeks I have a hearing in my

1 country. It can be a trial hearing. It can be a
2 preliminary hearing. Medidas cautelares, preliminary
3 measures. I don't know if you call it like that.
4 Hearing, yes.

5 My--my focus now is especially
6 anticounterfeiting, which is--it's kind of new in
7 Costa Rica. It started--the prosecutors restarted
8 the prosecution in 2014. So we saw a very good
9 opportunity there, and this is my most important area
10 of criminal litigation practice at this moment. Yes.

11 Q. Thank you.

12 On a separate topic, you'll recall that
13 Ms. Paez took you to Paragraph 56 and Paragraph 27 of
14 your first statement in relation--

15 A. 56 and 57.

16 Q. And she asked you some questions in relation
17 to your criticism of Mr. Martinez and his attitude
18 towards settling the complaint. And you'll recall
19 she took you to 56(b) in which--and this is a list of
20 criticisms--of examples of criticisms that you make
21 in respect of the criminal process.

22 A. Yes.

1 Q. And you say at 56(b), "Second, the prosecutor
2 failed to make a good-faith effort to settle the case
3 at the proper stage of settlement."

4 And Ms. Paez took you to the point where you
5 recorded that Mr. Aven had indicated that he was not
6 interested in settlement. Do you recall that line of
7 questions?

8 A. Yes. It's--it's very important to have a
9 proper chronology because I think with the proper
10 chronology, you can understand the good-faith comment
11 I did here in--especially in Point B. According
12 to--according to me, the settlement proposal was
13 something to be expected from the Costa Rican State
14 prior or during the preliminary hearing, which is, in
15 my experience, in the--the best and the--and the
16 proper stage to--to handle that.

17 Why? Because in that case, you avoid to go
18 to trial, which is the third stage. And you avoid
19 the cost and all the, you know, the personal things
20 that are involved to a criminal litigation.

21 There can be a lot of time from the
22 preliminary hearing to trial. And during that time,

1 there is always desgaste. It's like--how can I say?
2 I don't know how to say desgaste.

3 Okay. It's--it's--by definition, the
4 preliminary hearing is the best way. So, if there
5 was an interest from the State taking into account
6 the small amount of--of damages claim that was
7 included by the State and taking into account that
8 David Aven was what we call the delincuente primario.
9 It was the first time he was charged in the criminal
10 branch in Costa Rica; taking into account that also
11 he was an American citizen, a foreigner that is not
12 familiar with the--with the Costa Rican proceedings;
13 and taking into account that with all the documents
14 that are still in that file, you can see that there
15 was no--I think you call it intent, dolo. We call it
16 dolo in Spanish.

17 There were conditions enough for the Costa
18 Rican State to seek a proper settlement at that
19 moment in which there was no still possibility to
20 advance to a costly trial. And why costly? Because
21 as you can see in the trial, in both times we spent
22 almost 15 days of effective days. Working days were

1 the first time like 10 and the second time around 7
2 days.

3 Every day of trial costs a lot of money to
4 the Costa Rican State. And I can say only the first
5 trial has consumed more than the \$12,000--around that
6 was the amount that the Costa Rican State was
7 claiming at that moment.

8 So it was a matter of proportion. I mean,
9 what is going to cost more to you--all these days of
10 trial which, as the State pretended to receive 17
11 witnesses submitted by the Prosecutor Martinez, or
12 instead seek a settlement with a man--an old man that
13 was--that was also at that moment what we call
14 "adulto mayor" like an--like an elder man, that once
15 he has 65 years, he also deserves some little special
16 treatment by--by the State, especially if he's a
17 foreigner . I mean, all the conditions were--were
18 there to seek a settlement.

19 And you have to take into account that at
20 the end of the day, the purpose of every proceeding,
21 either civil, labor, but especially the criminal
22 ones, is--is to solve a problem, that his case was a

1 problem to nature. And maybe the best way to solve
2 it was at that moment, including like a plan and a
3 remedy plan and a payment of damages. I mean, that
4 was the proper stage.

5 But never happened. Never happened. I
6 mean, there was no--no proposal, no plan. And
7 moreover, there were needed approvals from superiors
8 of Mr. Martinez--that's what we understood at the
9 moment--that were not--that were not previously
10 consulted in order to explore the possibility of the
11 settlement at that moment.

12 Then we have one of the most strange
13 experiences I had. And I say "we" because I was to
14 together with Mr. Manuel Ventura. We were in Quepos
15 the first day of the trial, which was--this trial
16 started in--in December 5, 2012. We had our
17 four-year anniversary a couple of days ago.

18 Yes.

19 That day I recall very well that we arrive
20 early to the--to the Tribunal of Quepos. And we were
21 asked by the clerk of the judge, "Hey, listen. The
22 judge wants to speak to you."

1 And the name of the judge is Rafael Solis
2 Gullock. I know this judge because I--I did
3 represent two years before this case Cargill, the
4 American company, for criminal crimes. And he was a
5 judge in Alajuela, a neighboring court of the
6 international airport. And I say, "Yes. I think he
7 want to like say hello," or something like that, just
8 like a polite thing before the trial.

9 When we entered the room, inside the room,
10 there was Mr. Martinez already. And the judge asked
11 us to--to have a seat. And he promoted the idea of
12 achieving a settlement at that moment, on trial
13 stage, which is not normal, which is not the regular
14 proceeding, which is very strange. And especially
15 very strange in the way it--it has happened, promoted
16 by the judge in his office prior to the trial.

17 So it was a little bit, you know, shocking
18 to me, I have to say. But it was still something I
19 have consulted to my client, to David. And I said,
20 "Listen, these people are not interested in doing
21 something. And, you know, we have all these days of
22 trial, and you're going to spend all this amount in

1 hotels, meals, whatever. Are you interested in
2 achieving a settlement?"

3 And at that moment he said he was not
4 interested because it was already a matter of--of a
5 personal thing, a matter of pride to wipe out his
6 name, to clean his name before he, his family, and
7 his investors and the society because David Aven was
8 already an investor and with other investments in
9 Costa Rica with other businesses.

10 So I did understand it was a matter of clean
11 up his reputation. That can be something--well, it
12 can be one of the most valuable things a man may
13 have. So I--I respected that at that moment. So
14 that's--that's the way it happened. Right?

15 Q. Okay. Thank you for that.

16 And you recall that you were asked various
17 questions by Ms. Paez relating to what she
18 characterized as being Mr. Aven's absconding from
19 Costa Rica in relation to the criminal proceedings.

20 A. Uh-huh.

21 Q. You recall being asked questions by Ms. Paez?

22 A. Yes. Yes, indeed. I do.

1 Q. Now, you--your answer to the specific
2 question--this is on page 745 of the transcript. The
3 question in that context that was put to you was the
4 criminal trial--it's a little rough in the transcript
5 at this stage. I know the transcribers need to--will
6 be tidying it up in the final form.

7 The criminal trial has already started--has
8 not started because--well, not restarted because
9 Mr. Aven is not in Costa Rica; correct?

10 So she was putting it to you that the reason
11 that it's not restarted was his absence.

12 And you then went on to say, but you were
13 interrupted, "Yes. Moreover, they haven't provided
14 what I specifically asked at a moment that was for
15 security measures," and you refer to the shooting
16 incident, and then you were cut off.

17 I just wanted to give--given that you were
18 cut off, despite the fact, actually, you were
19 answering the question that was put to you--I just
20 wanted to give you a chance to give a full answer to
21 that question.

22 Why--and I'll put it in slightly different

1 words, but I think it's the same. Why do you think
2 the criminal trial has not restarted?

3 A. Well, I can say about what--of what I did in
4 order to--to, you know, have the possibility to have
5 David back in Costa Rica to face another trial. That
6 was the night that David was shot with him in the--in
7 the "OIJ" (phonetic) and in San Jose--it's like the
8 judicial police--together with Mr. Shioleno, I think,
9 is the name of the other investor.

10 They were very scared. They were very
11 afraid. There were six shots in the--in the car.
12 And it was a shocking spectacle to see that car.

13 And he has no idea where those shots come
14 from. I mean, the shots, according to the version,
15 were--were done in the--in the road after a
16 neighboring town to Quepos called Jaco, going to
17 San Jose, which is a--it's a very lonely road, yes.

18 He has no idea who--who did that, what was
19 the purpose. But there was always like--like this
20 feeling that there was somebody strongly committed to
21 remove David from--from--well, physically and, from
22 the economic point of view, his investment from

1 Quepos.

2 So I can understand the reaction of the
3 person that understands that somebody that sees that
4 the prosecution and the trial maybe did not went that
5 well for the Costa Rican State, because it didn't go
6 that well to the Costa Rican State, the way they
7 wanted. Maybe the best way was to kill him, you
8 know.

9 Given that, we--I, myself, I coordinated--I
10 asked two--two bodies. I asked the Court to explore
11 the possibility to provide specific security,
12 policemen and--policemen in the hotel and security
13 for--for a possible David coming.

14 And I also asked that to the American
15 Embassy--there was a lady there called Mrs. Sylvia
16 Cabezas. Sylvia Cabezas is the head of the--I don't
17 know if she still is--of the legal department or
18 legal affairs of the American Embassy, if she may
19 help us to--to get this kind of security.

20 And the two of them just say that that was
21 not possible to have this--this special security
22 because they see it like a--like a special treatment.

1 You know, like a--like a VIP or something treatment.
2 It's not like that. It was a matter of a man that is
3 a foreigner that wasn't trying to get killed.

4 So, from that moment on, I think David
5 desisted from the idea to returning to Costa Rica
6 because, basically, there are no guarantees for his
7 personal safety in the country, given that there was
8 no proper response for that issue, neither from the
9 Costa Rican State, neither from the embassy of his
10 own country. Yes.

11 Q. Just to be clear, in relation to the Costa
12 Rican State, you made a request, I think, is what
13 you're saying--

14 A. Yes.

15 Q. --for--for police guards to be available
16 while he returned to trial?

17 A. Yes. And I--I also did it by--by--in a more
18 informal way by phone calls and trying to speak.
19 We--we--we try to speak to higher prosecutors and--to
20 higher authorities to explore such a possibility and
21 it never happened. So--

22 Q. What--specifically, what responses did they

1 give you?

2 A. It was a problem of resources, which is
3 something I--I also understand. I mean, it is
4 not--Costa Rica, as you know, is not a wealthy
5 country. And there are limited resources as far as
6 the police and as for other bodies that we have
7 there.

8 But there is case law, even from the
9 Constitutional Court, that--even in the cases of
10 problem of resources, the State has to find a way to
11 provide security and guarantee basic human rights to
12 a person like in this case that was intended to--to
13 be killed.

14 I mean, David Aven, he did not take a flight
15 the day before the trial and never come back to the
16 US. That's an important thing to take into account.
17 David Aven refused to return to Costa Rica because of
18 the shots. Otherwise, knowing him, he--he--he's a
19 man of--how can I say? He's a brave man. He's an
20 hombre valiente.

21 So, I more from a human way, understood his
22 decision of--of not coming back to the country, given

1 the problem to his security. Yes.

2 Q. And are you aware of any extradition
3 proceedings having been brought to bring Mr. Aven
4 back to Costa Rica?

5 A. No. No. I mean, I--I--I was--I understood
6 that there were--there were those. And, also, there
7 was a petition arised from the Court still when I was
8 representing Jovan, asking David to come to--to Costa
9 Rica and declaring him in rebeldia which is the
10 natural consequence, of course, for not being on
11 trial.

12 But I'm not aware of the particulars of the
13 extradition proceeding. I--I was not appointed to
14 represent him in that.

15 Q. Thank you.

16 Last topic. Ms. Paez took you to some
17 points in relation to your criticisms of due process
18 observance in respect of the proceedings brought
19 against Mr. Aven. She indicated that you could give
20 a fuller answer in redirect, so it forced me to ask
21 you to reflect on what generally due process failings
22 you saw.

1 You may want to look back at your two
2 statements and just quickly refresh and, for the
3 benefit of the Tribunal, just give a rough
4 characterization of the scope and nature of the
5 criticisms you make.

6 A. Yeah. One of the manifestaciones--one of the
7 ways the due process is reflected, let's say, in
8 the--in the criminal proceeding is something that is
9 specifically provided in our procedural criminal
10 code, código procesal penal, we call the principle of
11 objectiveness.

12 And according to the principal of
13 objectiveness, the prosecutors are not only intended
14 to go and prosecute somebody with the permission of
15 one of the parties. In this case, with the
16 permission of Mr. Bucelato or with the version of
17 part of the employees of one body, like SINAC.

18 Why part? Because there was--there's still
19 a very strange thing that I don't understand. And
20 that strange thing is that SINAC, the environmental
21 administrative bodies that handle Mr. Aven's permits
22 and requests since, let's say, 2006 or 2007 until

1 2010 in which all those employees and visits and
2 reports stated that there were no environmental
3 problems in the property, no wetlands, no forests, no
4 nothing. Basically, no nothing.

5 And because--and relying on those
6 reports--other more powerful in terms of reports were
7 granted like the SETENA one.

8 One day, suddenly because of, according to
9 me, the fear of the director of the ACOPAC, Mr.--I
10 think the name Carlos Vinicio Cordero, appointing
11 Mr. Luis Picado. Luis Picado changed all that
12 technical--so-called "technical criterion" to
13 suddenly state that there were wetlands and that
14 there was a huge damage to the environment and that
15 there were a lot of irregular things happening in the
16 property. That things happened one day to the--to
17 the other.

18 In the case of the wetlands, for instance,
19 that things happened from August to January. So
20 according to Picado, for instance, there can be a
21 wetland that is borne in August and, you know,
22 it's--it becomes a wetland in February, in six or

1 seven months before.

2 The thing is that I still don't get the
3 sudden change of technical criterion. I still don't
4 get how the prosecutor didn't understand
5 Mr. Martinez, with all due respect to him. I still
6 don't understand why he didn't pay attention to the
7 fact that while Mr. Aven was getting all those
8 permits, there were specific reports from the
9 environmental agencies from Costa Rica stating that
10 there was no problem.

11 So, there is no intent. There is no dolo.
12 There cannot be an intent from Mr. Aven? Why?
13 Because it's not possible for him to represent the
14 possibility of a crime if the bodies--the bodies
15 entitled by the Costa Rican State to say that say the
16 opposite.

17 So how--you have to be like PhD biologist
18 or--or a PhD in wetlands to contradict those
19 criterions. And it's not the case. He's a
20 developer, and he's an American citizen.

21 He has to rely on two things: in the
22 criterions of the environmental bodies that were

1 consistent during three years and in the criterions
2 of the people he has hired during more than three
3 years, like six or seven. And all those criterions
4 met in the fact that there was no trouble.

5 So one day somebody--Mr. Picado thought that
6 there were wetlands, there were forests. And upon
7 that only version, Mr. Martinez built a criminal
8 case.

9 Upon--upon that only version, Mr. Martinez
10 thought that there was dolo, that there was an
11 intention. How come? How come all those years? Are
12 those going to be erased? Nothing that happened?
13 There were no reports?

14 If there is still a contradiction--because
15 there is still a contradiction--the permits are still
16 valid. This Costa Rican State hasn't promoted the
17 nullification proceedings to nullify those permits.
18 Those permits are still binding and enforced in Costa
19 Rica.

20 And on the other hand, you have criterions
21 that were issued after those permits saying the
22 opposite. So Mr. Martinez never ever paid attention

1 to the fact that there were permits. Mr. Martinez
2 never ever paid attention to the fact that Mr. Aven
3 hired experts. So that was according to me.

4 PRESIDENT SIQUEIROS: Mr. Burn, aren't we
5 moving a little bit away from the question and the
6 topic that was being questioned of Mr. Morera.

7 MR. BURN: I think that's fair, sir.

8 THE WITNESS: Okay.

9 MR. BURN: I think--I think, Mr. Morera,
10 you've given a very full answer to the question. The
11 Tribunal will bear that in mind.

12 And I have no further questions for you at
13 this stage. The members of the Tribunal may have
14 some questions for you as well.

15 THE WITNESS: Okay.

16 MR. BURN: So you must remain where you are
17 and deal with any questions they put to you.

18 Thank you.

19 THE WITNESS: Sorry if I get excited. After
20 two trials, you can behave like this.

21 QUESTIONS FROM THE TRIBUNAL

22 PRESIDENT SIQUEIROS: We understand.

1 Mr. Nikken, do you have any questions?

2 ARBITRATOR NIKKEN: Yes, I do.

3 I'm going to ask the questions in Spanish.

4 THE WITNESS: Thank you very much.

5 ARBITRATOR NIKKEN: What penalty is
6 envisaged by the Costa Rican legal system in the case
7 of violations of due process or violations to
8 constitutional human rights during a criminal
9 procedure?

10 THE WITNESS: Effective procedural
11 activities or annulments? Well, it's called--we
12 don't call it really annulment. We call it defective
13 procedural activities.

14 ARBITRATOR NIKKEN: Yes, but what
15 action--what remedy exists?

16 THE WITNESS: It can be an "amparo" remedy.
17 It can be one for defective procedural situation.
18 Can be also within the framework of an appeal
19 process, or it can be--which was part of my strategy,
20 to reserve this for two major intents, which was the
21 Preliminary Hearing, which didn't really proceed
22 because it was a very superficial coverage; or it

1 could be--which was my idea to do it--as part of the
2 closing of the arguments during the first trial of
3 David Aven.

4 ARBITRATOR NIKKEN: Yes, but a subject such
5 as this one, which arose regarding the poor
6 translation--defective translation of Mr. Aven's
7 position, could that be invoked immediately?

8 THE WITNESS: Yes, it could have been, but
9 it could also have been part of the strategy to
10 reserve it for later.

11 ARBITRATOR NIKKEN: But not because he had
12 to defer it for a given time? The remedy could
13 have--or the recourse could have been found
14 immediately--in other words, what would the penalty
15 have been? Annulment?

16 THE WITNESS: Yes. The thing is that the
17 act--or the investigation happens, again, but if in
18 this case--

19 I have to speak English here. I lost the
20 Spanish, and--

21 (Comments off record.)

22 THE WITNESS: I'm going to respect what I

1 said before, so, I'm going to reply in English. You
2 can ask me in Spanish, and I'll do my best to reply
3 in English.

4 So, as I was saying in Spanish, yes, the
5 remedies can be immediate, and you can have a
6 nullification at the moment, and you can have
7 the--what is--what has to happen is that that
8 declaration issue has to be given again. Okay? It
9 has to be repeated.

10 But I will be fully sincere with you, and it
11 was not part of my strategy, and as a defendant, I--I
12 can define it that way for a matter of convenience,
13 but also because it was not my most powerful
14 argument. My most powerful argument was the lack of
15 intent. The lack of the demonstration of the intent
16 by the disregarding of the objectiveness principle.
17 Yes. A more substantive issue.

18 ARBITRATOR NIKKEN: Okay.

19 PRESIDENT SIQUEIROS: Mr. Baker?

20 ARBITRATOR BAKER: Thank you, Chairman.

21 Could you tell me a little bit about this
22 10-day rule?

1 THE WITNESS: Uh-huh.

2 ARBITRATOR BAKER: That seemed to be quite
3 extraordinary, actually. I mean, from a--from a U.S.
4 lawyer's perspective, it seems that this is a rule
5 that is designed in order to protect the defendant.

6 THE WITNESS: That's it.

7 ARBITRATOR BAKER: And the defendant would
8 have been entitled to waive the protections of that
9 rule if it were up to them since it was for their
10 protection.

11 Is that not the case in Costa Rica?

12 THE WITNESS: No. Unfortunately, it's not.
13 And it was--I raise the point exactly the same way
14 you have suggested, that--I mean, we wanted to finish
15 the trial because we felt confident about the outcome
16 we were supposed to receive in the first trial.

17 And there was already a lot of resources
18 invested. I consulted David, and he said, "I want my
19 case finished. I want to have a decision."

20 And I told him about this provision, 3.36 of
21 the Criminal Procedural Code, that, in fact, the
22 philosophy behind that provision is to protect the

1 rights of the accused party. Okay?

2 So, I--I do think, as well, that is part of
3 the rights of the--of--it's also a constitutional
4 right to resign that document--that possibility and
5 say, okay, if this is intended to protect me, don't
6 protect me. I can protect myself. And I can--and I
7 can decide by my own, which is my own convenience in
8 this case, but it's not--unfortunately, is not the
9 way it works in the Costa Rican system.

10 In the Costa Rican system, there is
11 also--this is a not-peaceful--there is no peaceful
12 case law. There is case law that states that there
13 is no possibility of resignation--sorry, possibility
14 of an agreement of the two parties, because the two
15 parties have to agree to resign. And there is case
16 law that admits that if the two parties set into an
17 agreement to--to--for this resignation, that term can
18 be prolonged, yes. And that's what we try to seek
19 with the prosecutor, and they didn't want to. Yes.
20 They didn't want to.

21 So, it's--it's a very--it's a very
22 strange--but it's old. This provision comes from

1 the--from the former Criminal Procedural Code prior
2 to a big amendment that was introduced to the Costa
3 Rican criminal system in 1998.

4 ARBITRATOR BAKER: So, tell me a bit about
5 how it actually works in practice. So, does the
6 judge raise the issue that there's a problem with the
7 10-day rule, let's just call it; or is it that the
8 lawyers from both sides are aware of it, and they
9 either seek an agreement, and if an agreement is not
10 possible, then they tell the judge about it?

11 How did it work in this case?

12 THE WITNESS: I have to say that this is the
13 only case I have with such a problem of more than 10
14 days, you know, that lapsed, and--yeah, we--in our
15 case, we tried to seek the agreement of the
16 prosecutors.

17 And I think that it has to be--it has been
18 the way that the parties, by themselves--not the
19 judge promoting it, not the Tribunal--by the parties,
20 approached each other to get into this agreement and
21 to file a joint request or complaint, writ, stating
22 the possibility that the two of them want to continue

1 with the trial, yes.

2 ARBITRATOR BAKER: And my understanding of
3 your statement is that the reason for this was an
4 injury with the judge's--one of his hands; is that
5 correct?

6 THE WITNESS: The left hand. And the judge
7 was hand right--

8 ARBITRATOR BAKER: Right-handed?

9 THE WITNESS: Right-handed. Yes, thank you,
10 right-handed. And that was also very strange, and
11 that's why also called him lazy, a little bit,
12 because during all that trial, Mr. Rafael Solís
13 Gullock, who was about to retire, he never used, like
14 you, for instance, his computer or take notes. He
15 was just standing there, eventually took some notes.
16 But there was a clerk, you know, like, taking note of
17 everything that the parties were saying.

18 So, I never got the point about how the
19 left-hand injury was something that will, you know,
20 wipe out all the effort of the State, of David, of
21 everybody. Yes.

22 So--I ask also for the appointment of a new

1 tribunal, a new judge, and there was no possible--no
2 positive outcome of that.

3 I mean, if we have a rule, then we will
4 have, as the State--as the system, we will have to
5 guarantee the possibility to always be able to
6 appoint a substitute.

7 And it happens that we have the rule, but we
8 don't have the--that possibility, so, that's a very
9 arbitrary thing we have, to get over the possibility
10 of not being able to resign from that term. Yes.

11 ARBITRATOR BAKER: So, who would have to
12 make that appointment? Is it a superior judge, an
13 administrative judge, or is it the judge who, in
14 fact, had the injury that has to appoint a
15 substitute?

16 THE WITNESS: The tribunal. The tribunal in
17 coordination with other judicial authorities; they
18 would have to seek a substitute. Yes.

19 ARBITRATOR BAKER: And you're saying that
20 you applied for a substitute from that tribunal?

21 THE WITNESS: I officially applied for that
22 and was part of the arguments--I filed two appeals

1 for that, and I asked for that. And they told me
2 that there was no people coming from Puntareñas,
3 which is the neighboring judicial circuit, that were
4 able to be there all those days or the--the specific
5 dates to substitute Mr. Solís Gullock and continue
6 with the trial. Yeah. That didn't happen.

7 ARBITRATOR BAKER: I have one last question,
8 Chairman, if I may, and that is to take advantage of
9 the witness' knowledge and criminal expertise.

10 Would you describe for me--or comment,
11 rather, on the position that Costa Rica has taken
12 that the red-flag warning is automatic that was filed
13 in INTERPOL against Mr. Aven?

14 THE WITNESS: No, it's not automatic. It is
15 not automatic. Especially--it's--it seems to be very
16 strange that it's automatic for environmental crimes
17 now. It's not automatic.

18 ARBITRATOR BAKER: So, if it's not
19 automatic, who makes the decision in order to flag
20 someone at INTERPOL on behalf of the Costa Rican--if
21 you know?

22 THE WITNESS: I guess it must be a political

1 decision rather than a technical one.

2 ARBITRATOR BAKER: So, it would not be one
3 of the Environmental Ministries. It would be someone
4 from the Justice Ministry, you think?

5 THE WITNESS: I think.

6 ARBITRATOR BAKER: Thank you, Chairman.

7 ARBITRATOR NIKKEN: If I understood, you
8 said that you asked for the substitution of the
9 judge?

10 THE WITNESS: Yes.

11 ARBITRATOR NIKKEN: After the hearing?

12 THE WITNESS: Yes.

13 ARBITRATOR NIKKEN: Does Costa Rican law
14 allow a judge to decide on matters of--about the
15 hearing he didn't preside, he didn't hear?

16 THE WITNESS: I don't understand.

17 ARBITRATOR NIKKEN: You don't understand?

18 THE WITNESS: No.

19 ARBITRATOR NIKKEN: Does Costa Rican law
20 authorize a judge to make decisions on issues dealt
21 with at a hearing which he did not attend?

22 THE WITNESS: No, not him, but there are

1 superiors who have to make decisions for him and who,
2 in principle--well--administrative judicial bodies
3 that should decide that case, and they are in the
4 possibility of also solve the problems of the
5 substitution.

6 Of course, not Mr. Solís that was, I don't
7 know, in the hospital--at home. I don't know where
8 he was.

9 (Overlapping interpreter channel with
10 speaker.)

11 ARBITRATOR NIKKEN: But isn't there a
12 principle of immediacy; in other words, that a judge
13 has to decide on something he has heard in the
14 hearing?

15 THE WITNESS: There is this kind of
16 principle, but if we want to continue with the case,
17 there should be someone else that has to be there.
18 Otherwise, what is the reason of this rule?

19 ARBITRATOR NIKKEN: Right.

20 THE WITNESS: Yeah.

21 ARBITRATOR NIKKEN: And what answer did you
22 obtain to your request for substitution of a judge?

1 THE WITNESS: One of the reasons was the
2 principle you just quote, and lack of resources, and
3 that there was no possibility. Yeah.

4 PRESIDENT SIQUEIROS: Mr. Morera, I would
5 like to ask you about the--you also represented
6 Mr. Damjanac--

7 THE WITNESS: Yes.

8 PRESIDENT SIQUEIROS: --on the appeal?

9 THE WITNESS: Uh-huh.

10 PRESIDENT SIQUEIROS: Not on the appeal; on
11 the second trial.

12 THE WITNESS: Second trial, yes.

13 PRESIDENT SIQUEIROS: And from your
14 Statement, you mentioned that he was acquitted during
15 the second trial and that this acquittal has been
16 appealed by the prosecution in Costa Rica.

17 THE WITNESS: Yes.

18 PRESIDENT SIQUEIROS: Is this correct?

19 THE WITNESS: Yes, sir, that's correct.

20 PRESIDENT SIQUEIROS: And as I understand,
21 this occurred in 2014.

22 THE WITNESS: '14.

1 PRESIDENT SIQUEIROS: Is the appeal still
2 pending?

3 THE WITNESS: No. The appeal was accepted
4 because the decision--even though it was in favor to
5 our "thesis," the decision was very bad drafted from
6 the point of view of the technique of
7 the--"fundamentación." I don't know how to say
8 "fundamentación" in English. Like--

9 THE INTERPRETER: Grounds.

10 THE WITNESS: --to put all the grounds in a
11 very clear and ample manner. And the problem was
12 that that decision that was about more than 60
13 pages--let's say 80 percent of that decision was the
14 reproduction of the literal statements of the
15 witness, and there is ample case law stating that
16 there--this is not enough. This--this--this
17 procedure cannot constitute "fundamentación."

18 So, due to a bad drafting technique, it
19 was--the appeal was accepted. But as far as I know,
20 there is no trial date yet. There is no--there has
21 been no rescheduling for Jovan's new trial.

22 PRESIDENT SIQUEIROS: So, he will need to

1 have a new trial as well.

2 THE WITNESS: Yes. New trial.

3 PRESIDENT SIQUEIROS: Okay. Thank you very
4 much.

5 THE WITNESS: Uh-huh.

6 MR. BURN: Sir, if you'd forgive me, I just
7 have a couple of questions arising out of
8 Professor Nikken's questions that were put about how
9 the process should work with respect to finding a new
10 judge, and Professor Nikken was exploring how that
11 would really work if the new judge had not been in
12 the hearing in question. And if I could just follow
13 up on that with a couple of questions, if that's
14 okay.

15 PRESIDENT SIQUEIROS: You may do so.

16 FURTHER REDIRECT EXAMINATION

17 BY MR. BURN:

18 Q. So, Mr. Morera, you'll recall that
19 Professor Nikken had some questions for you around
20 this principle. If I heard correctly, I think
21 Professor Nikken called the "Principle of immediacy
22 of the Law," or something along those lines.

1 ARBITRATOR NIKKEN: Uh-huh.

2 BY MR. BURN:

3 Q. And now, first of all, just as a practical
4 matter--because I understand what you were saying, in
5 response to me, that you made requests for this.

6 A. Yeah.

7 Q. But you didn't get a positive response.

8 A. No, sir.

9 Q. Just to finish off, I think, the point that
10 Professor Nikken was exploring with you, if they had
11 said "Yes, here is a new judge," how would that have
12 worked with respect to the hearing that had been
13 presided over by a different judge?

14 A. Yes. I guess it will be a new scenario for
15 the new judge--and you may think about conflicts with
16 the immediacy Principle, the way you want to call it.
17 But according to me, there are higher principles that
18 are heard with this kind of provision.

19 The fact that the accused party is willing
20 to finish the case, the fact that the accused party
21 who has done a huge effort to face a case, is now,
22 you know, exposed to a new trial because of the

1 negligence of the Costa Rican State--because this is
2 actually a negligence, according to me--would allow a
3 second--a second judge to be in the courtroom.

4 You have to take into account that now,
5 since many years ago, all the hearings in Costa Rica
6 are videotaped, full--four cameras are in the room.
7 So, even--for instance, if we want to raise appeals
8 or if we want to raise motions, whether you think
9 our--is our most important input, the videos.

10 So, I don't think that there is a huge
11 conflict regarding the immediacy Principle, given the
12 fact that--if we have to appeal, or if the higher
13 court wants to know what happened, even the higher
14 court has that possibility.

15 So, why not think about that possibility for
16 another judge.

17 Q. So, your point is that it could have worked
18 because there's videotape--

19 A. Yes.

20 Q. --recording of the complete hearing?

21 A. Everything is videotaped.

22 Even--also, if the videotape--and there has

1 been cases--if an entire hearing or a hearing took
2 place and the videotape did not work, the hearing
3 will be nullified. The videotape is indispensable
4 now, as a ; technological resource in Costa Rica.

5 Q. Okay. And just so we're absolutely precise
6 about this, you explained that you had--you made
7 certain requests for another judge to be allocated,
8 maybe from a neighboring circuit or wherever,
9 frankly.

10 A. From wherever.

11 Q. But precisely, what was the response?

12 A. The response was very, very--how can you
13 say--(Spanish [laconica]), very--(Spanish
14 [laconica]), you have (Spanish, [laconica]).

15 Q. There's a word in English laconic.

16 A. In English, it's like very--it was a very
17 small and formalistic response in the sense that--so
18 sorry for you, but the ten years--the ten days have
19 passed, and this is the natural consequence of a
20 trial.

21 So, they didn't go deep into my arguments at
22 all. They didn't. So, it's--

1 Q. Were you--sorry. Were you explaining to them
2 the precise context--

3 A. Of course.

4 Q. --in terms of the amount of time that had
5 been invested--

6 A. Of course.

7 Q. And that Mr. Aven wanted--was very happy for
8 this to be concluded--

9 A. Especially--

10 MR. LEATHLEY: Objection. I mean, that's
11 leading.

12 MR. BURN: I do apologize. That's fine.

13 (Overlapping speakers.)

14 BY MR. BURN:

15 Q. Perhaps you just want to explain.

16 A. Yeah, especially the part that--the
17 particular situation here was that the person for
18 which--for which this provision was designed was the
19 person interested in resigning to that possibility.

20 So, it's--it's--it's a higher thing; it's
21 more like a constitutional thing to think about, and
22 a human's right thing.

1 I didn't explore, like, constitutional
2 remedies or human rights. It's not that--that is not
3 my field at all. But I--I had the frustration to
4 argue there for trying specifically to point that
5 thing out; that is, this is David Aven. This is the
6 accused party. And this is the accused party that
7 wants to continue with the trial. So, either appoint
8 a new judge or suspend the ten days in order to have
9 a new trial.

10 And once the left hand of Mr. Rafael Gullock
11 is in place, okay, let's have also Mr. Rafael, but
12 let's finish this trial. That's what I asked. Yeah.

13 MR. BURN: Thank you.

14 PRESIDENT SIQUEIROS: Mr. Leathley, do you
15 care to address this final line of questioning from
16 Mr. Burn or not?

17 MS. PAEZ: No. No further questions.

18 PRESIDENT SIQUEIROS: Okay. Then you are
19 released, Mr. Morera. Thank you.

20 THE WITNESS: Thank you. All of you.

21 Okay. I did my best. Good morning,
22 everybody.

1 PRESIDENT SIQUEIROS: So, the next witness
2 is Mr. Aven. How would the Parties wish to proceed?

3 MR. BURN: We're utterly relaxed. If
4 everyone wants to take a five- or ten-minute break
5 and begin immediately, that's fine. If we want to
6 break for an early lunch, that's equally fine. I'm
7 happy to go with whatever the Respondent and Tribunal
8 would prefer.

9 MR. LEATHLEY: Thank you, sir. Also, happy
10 to make progress. Maybe a five- or ten-minute break
11 might be convenient right now.

12 But just so you know, I do plan to
13 cross-examine Mr. Aven for probably about an hour.

14 PRESIDENT SIQUEIROS: So, why don't we take,
15 then, a five-minute break? Five-minute break. And
16 then we will continue.

17 Thank you.

18 (Brief recess.)

19 PRESIDENT SIQUEIROS: If the parties are
20 ready, Court Reporters and Interpreters, then we may
21 proceed.

22 Good afternoon, Mr. Aven.

1 THE WITNESS: Good afternoon.

2 PRESIDENT SIQUEIROS: You have witnessed
3 several of the prior examinations; and although I
4 believe you have likely heard me mention the process
5 for the prior witness, I will nonetheless state these
6 for the record.

7 There will be a brief examination on the
8 part of the team for Claimants to be followed by
9 cross-examination on the part of counsel to the
10 Republic of Costa Rica; and then a redirect, which
11 may be made by your counsel.

12 The Tribunal may at any time make any
13 questions of you.

14 I would ask that your answers be first to
15 address the questions that is presented, and you may
16 thereafter, as you have witnessed, make
17 clarifications at a later time.

18 If you do not understand a specific
19 question, please do not doubt in making sure you do
20 ask for any clarification from the person making the
21 question.

22 THE WITNESS: Yes, sir.

1 is entitled "First Witness Statement of David Richard
2 Aven, I'd like you to inspect that document and flick
3 all the way through to Page 81, which is the final
4 page, and let us know if that does indeed appear to
5 be a copy of your First Statement.

6 A. Yes, it does.

7 Q. Are there any changes, corrections, or
8 amendments you wish to make to this First Statement?

9 A. I don't know if there's--the--there's a date
10 that I want to modify--change. I don't know if it's
11 in the first or second. The April 1st date.

12 Q. Well, perhaps you could explain the
13 correction, and we might be able to locate where that
14 goes.

15 A. Okay.

16 Q. Just explain, and--

17 A. There's a--there is a first--April 1st date
18 for a document that--I think it--

19 Q. If you could speak up, Mr. Aven--

20 A. Yeah.

21 Q. --for the benefit of those in the room and
22 for the transcribers who are taking the record of the

1 proceedings.

2 A. There was a document that I believe was--went
3 back to 2002 where I put an April 1st date in there,
4 2002, and it should have been April 30th.

5 Q. Okay.

6 A. 2002.

7 Q. So, this is one of the contracts, I think
8 you--

9 A. I think it was one of the initial purchase
10 agreements or whatever.

11 Q. While we're dealing with other matters, we'll
12 find the appropriate reference in your Statements,
13 and we'll take you back to that. But thank you for
14 flagging that.

15 Are there any other corrections or
16 amendments you wish to make?

17 A. Yes. Any reference that I made regarding the
18 fact that Juan Carlos Esquivel owned 49 percent, I
19 want to change that to say Juan Carlos--at all times,
20 Juan Carlos Esquivel owned 49 percent or more, or
21 that--of the Concession; or that Paula Murillo owned
22 the 49 percent or more interest in the Concession at

1 all times.

2 Q. Is there a paragraph number for that?

3 A. I'm not sure.

4 Q. Okay.

5 A. But if they ask it, that's what I'm referring
6 to.

7 Q. Understood.

8 A. Okay.

9 Q. And we'll endeavor to find the references to
10 take you back. Subject to those comments--

11 MR. LEATHLEY: Sorry. Can I interrupt?

12 I think this is material evidence that is
13 being offered. So, I would like that to be clarified
14 on the record, not just in the event there's a
15 question on the cross. If this is the testimony in
16 chief of the witness, we need to have that very clear
17 on the record, sir.

18 PRESIDENT SIQUEIROS: Yes. This relates to
19 ownership in the La Canícula company?

20 THE WITNESS: La Canícula, yes.

21 PRESIDENT SIQUEIROS: Okay. Could you
22 please clarify what--the statement you wish to make

1 with respect to ownership--who owns 49 percent of the
2 company?

3 THE WITNESS: There a statement I made in
4 the--in one of my statements that Juan Carlos owned,
5 at all times, 51 percent. All right? And after
6 he--and I want to change that to say, "At all times,
7 Juan Carlos owned 51 percent or more shares in La
8 Canícula"; or--after he became, you know--resigned
9 from that ownership, then at all times--from that
10 time on he resigned or taken out of the share book,
11 Paula Murillo owned the 51 percent or more interest
12 in La Canícula.

13 PRESIDENT SIQUEIROS: So, at all times, he
14 has owned the percentage that you have stated.

15 THE WITNESS: Say again?

16 PRESIDENT SIQUEIROS: At all times, he has
17 owned the percentage that you have stated.

18 THE WITNESS: The 51 percent. There is--

19 PRESIDENT SIQUEIROS: 51 percent.

20 THE WITNESS: There's a claim by the
21 Respondent that--alleging that at some point in time,
22 I was the owner of that--those shares, which

1 is--I--which is not true.

2 So, I--but I--I made a statement in
3 there--somewhere in my Witness Statement that he
4 owned--at all times, he owned 51 percent. And I want
5 to just clarify, "51 percent or more."

6 BY MR. BURN:

7 Q. So, you may wish to refer to Paragraph 37 of
8 your Second Statement. We'll come to that shortly.
9 So, don't go there just yet, because we're still on
10 the First Statement.

11 A. Okay.

12 Q. But we will return to this in a moment in
13 order that we get your primary evidence correct on
14 this point.

15 Okay. So, still in the First Statement,
16 subject to the comments you've made, but will, I
17 hope, satisfy you when we look at the Second
18 Statement, are there any other matters you wish to
19 raise by way of correction or amendment in the First
20 Statement?

21 A. No.

22 Q. Looking at Page 81, is that your signature?

1 A. Yes, it is.

2 Q. Thank you.

3 Now, if you could go behind the white tab.
4 Now, the Spanish and English versions of your Second
5 Statement appear in opposite order of the First. So,
6 what you need to do is find a blue page; and behind
7 that blue page, you should find a copy of your--the
8 original English version of your Second Statement.

9 A. Yes. I have it.

10 Q. Could you go through the same process
11 quickly, just flick through, check whether that
12 appears to be a copy of your Statement.

13 I'm going to take you back to a couple of
14 points with respect to the matters you've raised.

15 A. Okay.

16 Q. Okay. Now, if you could turn to--first of
17 all, to Paragraph 27, which begins on Page 6,
18 continues over to Page 7 of that Second Statement.

19 You referred a moment ago to the date,
20 April 1, 2002.

21 A. Uh-huh.

22 Q. You'll see in this paragraph, there are two

1 references to that date.

2 Could you just read the text of that?

3 A. Which paragraph is that again?

4 Q. 27, beginning on Page 6. Read through the
5 whole paragraph.

6 If you're satisfied that that is the point
7 at which you need to insert a corrected date, let us
8 know. If it's not, we'll find the right place for
9 you.

10 A. Yes, we entered into a purchase
11 agreement--purchase and sale agreement with Mr. Monge
12 to purchase all shares of La Canícula from him. On
13 payment for the purchase of the non-Concession
14 property, the title was transferred to--by Pacific
15 Park Condo on April 1st of 2005 to Inversiones
16 Cotsco.

17 Q. So, that's 2002.

18 A. I'm sorry, 2002, yeah.

19 And as a result, the U.S. investors owned
20 the entirety of both La Canícula and Inversiones
21 Cotsco as of April 1st, 2002, including three
22 properties mentioned above.

1 Costa Rica is required that 51 percent of
2 the Concession be owned by a Costa Rican, and from
3 the very inception until today, a Costa Rican has
4 owned 51 percent, despite Costa Rica suggesting that
5 we owned 100 percent.

6 So, I just want to change that to "51
7 percent or more."

8 Q. So, first of all, on the dates--

9 A. I'll change that--yeah, April 30th, 2002.

10 Q. Is that correct, both of those April 1sts
11 should be April 30s?

12 A. Yes.

13 Q. And is this also the paragraph in which you
14 seek to insert the words "or more" after "51
15 percent"?

16 A. Yes.

17 Q. And there are two occasions in which you use
18 51 percent. Does the insertion apply to them both?

19 A. Yes.

20 Q. Okay. Thank you.

21 Could you just go down on that second point
22 to Paragraphs 36 and 37, just over the page, on Page

1 9.

2 A. Okay.

3 Q. Could you just read those paragraphs to
4 yourself--no need to read them out--and let us know
5 if there's any change that needs to be made there.

6 A. Again, it says, "At all times, a Costa Rican
7 national owned a 51 percent interest"--that should be
8 "51 percent or more interest"--"in the Concession."

9 Q. Yep. Again, you need to speak more clearly,
10 Mr. Aven, for the benefit of the record.

11 A. Okay. You want me to read Paragraph 37 as
12 well?

13 Q. Just read it to yourself again. If there is
14 a need for a change, you need to indicate that.

15 A. Again, "The above held the 51 percent or more
16 Concession interest on the Trust for U.S. investors
17 until 2005, at which time Paula Murillo, a Costa
18 Rican national, was appointed to hold that 51
19 percent, and Ms. Murillo has held that 51 percent
20 interest from 2005 until the present."

21 That's--we can leave that alone.

22 That's--that's good.

1 Q. Okay. Thank you very much.

2 Subject to those changes, are there any
3 other corrections or amendments to this Second
4 Statement that you wish to make?

5 A. Not that I know, but let me reserve the right
6 to--if I see something on the fly here that is
7 incorrect, I'll change that as well.

8 Q. Okay. If you could turn to the last page of
9 that Second Statement, which is not numbered, but
10 it's the 50th page.

11 A. Okay.

12 Q. Is that your signature?

13 A. Yes.

14 Q. Thank you.

15 That completes the formalities. But just
16 very briefly, I wanted to ask you a question or two.

17 I don't think you were in the room, but did
18 you witness the Opening Statements made in these
19 Proceedings?

20 A. Yes, I did, and I was--I wasn't here Monday
21 or Tuesday because I was suffering from severe
22 migraine headaches; and maybe some of you saw, I have

1 these blue glasses on, and the--was prescribed by my
2 doctor because the blue filters out the white light
3 that triggers the migraine headaches. So, I wear
4 those all the time. I'm not wearing them now because
5 you suggested I wear these, which I appreciate,
6 but--so, I took a couple--and I'm taking medication
7 for those migraine headaches.

8 I'm also being treated for PTSD by a
9 doctor--the letter's in evidence--after the--the
10 attempt at my life in Costa Rica.

11 And basically, you know, my life is quite
12 different now than it was when I moved to Costa Rica,
13 because of the happenings down there and the
14 developments--unfortunate developments that occurred
15 in that country.

16 So, I did hear--but when I was in my hotel
17 room, I did see some of it, but I heard a lot of it.
18 And I was very dismayed when I heard the counsel for
19 the Respondents--what I recall was--attacked me quite
20 viciously with respect to my engagement in duping the
21 country, committing all kind of crimes, illegalities;
22 and that's very hurtful, and--because none of it's

1 true.

2 And I want to categorically reject all of
3 the--those accusations, and--and I would like the
4 panel to know that, you know, there's--there's a
5 number of investors that--like buyers, okay; and they
6 purchased nearly \$2 million in lots from us, and
7 there's another two investors that put \$900,000 into
8 the project, and because of the illegal shutdown, we
9 are liable for that.

10 One of the investors--I got sued by one of
11 the investors, and I settled with him under the
12 representation that this wasn't our fault; and
13 therefore, we are committed to returning those monies
14 to the investors.

15 I could have been facing 20 lawsuits right
16 now, and I want to thank the investors and also the
17 people that are watching, livestreaming it, that--and
18 this is why you have to be careful with accusations
19 you make that are false, that it went out on
20 livestream all over the world that I'm a criminal
21 again, picking up the mantra that Mr. Martinez
22 started in 2011 and continues to this very day.

1 And I got numerous calls that day--you know,
2 Monday and Tuesday, from buyers, from family, from
3 friends, saying, "What's going on? Are you a
4 criminal?" I mean, it was so embarrassing to have to
5 listen to those people. And a lot of them were
6 angry, that they thought I deceived them.

7 So, everybody out there that's listening to
8 this stream, I'm categorically denying that the
9 charges that--of the Respondent's counsel that I
10 engaged in any criminal activity. I want to again
11 confirm that it is our full intention, if we prevail,
12 to return all the monies to the people that invested
13 in our project. Because they were collateral damage.

14 We were the--we received the--the bomb,
15 right, that went off and destroyed the project. But
16 all those people that invested, those people that put
17 their hard-earned money into this project lost it as
18 well. Nobody's talking about that, but that's a
19 reality.

20 And the U.S. investors are--I made a promise
21 that we want to return those funds with interest.
22 And so, for everybody listening--and there's

1 many--many of those U.S. investors that we gave those
2 links to, and our friends and family that are
3 listening to this, and we want to make that
4 commitment, that we intend to return the money.

5 Because it's not fair that they lost millions of
6 dollars because the project was illegally shut down.

7 So, one more thing. When James Comey, in
8 July of this year, dismissed the criminal charges--or
9 didn't charge Hillary Clinton with the crime--he
10 said--he said this: He said--and I'll never forget
11 it, because when he said this, this hit me hard. He
12 said: "The most valuable thing I have is my family
13 and my reputation."

14 And my family's back there, some of them.
15 My friends are back there. And my reputation is in
16 shatters because of what this Respondent Government
17 done--has done to me.

18 And I'll never get that back. So, I just
19 want to say again, I categorically deny all these
20 charges I heard when I was listening to counsel for
21 the Respondent.

22 And I think you should be more careful with

1 your words. Because words do have meaning, and they
2 do have effect.

3 That's all I want to say. Thank you.

4 Q. Thank you very much.

5 MR. BURN: And I have no further questions
6 for Mr. Aven at this point.

7 PRESIDENT SIQUEIROS: Mr. Leathley?

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

9 CROSS-EXAMINATION

10 BY MR. LEATHLEY:

11 Q. Good afternoon, Mr. Aven.

12 A. Good afternoon.

13 Q. My name is Christian Leathley; I'm appearing
14 on behalf of Costa Rica. I'd like to ask you a few
15 questions in relation to your two Witness Statements
16 you provided in this Arbitration.

17 In Paragraph 235 of your First Witness
18 Statement, you say that you left Costa Rica in around
19 May 2013; is that correct?

20 A. What--what--

21 Q. Yes. Your First Witness Statement?

22 A. Page what?

1 Q. Paragraph 235.

2 A. Oh, I'm sorry.

3 Q. If you look at the last line of 235.

4 A. Back here, right? Okay.

5 Yes, that's correct.

6 Q. And you traveled to and have remained in the
7 United States ever since that time; is that correct,
8 sir?

9 A. That's correct.

10 Q. And, in around September of 2013, you listed
11 yourself as having an address in New Castle,
12 Pennsylvania; is that right?

13 A. Where is that located?

14 Q. That's in your Notice of Intent to Submit a
15 Claim to Arbitration.

16 A. Yes.

17 Q. And nowadays, am I right in thinking you
18 reside in the Clearwater, Florida, area?

19 A. I'm not saying where I reside because of my
20 safety concerns.

21 Q. And you're aware that your testimony here
22 today, sir, is of potential impact on any criminal

1 proceedings that are taking place in Costa Rica?

2 A. Is potentially what?

3 Q. You are aware that the evidence and the
4 testimony you are providing today could have
5 potential implications on your criminal proceedings
6 in Costa Rica; is that right?

7 A. I am not aware of that. I'm not a lawyer,
8 and I'm not a criminal lawyer, so I'm not aware of
9 that.

10 Q. Okay. And you don't speak Spanish, do you,
11 sir?

12 A. I do not.

13 Q. And all the officials you've dealt with in
14 Costa Rica only speak Spanish; is that right?

15 A. No, I would say not all of the--all--no, not
16 all of them. A lot of them do speak Spanish--do
17 speak English.

18 Q. Then let's work through. So, does Ms. Mónica
19 Vargas--does she speak English?

20 A. You know what? I don't know, because I never
21 spoke to Mónica Vargas in my entire life.

22 Q. Does Hazel Díaz speak English?

1 A. Never spoke to her either.

2 Q. Does Mr. Luis Martinez speak English?

3 A. I don't think he does, no.

4 Q. So, all of your dealing with advisers, to the
5 extent you had any direct dealings, have been
6 filtered through other people?

7 A. All of my dealings with who? These three
8 people?

9 Q. For example--yes.

10 A. Well, I don't--I had no dealings with Helen
11 Díaz that I know of.

12 Q. Hazel Díaz.

13 A. Hazel Díaz.

14 I don't really remember much interfacing
15 with Mónica Vargas. And the only one of the three
16 that you mentioned, Mr. Martinez, to my knowledge,
17 does not speak English.

18 Q. So, all your communications to them would
19 have been through somebody else, and all the
20 communications from them would have been through
21 somebody else, is that right, sir, because you don't
22 speak Spanish?

1 A. Well, you keep saying "from them?" Is it
2 "from them" that I hear? From him?

3 Q. Let's take Mr. Martinez, as an example.

4 A. Yes, he--the only time I--yeah, that's true.
5 It had to be through an Interpreter.

6 Q. And the communications and the correspondence
7 that you received in Spanish would have had to have
8 been translated by somebody else; correct?

9 A. Yes.

10 Q. And would that have been translated to you in
11 writing, or would it have been translated in oral
12 communication?

13 A. I would say generally in writing.

14 Q. Generally in writing.

15 A. Yes.

16 Q. But those--those English translations haven't
17 been provided in this Arbitration, have they, sir?

18 A. English translations of what?

19 Q. The documents we're referring to. Your
20 communications that have been received from various
21 entities, you cannot read. So, we've just
22 established that you would have had to have them

1 translated and you said they would have been
2 translated in writing. And I'm asking you whether
3 those documents have been submitted in this
4 Arbitration.

5 A. If you have a document that you want to refer
6 me to--I don't recall off the cuff. You're
7 asking--you're asking me questions that happened
8 years ago, so if you have a specific question about a
9 document, then I'd like you to ask that question
10 about a document.

11 Q. Have you been involved in this Arbitration
12 with your counsel, sir?

13 A. Yes.

14 Q. Are you aware of the disclosure phase in July
15 of this year, sir?

16 A. Yes.

17 Q. And were you asked questions to produce
18 certain documents during that phase?

19 A. Yes.

20 Q. And did you provide any of those
21 translations, those written translations that you
22 received?

1 A. What I remember doing--and you're
2 asking--asking--counsel's asking these questions,
3 there's--I remember sending Mr. Burn a huge box of
4 documents after I got that request.

5 So--there's thousands of documents in
6 evidence in this case. And the documents I was able
7 to find, I--I sent to Mr. Burn.

8 Q. Did you send those translations that you
9 received, those written translations, to Mr. Burn?

10 A. I don't recall what was sent. I mean, we're
11 talking thousands of documents, and--you know, I
12 hardly remember what happened last week. And with
13 this condition I have with my migraine headaches,
14 it's getting more difficult. So, I don't recall.

15 Q. No, I sympathize, sir.

16 And my question is really whether you would
17 accept my representation that there are no
18 translation of those official documents.

19 A. I'm not going to accept that because I can't
20 verify it. I don't recall.

21 Q. Okay. Thank you.

22 Let's go to Paragraph 54 of your First

1 Witness Statement, and here you say that you were
2 well aware of the demands of the environmental
3 permitting regime in costa Rica.

4 A. Okay.

5 Q. Is that still your testimony today?

6 A. 55?

7 Q. 54, sir.

8 A. 54. Let me read it.

9 Yes.

10 Q. And I assume with your advisers, they would
11 have informed you of those demands; correct?

12 A. Yes.

13 Q. And--such as not providing false information.

14 A. I reject the assertion that I ever did
15 provide false information.

16 Q. Don't worry, sir; I'm not making that
17 assertion.

18 A. Well, you just said it.

19 (Overlapping speakers.)

20 BY MR. LEATHLEY:

21 Q. Let me repeat the question, and then we can
22 answer it again.

1 So, I assume with your advisers that they
2 would have informed you of the demands of the
3 environmental permitting regime in Costa Rica; is
4 that correct?

5 A. Yes.

6 Q. And they would have advised you in relation
7 to whether or whether you should not provide false
8 information. Just the--the standard of whether or
9 not one provides false information or not in any
10 permitting process.

11 A. To be--in recalling what--you know, quickly
12 recalling the conversations I had with my initial
13 adviser, Juan Carlos Esquivel, I don't recall ever
14 having that conversation with him, to tell--

15 Q. And were you ever advised what your
16 obligations were when submitting the D1 Application?

17 A. Well, again, I'm not Costa Rican. I don't
18 speak, read, or write Spanish. At all times, I
19 relied upon professionals: Attorneys, people that
20 were--that were engaged in the activities of taking a
21 project through the Environmental Impact studies and
22 on to the permits.

1 So, I was relying on these professionals. I
2 never actually was involved in any of that. And I
3 relied totally on the professionals. As you said, I
4 don't speak Spanish, I don't read Spanish, I don't
5 write Spanish. And so, I relied totally on the
6 professionals that I had employed.

7 Q. And you do not recall or it didn't
8 happen--this is my question--whether you received any
9 advice regarding your disclosure obligations in the
10 D1 Application.

11 A. I don't recall any of that whatsoever,
12 because my understanding from the lawyers, and later,
13 Mr. Mussio, was that they were the team that had
14 expertise in shepherding a project through the
15 permitting process, and they knew the requirements.

16 Frankly, during that whole exercise, I never
17 even spoke to anyone from SETENA, at all. I--you
18 know, because except--with the exception of Luis
19 Chávez, who was director of operations much later,
20 which I talked to him with my attorney, Manuel
21 Ventura later, we had discussions with him, but
22 during the early phases of this whole permitting

1 process, I never even talked to anybody at these
2 agencies ever.

3 Q. No, and we'll come on to the agencies in a
4 moment, sir. My questions are in relation to your
5 discussions with your attorneys.

6 A. Excuse me. You do understand those
7 discussions are privileged, don't you?

8 Q. We'll come to that in a moment, sir.

9 A. Well, no. The moment was right now. You
10 just said it.

11 Q. That's okay, sir.

12 A. Are those discussions--are attorney-client
13 privileged discussions privileged or not?

14 Q. I'm the one asking the questions, please,
15 sir. We'll come to that in a moment.

16 (Overlapping speakers.)

17 PRESIDENT SIQUEIROS: Mr. Leathley is the
18 one asking the questions at this moment.

19 THE WITNESS: I'm sorry. Excuse me.

20 PRESIDENT SIQUEIROS: So, please restrict
21 yourself to answering questions. If there are some
22 issues that your counsel wished to object, he will do

1 so in his own time.

2 THE WITNESS: All right. My apologies to
3 the panel.

4 BY MR. LEATHLEY:

5 Q. And the process this week, sir--sorry, I
6 would like an answer to my previous question.

7 We're talking about the exchanges you had
8 with your attorneys. I'm just going to ask about the
9 existence of those conversations.

10 A. Okay.

11 Q. Did you have conversations with your
12 attorneys regarding your duty to disclose in the D1
13 Application? You may not remember the content of the
14 conversations, but do you remember them actually
15 occurring?

16 A. I honestly do not remember any of those
17 conversations. What I remember is conversations like
18 what--the steps you had to take. My understanding
19 was that initially you had to get the SETENA
20 approval--and SETENA, my understanding, was the only
21 agency that was given the authority by the Government
22 and the Courts to issue Environmental Viability

1 permits, and the resolutions for those project
2 permit, and once they were issued, then they had the
3 force of law.

4 And what I remember was--

5 Q. I'm sorry to interrupt you, sir.

6 A. I'm getting there. Excuse me.

7 Q. And just--just so I can help steer you.

8 A. I'm getting there. My next statement--okay.

9 Q. Okay. Very good.

10 A. So, my understanding was from my--the
11 professionals, the lawyers, was that SETENA had a
12 bunch of check-the-boxes. You know, they had to get
13 approvals from various agencies all the way down the
14 line, from--and one of the important ones was from
15 MINAE, who had to give SETENA a clearance letter
16 stating there was no environmental problems with the
17 Project site.

18 So, my recollection, Counsel, is that
19 the--the lawyers that I engaged went through in
20 detail with me about the requirements that we
21 needed--what we had to do to--from, you know, A to Z,
22 to get the--the permits. And there was a lot of

1 check-the-boxes in there.

2 Q. Let's turn to the first tab, Tab 1, in the
3 folder sitting on your desk. And this the D1
4 Application, which is Exhibit R-13.

5 A. Okay.

6 Q. And just keep it on the first page.

7 Do you recognize this document, sir?

8 A. Yes. Well--well, okay. I recognize my
9 signature on the document.

10 Q. Right.

11 A. Okay.

12 Q. And so, you recognize that this is the D1
13 Application that was filed in relation to the
14 Condominium Section; is that right?

15 If you look at the top left box, Box 1.

16 A. Okay. Yes.

17 Q. Do you see that, sir?

18 A. Yes.

19 Q. And you've just confirmed that's your
20 signature at the bottom.

21 A. That's my signature, yes.

22 Q. And there was a--and there's a legal

1 Declaration in the middle of the page, where you see
2 that paragraph where the text starts.

3 Do you see that, sir?

4 A. Yes.

5 Q. That's in Spanish; I won't ask you to read
6 what it means, but were you ever advised what that
7 meant?

8 A. No.

9 Q. Okay. Thank you.

10 Did you ever receive any legal advice in
11 relation to the box-checking exercise that you
12 described? And I mean written legal advice.

13 A. I don't recall, but if there's a document in
14 evidence that you can refer me to, I'd be happy to
15 look at it.

16 Q. Well, that's where I'm going, sir. I'm
17 assuming as a prudent businessman, you would have
18 received the advice in writing because you're making
19 these applications on behalf of a number of investors
20 or potential investors; correct?

21 A. I'm not denying that I received the advice.
22 I'm just--I can't recall every document that I signed

1 or reviewed.

2 Q. Now, your counsel has advised during the
3 course of this Arbitration--they've advised you to
4 provide all documents that were requested by this
5 Tribunal; correct?

6 A. Yes.

7 Q. And have you disclosed all the documents to
8 your lawyers that you were asked to disclose in this
9 Arbitration?

10 A. I believe I have.

11 Q. But your lawyers didn't disclose any
12 Memoranda of Advice or letters of advice in this
13 Arbitration, did they?

14 A. What lawyers are you speaking about?

15 Q. Well, first of all, I'm saying, your counsel
16 who's sitting on your left, Mr. Burn and his team--

17 A. All right.

18 Q. --that they did not in this Arbitration
19 disclose any Memoranda of Advice or Letters of Legal
20 Advice from you to or from your attorneys in Costa
21 Rica; is that correct?

22 A. I don't recall. If you--as I said, if you

1 have a document that I can look at, I'd be happy to.

2 But I don't recall.

3 Q. Well, sir, there's a document--have you heard
4 of the phrase "Redfern Schedule"?

5 A. I don't believe so.

6 Q. So, Redfern Schedule is a name which is given
7 to a document helps the disclosure phase in this
8 Arbitration, and there was a request that Costa Rica
9 made in that process. The request was--and I'd like
10 to read out--this is Request--Respondent's Request
11 Number 4.

12 A. Is it in this book?

13 Q. It isn't, sir. Yes, I believe it is. I beg
14 your pardon. Yes. Tab 2, Page 12.

15 A. Tab 2, Page 12. Are these pages numbered
16 here? Oh.

17 Q. We'll help you with it, sir, because it's
18 going to have to be read sideways, I'm afraid.

19 A. All right. Thank you.

20 Q. So, page 12, there's a little page 12 down at
21 the bottom, and you'll see--yes, the page you're
22 holding, sir. And I'm going to read out to you the

1 Request. So, this was a Request that was made from
2 us to your attorneys in this Arbitration.

3 And the Request is for "Documents or
4 communications received by Claimants, including,
5 without being an exhaustive list, advice provided to
6 the directors, representatives, agents, and employees
7 and/or related persons between 2000 and 2010 relating
8 to aspects of the legal and regulatory regime of real
9 estate development projects in Costa Rica and/or the
10 requirements and enforcement of environmental laws in
11 Costa Rica, including, by way of example, opinions,
12 legal notes, and due diligence reports, indicating
13 the authors of such documents and communications."

14 And the Tribunal requested by response,
15 respecting the privilege that can exist and obviously
16 does exist between an attorney and a client, that
17 there be what's called a privileged log. And that's
18 a standard procedure.

19 Were you told about this privileged log
20 process, sir?

21 A. By whom?

22 Q. By your attorneys in this Arbitration.

1 A. I don't recall.

2 Q. So, let's turn to Tab 3, and this is
3 Exhibit R-399.

4 This is the privilege log that your counsel
5 submitted to the Tribunal on July the 22nd of this
6 year; is that correct, sir? Or can you recognize
7 that?

8 A. Okay.

9 Q. And there's only one entry in that box, and
10 that's dated the 6th of March, 2006, from a firm
11 called "Laclé & Gutiérrez Abogados," sent to you, and
12 it's in relation to the ownership structure at Las
13 Olas; is that correct, sir?

14 A. I'd have to see that document before I answer
15 that question. I'm not sure what that--what this
16 advice was about.

17 Do you have a copy of that document?

18 Q. Actually, that document is not the focus of
19 my questions. It's the lack of any other documents
20 that's the focus of my questions.

21 A. Oh. Well, you didn't tell me that.

22 Q. So, you've just testified that there was

1 advice, there was written legal advice that you
2 received, but we've received nothing in this
3 privilege log, which you, yourself, you're about to
4 assert privilege.

5 So, I wonder, sir, you either violated the
6 Tribunal's orders or you're not telling the truth
7 now, but I'd like to know which one it is.

8 A. I reject both of those assertions.

9 Q. You understand that--the framing of my
10 question, though, sir. You were under an obligation,
11 as were your attorneys, to disclose, at least in a
12 privilege log, all legal memoranda that qualified
13 under the Respondent's Request Number 4. That's how
14 these Arbitrations function.

15 A. As I told you--I'll restate this again. I
16 sent a--a huge box of documents to the attorneys
17 that--what I could find in the files, and those
18 documents--whatever documents I had was in that box.

19 Q. And so, would you say those legal advice that
20 you received would have been in that box, the written
21 legal advice that we were talking about before?

22 A. Well, sir, I mean, I can't say that this is

1 not the only legal advice I ever received. I mean, I
2 can't say for a fact that this was not the only thing
3 that I ever got.

4 Q. You didn't have a discussion with your
5 lawyers about what legal advice you'd received?

6 And when I say "your lawyers," I mean Mr.
7 Burn and his team.

8 A. Yeah, we had discussions about what legal
9 advice I received. But a lot of that legal advice
10 was in the form of conversations.

11 Q. And in writing, was your testimony earlier.

12 A. Well, this is one of the ones in writing; I
13 do recognize that.

14 Q. Yes. And there are others, then, sir, was
15 that right?

16 A. What?

17 Q. There were other written communications as
18 well. You testified earlier there were other written
19 communications.

20 A. Don't put words in my mouth.

21 (Overlapping speakers.)

22 THE WITNESS: I'm sorry. You want to ask

1 or--

2 MR. LEATHLEY: I don't know who's got the
3 ball, sir.

4 Let me ask a question and then we're clear.

5 BY MR. LEATHLEY:

6 Q. Let me take a step back, because I don't want
7 to take too long on this. You should have been
8 consulted by your lawyers to disclose any legal
9 advice to be provided in that privileged log. And
10 I'd like to understand what your testimony is. Is it
11 that you did not receive any written advice at all or
12 that you did, but it just doesn't appear in that log?

13 A. My recollection is that I do recognize this,
14 this document. And I don't recall any other
15 documents I ever got from an attorney right now. I
16 may have, but I don't recall any, that it was a
17 written legal advice. Most of the time, the
18 attorneys I dealt with would just give me verbal
19 advice, and verbal directions. So, I can't--you
20 know, this--I think, if there's nothing more than
21 this, that's the only thing I had in the way of legal
22 advice.

1 Q. Okay. Well, that's quite different to the
2 testimony you just provided a moment ago, sir.

3 A. Well, maybe I--okay. Let me slow up, because
4 I want to--then I misunderstood you.

5 Q. Let me rephrase a new question.

6 A. Well, I misunderstood you prior to what--to
7 this.

8 Q. Have you received written legal advice from
9 Costa Rican lawyers or any other lawyers regarding
10 your development of the Project that would have
11 squared with the Request that I read out to you from
12 that Redfern Schedule?

13 A. My recollection--my recollection is, if this
14 is the only thing here in this log, that's all
15 I--that's all I've gotten that I can recall.

16 Q. That you can recall.

17 A. That I can recall, yes.

18 Q. And I'm asking you whether you received
19 written legal advice from your attorneys in Costa
20 Rica.

21 A. I can confirm, I got this written legal
22 advice. I can't confirm I got any others.

1 Q. You just don't know.

2 A. I don't--my answer is that most of the legal
3 advice I received from my attorneys was verbal.

4 Q. So, now it's "most."

5 A. Most--okay. I understand that lawyers like
6 to pick at words here.

7 Q. Sir, I'm just trying to establish what advice
8 you received, because I think it's quite important
9 for your case, and I'm wondering whether--

10 A. Well, if the question is what advice I
11 received, then--we're talking about written legal
12 advice--

13 Q. Yes, sir. Absolutely.

14 A. Here's my answer. The only written legal
15 advice I'm aware I received was this one piece
16 of--this one legal advice that's appearing in this
17 log.

18 Q. So, in relation to all of the years that
19 you've gone through, which has clearly had its toll
20 on you, from your earlier testimony, you never
21 received any written legal advice, never any written
22 legal advice in relation to the enforcement actions

1 that were taken against you, no written legal advice
2 in relation to the injunctions that were placed on
3 you and the property, never had anything in writing
4 from your lawyers; that's your testimony today, sir,
5 is it?

6 A. Not that I can recall it, at this point, no.
7 If it's not in here--I sent everything I had to my
8 attorney, and if this is the only thing here, then
9 that's all I have.

10 Q. Could you turn to Tab 4, sir. This is
11 Exhibit C-113. This is a letter addressed to SINAC.

12 A. Uh-huh.

13 Q. Do you have that document, sir?

14 A. I do.

15 Q. And the stamp of MINAE-SINAC indicates--the
16 top right-hand corner--23rd of February 2011.

17 A. Uh-huh.

18 Q. Do you see that, sir?

19 A. Yes.

20 Q. Now, if you'd just turn the pages, and you'll
21 see that the--if you look at Page 4--

22 A. Uh-huh.

1 Q. --you see it is the Master Plan of the
2 Project?

3 Yes, there on your left, sir.

4 A. Yes.

5 Q. That's the Master Plan for the Project;
6 correct?

7 A. Uh-huh.

8 Q. Or an illustration of.

9 A. Okay.

10 Q. And the penultimate page of the
11 document--let's go to the back--to the last page of
12 the entire document, sir.

13 You'll see your signature; is that right?

14 A. Yes.

15 Q. And then there's a--I'm going to read
16 the--refer to Page 13 of that same document, and I'll
17 try and identify it--if you look at the top
18 right-hand corner, you'll see a stamp. And you
19 should be looking for 330.

20 A. Okay.

21 Q. Do you see--you've got that page there, sir?

22 A. I do.

1 Q. And we have a translation, so, if you want to
2 turn up to the last page in Tab 4--yes. So, you're
3 in the right tab, sir. Last page, behind the blue
4 sheet of paper. And keep going. There, sir.

5 We've prepared a translation of what I want
6 to read to you. And your counsel can, obviously,
7 raise any questions of my translation.

8 Now, the page that we were on, Page 13,
9 which I would invite Members of the Tribunal to keep
10 on, has a list.

11 Now, there's a--in the middle of the page,
12 there's a (in Spanish, [pruebas]). And then there's
13 a sentence in upper caps, and it says, "Evidence that
14 demonstrates the legality of the construction process
15 undertaken by my company."

16 This is, of course, your document you've
17 signed. And go down the list, you see A, B, C, D,
18 and E.

19 And then here, it says, "Copy of the
20 geological survey conducted by the company Geotest
21 that concludes that there are no wetlands or floods
22 within the property."

1 Do you see that, sir?

2 A. Yes.

3 Q. And this is the Protti Report.

4 A. Okay.

5 Q. Are you familiar with that term, sir?

6 A. I am.

7 Q. And according to this letter, you submitted
8 the Geotest Protti Report to SINAC; correct?

9 A. No, not correct. This was prepared by--well,
10 as you see, Sebastián Vargas, Attorney at Law.

11 I believe this letter was written in
12 response to the illegal shutdown notice I got from
13 SINAC in a previous date in February.

14 So, he--he drafted this letter and had me
15 sign it.

16 Q. Right. You signed it, and it's saying that
17 the evidence that was submitted, the proof, rather--

18 A. Well, you know what--

19 Q. --it demonstrates that you have a legal
20 construction. You included the Protti Report; right?

21 A. As I said, I signed this letter. I did not
22 send it. This was sent by Sebastián Vargas.

1 Q. Was the content explained to you before you
2 signed?

3 A. No, it was not.

4 Q. Now, this Geotest Protti Report was not
5 submitted as part of your D1 Application, was it?

6 A. I think the D1 Application should speak for
7 itself. I have no idea.

8 Q. Okay. Well, then I think, sir, it's been
9 fairly well-established--or I'm happy for your
10 counsel to ask you any questions if he
11 disagrees--that the D1 Application that we were
12 looking at before, which is at Tab 5, which I think
13 you've seen already, does not include the Protti
14 Geotest Report.

15 A. Documents speak for themselves. If it
16 doesn't, it doesn't.

17 Q. Thank you, sir.

18 In fact, the only time that this
19 document--the Protti, the Geotest Protti Report, was
20 submitted, was sent--was sent after you had obtained
21 the Environmental Viability for the Condo Section;
22 correct?

1 A. Repeat that question again.

2 Q. Yes, sir.

3 The only time that the Protti Geotest Report
4 went to a public authority was when you sent it after
5 you had obtained the Environmental Viability for the
6 Condo Section; is that correct, sir?

7 A. I don't--I never sent the Protti Report to
8 anybody. As this document demonstrates, this letter
9 was written by my attorney, Sebastián Vargas. He had
10 me sign it. He didn't do a translation of this
11 document. He just told me this was a document that
12 we were objecting to--objecting to the illegal
13 shutdown letter he sent me on--earlier than this
14 February 23rd date.

15 So, you know, I never sent this letter. It
16 was--I signed it.

17 Q. Yes, sir.

18 A. But he sent it. And he wrote it. I didn't
19 write this letter. As you know, I don't
20 read--write--read or write or speak Spanish.

21 Now, again, this is a situation where I'm
22 relying on attorneys. All right? Now, maybe the

1 best thing for him to have done was give me a
2 translation in English and say, "David, read this
3 thoroughly, and make sure you understand it
4 thoroughly, and then sign it."

5 He didn't do that. He just wrote it. He
6 told me--again, confirming, like, what I said, that
7 most of the time, this was--what the attorneys told
8 me were verbal--maybe they didn't want to take the
9 time to explain it, you know, do the translation from
10 Spanish to English and explain things to me. They
11 said--they just put documents in front of me and said
12 verbally what they were for, and I signed them, and
13 he sent them.

14 And if you look at the fax number, that's
15 not my fax number. That's his fax number.

16 Q. And let me just--to conclude the point, so,
17 what I would--also you said the documents speak for
18 themselves. We obtained a copy of the Protti Report,
19 the Geotest Protti Report, because it was part of the
20 document you've got in your hand, but it was not from
21 the D1 Application.

22 Would you--would you have any basis to

1 disagree with that, sir?

2 A. I have no basis to disagree with it. I mean,
3 the documents speak for themselves. The facts speak
4 for themselves.

5 But what's important to know is, I never
6 read the Protti Report. I never even became aware of
7 that Protti Report until it was brought up by the
8 Respondent in their--one of their Memorials.

9 Q. So, you have been sitting in this room this
10 morning during the testimony of Mr. Morera; is that
11 correct?

12 A. Yes.

13 Q. And you would have heard him testify in
14 relation to the shooting that you were subject to;
15 correct?

16 A. I did not have to listen to his testimony
17 about the shooting. I lived through it.

18 Q. I'm sure, sir.

19 And there was a--an exchange about security.
20 I wondered, did you ever contract a private security
21 or look into a private security firm in order to
22 return to Costa Rica?

1 A. Well, I think Mr. Morera testified he was the
2 one that was inquiring about that in Costa Rica.

3 Q. He did, sir. In fact, he said two things.
4 The first was that he consulted with the public
5 authorities for security; and secondly, he consulted
6 with the U.S. Embassy. And what struck me, sir, is I
7 wondered whether you have sought any private security
8 arrangements.

9 A. What time frame?

10 Q. Whatever time frame you wish.

11 A. When I was in--after the shooting, when I was
12 in Costa Rica? Yes, I did.

13 Q. Uh-huh. And what did they say to you?

14 A. No, what--it's not what they said to me.
15 It's what I said to them; that, "Look, I want you to
16 protect me. I was just almost killed a few--a couple
17 days ago, and I need to engage you to protect me."

18 Q. And what did they then say?

19 A. Well, that's their job. I mean, they had
20 guns and they--you know.

21 Q. So, you hired a private security firm.

22 A. I did.

1 Q. Uh-huh. And did they do their job?

2 A. I'm sitting here today, so, I think they did.

3 Q. Okay. Thank you, sir.

4 Now, Mr. Aven, you say in Paragraph 74 of
5 your Second Witness Statement that you were working
6 in good faith with the Government. That's your
7 Second Witness Statement, Paragraph 74.

8 A. 74, okay. You want me to read it?

9 Q. No, sir. I just want to take you to a--yeah,
10 so, the third line down--I'm just going to read a
11 part of this sentence. "This is a multimillion
12 dollar project and we were working in good faith with
13 the government."

14 Do you see that sentence?

15 A. 74?

16 Q. Yes, sir. It's with the quotes--

17 A. Whoa. Whoa.

18 Q. Second Witness Statement.

19 A. 74 says--oh, I see. Okay.

20 Q. Yes. So, the third line down of that last
21 part of Paragraph 74.

22 A. Okay.

1 Q. And so, you say that "We were working in good
2 faith with the Government."

3 Do you see that?

4 A. Yes, I do.

5 Q. And in the same Paragraph 74, you say that
6 you never ignored notifications from local agencies;
7 correct?

8 A. Yes, that's correct.

9 Q. And is that still your testimony today?

10 A. It is.

11 Q. And in Paragraph 150 of your First Witness
12 Statement--Paragraph 150, you say that "On the 14th
13 of February 2011, you received a letter from Mr. Luis
14 Picado, requesting an injunction against the Las Olas
15 Project."

16 Is that right?

17 A. That's right.

18 Q. And this is what's been known as the SINAC
19 injunction; correct?

20 A. Yes.

21 Q. And in Paragraph 157, in the First Witness
22 Statement, you say in the immediate aftermath of

1 receiving the SINAC injunction that, quote, "At this
2 point, we were advised that the SINAC notification
3 contained in the letter sent by Mr. Picado, sent out
4 to me in February of 2011, was of no legal effect
5 because SINAC did not have jurisdiction over
6 construction permits or developments operation."

7 Do you see those words there, sir?

8 A. Yes.

9 Q. And I assume this was legal advice you said
10 you took.

11 A. Okay. Now, this--this is going to be one of
12 those on-the-fly adjustments I want to make to this.

13 I agree with that statement, but the--what I
14 was told by my attorney was that SETENA was the
15 agency that was granted the powers by the Government
16 and the Courts to issue environmental--Environmental
17 Viability permits.

18 Q. I am sorry to interrupt Sir, but I have a
19 very specific question. So, we'll see if we need to
20 come to this.

21 A. Okay.

22 Q. My question was that you referred to advice.

1 You say in the first line of Paragraph 157, "At this
2 point, we were advised."

3 A. Yes.

4 Q. And my question is simply: Was that legal
5 advice?

6 A. Yes.

7 Q. Okay. Thank you.

8 Because ignoring an injunction was going to
9 implicate both you and your fellow investors,
10 correct? So, it obviously made sense that you sought
11 legal advice.

12 A. My attorney, Sebastián Vargas, said that this
13 injunction that SINAC sent out was not valid.

14 Q. I'm sorry, sir?

15 A. The legal advice I received from my attorney,
16 Sebastián Vargas, said that the SINAC notification to
17 shut down the project in February of 2011 was not a
18 legal document.

19 Q. Was that provided in writing, sir, that legal
20 advice?

21 A. No. Again, it was--it was represented to me
22 verbally.

1 And that--that resulted in the letter that
2 we just reviewed that Sebastián Vargas wrote to
3 SINAC.

4 Q. Yes.

5 A. Which was many pages, as you know. He
6 briefly--and basically, he said, look, this is
7 illegal, and I'm going to file something with
8 whoever, and he drafted that letter, and he had me
9 come in, explained basically what this is. It's not
10 a legal document, and he said "Sign this, and I'm
11 going to get it filed." And that's what he did.

12 Q. Uh-huh. But no written legal advice to you
13 or your fellow investors.

14 A. Just verbal.

15 Q. Okay. Thank you.

16 Let's go to Paragraph 107 of your Second
17 Witness Statement. 107.

18 Do you have that there, sir? Here, you say,
19 quote, that you "never received notice of a
20 subsequent trial date." We're in the context of your
21 criminal proceedings here. This is your Second
22 Witness Statement.

1 Do you remember this, sir?

2 A. Yes.

3 Q. Do you wish to make any changes here?

4 A. No, I don't think I--I don't recall ever
5 getting notice.

6 Normally, the notice was sent by the Court,
7 e-mail to me.

8 Q. So, can you turn to Tab 6 in your binder.
9 And this is Exhibit R-350. And there's a translation
10 which I would encourage you to look at.

11 So, this is--R-350 is the notification of a
12 new trial to you dated the 16th of October, 2013.
13 And this is an e-mail the Court sent to your
14 registered e-mail; correct?

15 A. Where is the e-mail address?

16 Q. So, if you go to the last page of the
17 original, and then you see it's circled, and that's
18 David3A@gmail.com?

19 A. Yes. That's my e-mail address.

20 Q. Okay.

21 A. But I never received this e-mail.

22 Q. You never received that.

1 Can you turn to Tab 7. This is Exhibit
2 C-166.

3 A. Uh-huh. Okay. Yes, I see it.

4 Q. In fact, you refer to this e-mail, this
5 document, in Paragraph 237 of your First Witness
6 Statement, and this e-mail was sent to you, to the
7 same e-mail address--

8 A. That's correct.

9 Q. --as the criminal court's notification?

10 A. That's correct.

11 Q. So you did get this one, but you didn't get
12 the other one?

13 A. Well, we all understand that any e-mail can
14 go into a spam folder, it can get bounced, and it's
15 not a guaranteed way of communication.

16 So--so, that's why I--I did get this one,
17 but I did not get this one.

18 Q. And then in Paragraph 240 of your First
19 Witness Statement you say that after Costa Rica
20 issued the international arrest warrant--so your
21 First Witness Statement, Paragraph 240.

22 A. Slow up. I'm not there yet.

1 Q. Okay.

2 A. Just a minute.

3 Which one is this, now?

4 Q. Paragraph 240.

5 A. Okay.

6 Q. And you say that after Costa Rica issued the
7 international arrest warrant, you heard, quote,
8 "Rumors that the Court was also considering making a
9 request that INTERPOL issue a red notice against
10 you."

11 A. Yes.

12 Q. And, Mr. Aven, you and your criminal counsel
13 reviewed the international arrest warrant; correct?

14 A. What criminal counsel?

15 Q. You didn't have a criminal lawyer?

16 A. What date--what time frame are you talking
17 about?

18 Q. The time that you received this document,
19 sir. Let's go to it.

20 Tab 8, Exhibit R-150.

21 A. Okay. I'm there.

22 Q. Yes. And this is the international arrest

1 warrant issued by you--sorry, against you. And I
2 wonder if you can turn to the last page, last line.
3 And there's a translation.

4 This is Tab 8, Exhibit R-150. There's a
5 translation there. And we have a translation of the
6 last line, which is to say, "It is hereby ordered to
7 communicate INTERPOL of the resolved."

8 A. I see it.

9 Q. Did you see that at the time, sir?

10 A. No. I never saw this document before.

11 Q. You never saw this before.

12 A. I don't believe so. I may have seen it in
13 production, but I--how was I supposed to get this
14 document?

15 Q. You didn't receive it from your attorneys?

16 A. Which attorneys?

17 Q. You were being represented during the
18 criminal proceedings; right, sir?

19 A. What's the date of this document? Do you
20 know? Is it dated?

21 Is this document dated? I don't see a date.

22 Q. I don't have a date with you here, sir, but--

1 A. So, how am I supposed to answer a question if
2 we don't know a time frame?

3 I don't mean to ask you a question, but
4 I'm--

5 Q. Let's move on, sir.

6 A. Okay.

7 Q. In Mr. Burn's opening remarks about the
8 Las Olas Project, he remarked that you'd hired a
9 consultancy group called Norton Consulting and EDSA?

10 A. Yes.

11 Q. And he said that they looked at your
12 investment, quote--and I'm quoting from Mr. Burn's
13 remarks, "which included a conceptual design with
14 luxury beachfront villas, mid-range townhomes,
15 smaller villas, and a beach club"; correct?

16 Is that a fair summary from Mr. Burn?

17 A. I don't recall. Did he just say that
18 recently or just now?

19 Q. He said it on Monday, sir.

20 A. Oh. Then I missed it.

21 Q. Okay.

22 MR. BURN: Sorry. I think he's

1 misunderstanding the question. The question from Mr.
2 Leathley is: Does the description that I made sound
3 accurate to you?

4 THE WITNESS: Oh. Yes. Yes. I--yes.

5 BY MR. LEATHLEY:

6 Q. Okay. Thank you, sir. Thank you.

7 And he said that based on this view of the
8 Las Olas Project, you and other Claimants made the
9 decision to develop the project; is that right, sir?

10 Let me assist you. Let's go to Paragraph 41
11 of your First Witness Statement.

12 A. All right.

13 Q. I'm sorry, yes. Your First Witness
14 Statement.

15 A. 41? You want to read it?

16 Q. No. I'm just going to summarize it, if I
17 may, sir, but you can correct me if you think I'm
18 mis-summarizing it. You say that you hired Norton
19 Consulting and it's as part of your assessment of the
20 business options available to you and your
21 co-investors.

22 A. Yes.

1 Q. And just so I'm right in the timeline, Norton
2 Consulting was hired in 2004; correct?

3 A. Correct.

4 Q. Which was after you'd acquired the investment
5 for \$1.647 million, \$1,647,000; is that correct?

6 A. Yes.

7 Q. And as part of Norton Consulting and EDSA,
8 they went--sorry, as part of that, Norton Consulting
9 and EDSA went to visit Las Olas.

10 A. Yes.

11 Q. And this is around September 2004; correct?

12 A. I'm not sure about the time frame. I'd have
13 to see when the report came out. They--Marco Larrera
14 and Rick Norton--my recollection is they came down to
15 Costa Rica a couple of different times, and they were
16 on-site. They studied the site.

17 At one time, there was a guy from EDSA's
18 office in--from Fort Lauderdale, and they're a
19 renowned land-planning company, and we were talking,
20 and they were looking at the site, and--and I--and
21 this one guy--I forget who he was, but he was with
22 Marco Larrera, and he made a comment--I was asking

1 about the--what he thought about the topography and
2 the lay of the land. He said it was beautiful.

3 I said, "You think"--you know, "You don't
4 think there's any environmental problems with this,
5 do you, I hope?"

6 And he says, "No." He says, "I don't see
7 any problems with that visually," just visually.

8 Q. And they spent time surveying the property
9 and taking photos of the land; right?

10 A. Yeah.

11 Q. And I want to put up on the screen for you,
12 sir--this is one of the pictures they took. That
13 looks like some of the terrain of Las Olas to me.

14 Would you agree , sir?

15 A. I can't confirm that. I mean, it's--terrains
16 down there, as you know, they--a lot of them look the
17 same. But I--

18 Q. This is from the Norton Consulting Report.

19 A. If you--if you represent it's in the Norton
20 Consulting Report, then I'd say yes.

21 Q. You'd say yes?

22 A. Yes.

1 Q. And let's look at another photo. This is
2 also in the Norton Consulting Report. That looks
3 like the beach.

4 I've also been to the site, sir. I wondered
5 if you'd agree that looks like the beach view. Very
6 difficult to, of course, say. I'm asking you to
7 define waves.

8 But--so, they charged you a substantial sum.

9 A. Yes.

10 Q. 150,000 U.S. Dollars; correct?

11 A. Yes.

12 Q. And they were assisting you in planning how
13 to maximize the land use and to, obviously, make it a
14 profitable investment; correct?

15 A. There was a dual purpose with that. They did
16 provide some of that kind of advice. But there was
17 two parts to that. There was EDSA and there was
18 Norton. So, there was an extensive marketing study
19 done to determine what the values were of the real
20 estate projects and what--you know, what things were
21 selling for in what areas.

22 And Marco Larrera's job with EDSA was

1 specifically to look at the Las Olas site and to
2 determine what could be done with it.

3 Q. Uh-huh.

4 A. And, also, to determine--so, we were trying
5 to figure out two things: The types of structures we
6 could build--condos, homes--and also the price range
7 that we could sell them for.

8 Q. And, I mean, these guys are experts, right,
9 in terms of integrating the natural features of the
10 land so as to help with the design of the overall
11 project.

12 A. Yeah. They were--they were land-planners. I
13 wouldn't say that they were experts in project
14 development. They were more, like, land-planners,
15 and they gave me kind of an initial read of what
16 possibly could be done with the land.

17 Q. I wonder if you can turn to Tab 9. This is
18 Exhibit C-30, and I can sense the eyes burning into
19 the back of my head from the Tribunal.

20 PRESIDENT SIQUEIROS: And it's more a
21 concern--not as regards to counsel and Mr. Aven,
22 because I'm sure there's a lot of adrenaline running

1 in both. But it's more of a concern for Reporters
2 and Interpreters. Because it's way past lunchtime,
3 and they've been going on for almost five hours now,
4 four hours and a half.

5 So, whenever--if you're going to conclude
6 within the next very few minutes your examination,
7 I'm sure they would be satisfied with taking a break
8 in just a very few minutes. Otherwise, perhaps we
9 should find a break--

10 MR. LEATHLEY: Thank you, sir. There will
11 be a very natural breaking point at the end in two
12 minutes. Thank you.

13 BY MR. LEATHLEY:

14 Q. Let's look at Tab 9. This is Exhibit C-30.
15 Do you have that there, sir?

16 A. Is this the EDSA? Oh, no. Wait. Sorry.
17 Yes.

18 Q. And you see the front cover there, sir?

19 A. Yes.

20 Q. And there are photos--the first two are the
21 ones you've already seen.

22 A. Yes.

1 Q. Can you tell me what we're looking at on the
2 right photo, please?

3 A. I don't know. I can't place any of these--I
4 can't place any of these photos. I...

5 Q. We're putting it on the screen.

6 Looks quite like a wetland, doesn't it, sir?

7 A. No. How could--

8 Q. No?

9 A. That's--I don't--I can't place that. I
10 really can't. I mean, I know--I know the project
11 fairly well.

12 Q. Okay. Well--

13 A. But I really can't place that.

14 Q. Let's turn to Slide 5 of the Report. Let's
15 get into the Report. This is the Report they
16 prepared.

17 And this slide is called the Land Use
18 Summary.

19 A. Are we on a page number?

20 Q. So, we want to go to Slide 5, which is not
21 page 5. It's Slide 5. The number is on the bottom
22 right. And this introduces the property before the

1 Report analyzes the options available to you as
2 investors.

3 Do you see that, sir?

4 A. Which--what part are you looking at now?
5 I've got the Slide 5. Are you talking about the
6 graphic on the left?

7 Q. Yes, the graphic on the left.

8 A. Okay. Uh-huh.

9 Q. You see the water features there, sir?

10 A. Yes.

11 Q. And on the screen, what I'm going to do is
12 put up from Tab 10--this is Figure 2 from the KECE
13 Report, just so we can compare and contrast.

14 A. Oh, this one?

15 Q. No. Keep your finger in Slide 5 for now.

16 Now, look at Slide 5. Do you see that, sir?

17 A. Yes.

18 Q. And if you can look up by comparison--so, I
19 can count about five of the water feature areas that
20 also match the wetlands that have been identified by
21 KECE's Report.

22 For example, the southwest, which is around

1 KECE Wetland 1 on the west side, which is around the
2 area of KECE Wetland 2 on the southeast, which is
3 where KECE Wetland 8 is. The northeast, which is
4 where KECE Wetland 6 is. And the northwest, which is
5 where KECE Wetland 5 is.

6 Would you agree with that comparison?

7 A. I don't agree that they're wetlands.

8 Q. Okay. That's fine, sir. But you would agree
9 with the comparison?

10 A. What are you asking me to agree to?

11 Q. I am asking you whether the location of the
12 water features that have been included in the
13 water--in the Land Use Summary match where the
14 wetlands are that have been identified by the KECE
15 experts.

16 A. Well, you know what I would say with that?
17 Maybe KECE saw this graphic and he just copied it. I
18 don't know. I have no idea.

19 Q. Well, your lawyers can ask that question of
20 Mr. Erwin when he's here.

21 A. Yeah, I don't--I don't know. To be sure,
22 Marco Larrea and EDSA was not an environmental firm.

1 They were a land-planner.

2 Q. Right.

3 A. So, this was their plan.

4 Q. And, in fact, if you read on the design, it's
5 a little hard to read, but on the southwest and the
6 west side, it says, "Existing low-area drainage,
7 potential lake feature." For the southeast and the
8 northeast, it says, "Existing low area and drainage
9 corridor." And then in the northwest, it says,
10 "Existing low area, potential lake feature."

11 So, these--these specialists are identifying
12 areas that at least would be suitable to develop what
13 would be natural or water features for the property;
14 right?

15 A. Well, that was--that was their concept,
16 apparently--you know.

17 Q. Uh-huh. And just for the record, Slide 6,
18 Slide 45, and Slide 47 identify similar features.
19 Slide 45, which is a conceptual land use.

20 A. Keep my finger here--

21 Q. Do you have Slide 45 there, sir?

22 A. Uh-huh.

1 Q. That includes four features, four water
2 features, including--look at the southwest corner,
3 sir. Quite a large area of water that's proposed.

4 A. Well, let me just say that my recollection is
5 this was a report done many years ago--but my
6 recollection was that--

7 Q. I'm sorry. Could you speak a little bit more
8 into the microphone--

9 A. I'm sorry. I'm sorry.

10 My recollection--this was many years ago.
11 My recollection was that we--Marco Larrea and I
12 visited the Los Sueños site. And he liked the water
13 features. I don't know if any of you gentlemen
14 were--the Los Sueños site, but they have many water
15 features in that resort as well.

16 So, he may have gotten some inspiration from
17 the water features that Los Sueños put in around
18 the--around their project and incorporated them into
19 this project. I don't--but I can tell you that the
20 areas that are indicated on this Graphic 5, on the
21 left and on the right, the--specifically the ones on
22 the left, was an area that both Mr. Baillie and

1 Mr.--Dr. Cubero both examined extensively, and they
2 said that was not a wetland area. So, that's their
3 expert opinion.

4 Q. Oh, so, they're experts in wetlands now.

5 A. Who?

6 Q. Your--these designers you're referring to.

7 A. No. No. I said Mr. Baillie--

8 Q. Mr. Baillie.

9 A. --and Dr. Cubero.

10 Q. Yes. We'll hear from them later this week.

11 I'm just wanted to--

12 A. I am just making a distinction that there's a
13 difference between a wetland and a wet area, but--but
14 this could have been just a conceptual rendering of
15 what you--you could do with the area if--something
16 like what Los Sueños did with their project.

17 Q. Absolutely, sir.

18 A. They had a lot of water features.

19 Q. Absolutely, sir. And just for the record,

20 I'm not suggesting that this map is representing

21 defined wetlands as defined by Norton Consulting.

22 I'm just identifying the fact that they are proposing

1 water features in exactly the locations where
2 wetlands have been identified by KECE. And in Slide
3 43 of the study, they say, "This is the proposed
4 integration of water features into the land plan."

5 A. Yeah. That's what I said. We visited
6 Los Sueños, and I think they liked the water features
7 of Los Sueños. And, so, they wanted to incorporate
8 some of the water features into the Las Olas Project.

9 Q. So, does it strike you as coincidental,
10 purely coincidental, then, that these water features,
11 some of them of which are significant size, happen to
12 be where the wetlands are--been identified in this
13 Arbitration?

14 A. Not--those areas have not been identified by
15 our experts. They've been--

16 Q. Well, we'll--

17 A. --identified by your experts, right? I'm
18 sorry. I don't mean to ask you questions.

19 Q. I know. We're disagreeing about that as
20 well, sir, but--

21 MR. LEATHLEY: Okay. I don't think I have
22 any other further questions. Thank you, sir.

1 MR. BURN: Any further questions at all or
2 just for now? Just so I know.

3 MR. LEATHLEY: No further questions at all.
4 I've finished my cross-examination. Thank you.

5 PRESIDENT SIQUEIROS: Okay. Thank you,
6 Mr. Leathley.

7 Now would be a good time to take a break,
8 and the break should be lunch break. So, I would ask
9 that Mr. Aven is sequestered.

10 You understand, Mr. Aven, that during the
11 next break, lunch break, you will be asked to be by
12 yourself. So, simply to avoid any contact with any
13 of your attorneys or other colleagues, because you're
14 still under the period of examination.

15 You will--we will continue, as I had
16 anticipated earlier, with the redirect on the part of
17 your counsel; any questions further afterwards from
18 the Tribunal.

19 So, we will start at--when we--at quarter to
20 3:00.

21 Thank you.

22 (Whereupon, at 1:38 p.m., the Hearing was

1 adjourned until 2:45 p.m.)

2

3

4

5

1 Q. And before that?

2 A. We kept them in the--some of them are
3 maintained in my attorney's office and some of them
4 in my home.

5 Q. And by your home, you mean your home in Costa
6 Rica or--

7 A. Yes. Yes, Costa Rica.

8 Q. And what happened to the documents when you
9 left Costa Rica?

10 A. Before I left Costa Rica in July of 2012, our
11 office got broken into and a file cabinet full of
12 documents were stolen plus a laptop. And then what I
13 had in my home, I--which is what I shipped to you,
14 some of it I--I FedEx'd back to the States.

15 Q. Okay. Thank you.

16 Now, again, on the question of documents,
17 you had asked questions relating to your
18 understanding of Spanish language documents that are
19 relevant in this case and so on. And, indeed, there
20 are numerous documents to which you refer in your
21 statements which are Spanish language documents and
22 so on.

1 Have you ever had reason to doubt your
2 understanding of what those documents say? Do you
3 feel you understand those documents?

4 A. The relevant ones I definitely do understand.
5 The relevant ones were the 2004 SETENA resolution and
6 2006 SETENA resolution, 2002--April 2nd, 2008, the
7 MINAE letter. It's "Clear the land of all the--of
8 all the environmental problems." The 2010--2008
9 resolution. I think June 2nd, 2008.

10 The--the MINAE reports that were done in the
11 summer of 2010. The SETENA resolution that was done
12 in September of 2010. And up until that time, you
13 know, those were the relevant documents that I was
14 very well familiar with.

15 Q. You'll recall that in relation to the D1
16 application, you were asked various questions about
17 the advice you took at the time.

18 A. Yes.

19 Q. And various questions were put to you along
20 the lines to interrogate whether you took advice as
21 to the significance of being truthful in that D1
22 application. Do you recall those questions?

1 A. Yes.

2 Q. Did you need to take advice to understand the
3 significance of being truthful in an official
4 application?

5 A. No, I don't need to take advice to be
6 truthful. I generally act that way--acted that had
7 way most of my life. In that particular--like when
8 he--the documents like the D1 document--most of the
9 documents--official documents that I execute, I
10 signed, was in Spanish.

11 I'm relying on the professionals that I
12 engaged to do various things for me. And all of
13 those official things were done in the Spanish
14 language. And, you know, when they got
15 something--like the D1 is a perfect example. It was
16 presented to me by the professional. And I--I signed
17 it as something that was necessary to--to get
18 executed and submitted.

19 Q. And subject to that point that these were
20 documents--the D1 application was prepared by others
21 and you relied on others and so on and so forth,
22 which you've made clear, is it your understanding

1 that the D1 application was accurate?

2 A. Of course. Absolutely.

3 Q. Now, Mr. Leathley took you to some questions
4 about the so-called "Protti Report." It's a report
5 on the headed paper of an outfit called Geotest.

6 Do you remember that?

7 A. Yes.

8 Q. Is it your understanding of that report--or
9 what do you understand that report says about
10 wetlands on the site?

11 A. Well, what I read about that report in terms
12 of later--I didn't find--I really didn't become aware
13 of that report until the Respondent brought it up.
14 I've never seen that report.

15 But after becoming aware of it and reading
16 it, I--I didn't find anywhere--and I think I got a
17 translation--I got--it was translated in English for
18 me. I didn't see anywhere that it mentioned in that
19 report that there's a wetlands.

20 So I really--I really was befuddling about
21 what they were talking about and relying so heavily
22 in that report saying that there's a wetlands. And

1 I--and they used that as a basis of saying that I
2 duped SETENA.

3 Look, I don't--I didn't dupe anybody. You
4 know, duping the federal government is a very serious
5 crime. Deceiving a government is a very serious
6 crime.

7 And what I would say is this: I think--I
8 still think SETENA is a governing--an agency that is
9 still in business in Costa Rica. I haven't heard
10 that it's closed its doors. And when you--when you
11 make a serious charge like that, where is SETENA?
12 Where is their statement?

13 Where is somebody--you know, they could--the
14 government could go--they work for the government.
15 They could go to their office--SETENA office and say,
16 "Look, we have evidence that David Aven duped you.
17 We want do get a statement from you to confirm that."

18 Isn't that what you do normally when you try
19 to--before you start accusing somebody of serious
20 crimes? Go get your evidence to prove it.

21 Everything I read in the memorial statement, in all
22 the witness statements and everything thing in

1 this--from what the Respondent said that I've heard
2 is what I would call fabricated, fake stories. Like
3 you've heard about fake news. They just create it.
4 None of this stuff that they're saying now was in the
5 criminal trial record.

6 Q. Okay.

7 A. This is all newly created stuff. So--

8 Q. Well, I think anybody who has been following
9 Donald Trump's election campaign will be very
10 familiar with fake news.

11 Suffice it to say--I would like to take you
12 back, though, to the Protti Report. And you'll
13 remember that Mr. Leathley took you to the document
14 at Tab 4 in the file.

15 A. You want me to refer to it?

16 Q. Yes, please. And this is the submission from
17 Sebastián Vargas after the shutdown.

18 A. Where is that located, please?

19 Q. Tab 4 in that file. And if you just turn
20 back, Mr. Leathley took you to this page, the page
21 that has in manuscript at the top the number 330.
22 The numbering is actually in reverse order--

1 A. Yeah.

2 Q. --for some reason--historical reason. But if
3 you just go to that page for me quickly.

4 A. Yes.

5 Q. Was the Geotest or Protti Report filed? If
6 you go down to E, at the bottom of the page.

7 A. Yes.

8 Q. Do you know whether or not you, as the lead
9 developer, if you like, were obliged to submit that
10 report to SINAC?

11 A. As I told the counsel for the Respondent, I
12 had no idea that this report was even--the Protti
13 Report was even submitted to SINAC. I mean, this
14 is--because this is--this is a lengthy letter that
15 Sebastián Vargas presented or prepared and just told
16 me what it's basically about. He was making--lodging
17 a complaint against--against the--the--the illegal
18 Shutdown Notice, that he felt that it was illegal and
19 that he asked me to sign it because he was going to
20 file it. So I said, "Okay," and I signed it.

21 Q. Okay.

22 A. But I didn't even--I didn't know that he was

1 even supplying--what he sent along with this letter.

2 Q. Ok .

3 A. He didn't show it to me. I didn't see it.

4 Q. Right. Thank you.

5 Now, another document that you were taken to
6 is at Tab 9. And you'll recall this is the Norton
7 Consulting EDSA PowerPoint presentation.

8 A. Yes.

9 Q. Now, I'd just like you to turn back to page 5
10 in that PowerPoint pack. And you'll recall that
11 Mr. Leathley made various--put various points to you
12 in relation to the site plan--the land use summary
13 that appears there.

14 A. Yes.

15 Q. Now, first of all, do you know what Norton
16 Consulting and EDSA were seeking to communicate with
17 this--this land use summary at this point in time?

18 A. I think it was a general design of what they
19 would think would--would include a--the--their
20 concept of a--the Project that they were looking at.
21 And, like I said, we visited Los Sueños, and they
22 were quite impressed with the--the water, amenities

1 that Los Sueños had. And I think that's why they
2 designed some of these, you know, areas where they
3 had some pools and things like that.

4 But--but I--but it's not--it's not to
5 indicate that there's a wetlands there but just an
6 area where there could be some water projects.

7 Q. Right.

8 A. In fact, it says that the ponds and water
9 features are 3.6 hectares out of a total land use of
10 37.3 hectares.

11 Q. Right. And to be absolutely fair to
12 Mr. Leathley, he did in the end point out to you that
13 the water features are marked on the plan, but in
14 very small print there, "potential lake feature," and
15 so on.

16 Do you see that?

17 A. I can't--I can't read it. I really can't.

18 Q. You can't read it?

19 A. I can't see it.

20 Q. Okay. And, again, if you would just turn up
21 to page 45 in the same pack of slides. Now we see
22 something different from Norton Consulting and EDSA

1 at this point. Do you have any comments about what
2 is represented in this slide in relation to the
3 presence of wetlands on the Project site?

4 A. Well, I think it's a representation of where
5 the units were going--the same--looks like similar
6 water features and just a conceptual land use plan
7 for the Project.

8 Q. Okay. Thank you.

9 Now, I just want to put a couple of quick
10 points to you in relation to the criminal litigation.
11 If you could turn, first, to Tab 7. Now, you'll
12 recall that Mr. Leathley took you to a couple of
13 emails sent to your gmail address.

14 A. Yes.

15 Q. And in the email there, we see a rather
16 aggressive, verging on racist, message that was sent
17 to you by somebody. Is the--do you remember if there
18 was an attachment to this email?

19 A. I don't--I don't think so.

20 Q. All right.

21 A. I don't remember one.

22 Q. Can you see any reference to an attachment to

1 that email there?

2 A. No, I don't.

3 Q. Okay. And if you would just turn back to Tab
4 6, but the last page. Mr. Leathley pointed this out
5 to you and pointed to the references to your email
6 address again.

7 Do you see that?

8 A. Tab 6, last page. Okay. Is that the one
9 that says "Court of Puntarenas"? "You are summoned
10 again for trial," is that what you're talking about?

11 Q. At the top it says "Delivery Status
12 Notification (Relay)." You may have to turn over
13 another page. So the very last page of Tab 6.

14 Can somebody help him, please.

15 A. Yeah, I'm here. Oh, wait a second. Okay.

16 Q. Okay. Yes, you have the page?

17 A. Okay.

18 Q. So you see your email address appears on this
19 automatically generated message?

20 A. Yes.

21 Q. And Mr. Leathley pointed that out to you?

22 A. (Nodded.)

1 Q. Now, the actual--behind that--so if you go
2 back to the front of the document, does that document
3 look like it is an email?

4 A. Is this 9(c) I'm looking at?

5 Q. Yeah.

6 A. No. That looks like a--a letter sent on the
7 Court's stationery.

8 Q. Right. And if you turn over, you see some
9 images there. Do those look like emails?

10 A. No. They look like stamps or something.

11 Q. All right. Do you think those might be
12 attachments to the email that's recorded on page 997?

13 A. It could be, but I'm not--I'm not certain.

14 Q. When you--have you ever had difficulty
15 receiving an email because it's got an attachment?

16 A. All the time.

17 Q. Okay.

18 A. Even from you.

19 Q. Surely not.

20 A. Yes, I'm telling you.

21 Q. Now, Mr. Leathley asked you the question in
22 relation to security arrangements that you might have

1 put in place after the shooting incident?

2 A. Yes.

3 Q. And he put it to you that you--he asked you
4 about private security arrangements that you
5 confirmed you did make in the immediate aftermath.

6 A. Yes.

7 Q. You remember that?

8 A. Yes.

9 Q. Now, I'm not asking you as a lawyer because
10 you're not a lawyer. But just as a--as a layman, do
11 you--do you consider yourself familiar with the
12 concept of the general protections that an accused
13 person in criminal proceedings is provided in law,
14 whether it be Costa Rica or the United States or most
15 countries around the world? Do you think generally
16 you have an understanding of the types of protections
17 an accused person is provided?

18 A. Let me make sure I understand the question.
19 Under what circumstances? A similar--

20 Q. If a person is accused of a crime--

21 A. Yes.

22 Q. --and is subjected to--and is charged with a

1 criminal offense, do you think you understand roughly
2 the types of protections that person will get at law?

3 A. Are you talking about security protections?

4 Q. No. General. General protections and
5 safety--in the general sense. Not the sort of
6 "personal security against a shooting" sense. But
7 the general presumption.

8 A. You mean like during the course of the trial?

9 Q. During the entire process. Just in general
10 terms.

11 A. I understand. Okay. So would I--

12 Q. I'm not asking you to enumerate them. I'm
13 just asking whether you're generally aware of the
14 types of protections--human rights-type protections/
15 due process-type protections that a person has.

16 A. Yeah, I'm generally aware of it.

17 Q. Right. And is one of those usually that a
18 person is, generally speaking, presumed to be
19 innocent?

20 A. Presumed to be innocent?

21 Q. Yes.

22 A. I think that's--yes, that's my, definitely,

1 understanding.

2 Q. So speaking from a layman's point of view,
3 does it seem reasonable to you when a State is
4 prosecuting a person, is putting them through a
5 criminal process, that they should look to that
6 person to protect themselves, bearing in mind they
7 are at all innocent?

8 MR. LEATHLEY: Objection. I think this is a
9 leading question. "Does it seem reasonable to you"?
10 I'm afraid it suggests exactly what the answer should
11 be. I think we should strike that entire question,
12 and we shouldn't have an answer.

13 BY MR. BURN:

14 Q. What is your view?

15 PRESIDENT SIQUEIROS: Mr. Leathley is right.

16 MR. BURN: I'm happy to rephrase, sir.

17 BY MR. BURN:

18 Q. What do you think of a situation in which a
19 person is being accused that may be encouraged or
20 expected to make their own security arrangements?

21 A. Well, it--okay. It depends upon the
22 circumstances of--I think. In other words, if I'm

1 accused--I was accused. If I'm accused. I was
2 accused of a crime I didn't commit.

3 Okay. So we show up at the courthouse.
4 There's a guard at the courthouse protecting you
5 there. I didn't have any security. You know, I
6 didn't expect security there in terms of--you know,
7 to and from there. I mean, I went there with my
8 attorney and Jovan, and everything is fine.

9 However, once the--the shooting happened,
10 that whole--you know, that's a whole different ball
11 game. And I did expect that some type of security
12 procedures to be put in place because I was almost
13 killed.

14 And, actually, I was--you know, so--and so
15 I--we--I--we tried to get some security, and we tried
16 to get some help and--as Néstor told you, as you
17 heard his testimony. And I went to the US embassy.
18 "Hey, look." Told them what happened. And Néstor
19 called them.

20 And this was a time of the ambassador in
21 Benghazi was killed along with three other people.
22 And the embassy said, "Look, we can't protect you."

1 And I took it, well, okay, if they can't
2 protect their own ambassador, who am I? I'm a
3 nobody. So, you know, I'm insignificant compared to
4 the US ambassador.

5 So I was--who's going to--so, to me, there's
6 nobody to look after me except me.

7 And I think if this happened to anyone in
8 this room, that you would have done the same thing I
9 did, get out of danger, very simply.

10 So I had to kind of take--you know, take
11 steps of my--that I could take to get out of danger.
12 And my family, they were--they were petrified of what
13 happened and pleaded with me to leave the country
14 before I got killed.

15 So--and then after I left, there was--I
16 think Nestor testified he tried to get additional
17 assurances.

18 Now, one thing I want to make--you know,
19 make note of, which hasn't been raised here. But in
20 January of 2014 when that hearing happened--when
21 Jovan was put on trial the second time, I was in the
22 hospital in the States and had surgery within a week

1 or so, virtually the same time.

2 And I sent letters from my doctors, from the
3 hospital. I sent them to Manuel Ventura, who was my
4 attorney, and he forwarded them to the court. And
5 they didn't care. They didn't care.

6 And they put out the arrest warrant
7 immediately. And the next thing I know, you know,
8 there's an INTERPOL report. And it was--it was a
9 total--so they just kept ramping it up.

10 And after I looked at the INTERPOL report,
11 which we got from the Respondent, INTERPOL clearly
12 told them, "Look, according to 83.1.1," I think, as I
13 remember reading it, "this is not a crime that rises
14 to the level of reporting people to INTERPOL."

15 It's like somebody steals a candy bar from a
16 7-Eleven and they don't show up for hearing, so you
17 report them to INTERPOL. No, that's not what
18 INTERPOL is for. They're for serious crimes.

19 And this--and they told them. I read it
20 myself after Mr. Burn sent it to me. And--and--and
21 they still insisted. They still, you know, tried to
22 get--tried to appeal to INTERPOL to, you know, get

1 the Red Notice issued for me.

2 It was--it was--you know, it was
3 mind-boggling. I mean, nobody can believe. I tell
4 this story to people. They don't believe it. They
5 think I'm kidding them when I tell them what
6 happened.

7 Q. Okay. I'll just come back very briefly to
8 INTERPOL in a moment.

9 But before that--before we leave the topic
10 of security arrangements, I just wanted to ask
11 whether the Costa Rican police did anything in
12 relation to the shooting incident.

13 A. Again, Manuel Ventura--you know, thank God
14 for Manuel. I mean, I don't know what I'd do without
15 him. But he went, as you know, to get these reports,
16 trying to get the police report, trying to get the
17 report from the prosecutor in Quepos where I filed
18 the complaint against Cristian Bogantes. And he had
19 difficulty getting them. And when he finally did get
20 them, there was nothing much in them.

21 Q. Okay. And just on that point about INTERPOL.
22 You were taken to the document at Tab 8. You will

1 recall this was the international arrest warrant for
2 extradition purposes. And you indicated that
3 you--you did not receive that document or see a copy
4 of it or you weren't aware of it. Is that--

5 A. No.

6 Q. That--that's--

7 A. No.

8 Q. That was your evidence.

9 Perhaps you want to go back to your First
10 Witness Statement. Have a look at Paragraph 240.
11 And just comment on--just--if there's anything
12 further you wanted say in relation to the INTERPOL
13 reference.

14 A. Paragraph what?

15 Q. 240. 2-4-0. It is on page 73 of your first
16 statement. You may feel you've already covered these
17 points officially. But I just wanted to give you the
18 opportunity, given that you were taken to the arrest
19 warrant itself.

20 A. 240?

21 Q. Yeah.

22 A. You want me to read this?

1 Q. Just read it quickly.

2 A. Okay.

3 Q. If there's anything further that you wish to
4 say, given what appears there, please let the
5 Tribunal know.

6 A. This was really amazing. I was--I was
7 talking to Louise Woods over there at one time, and I
8 was talking to her about my--rumors about an INTERPOL
9 notice being issued for me. And Louise--the next
10 thing I know, she's--she looked it up. And she says,
11 "You're there. Your name is there."

12 I says, "You're kidding me?"

13 So, no, that's--that's a--that's an
14 accurate--

15 Q. That is the first time you--you learned that
16 you were on the--

17 A. Yes.

18 Q. --the Red list at INTERPOL?

19 A. Yes, exactly. First time. Yeah.

20 MR. BURN: Okay. I have no further
21 questions. Thank you.

22 PRESIDENT SIQUEIROS: Pedro, do you have any

1 questions?

2 ARBITRATOR NIKKEN: No.

3 PRESIDENT SIQUEIROS: Mark Baker?

4 ARBITRATOR BAKER: Thank you.

5 PRESIDENT SIQUEIROS: Please.

6 QUESTIONS FROM THE TRIBUNAL

7 ARBITRATOR BAKER: Mr. Aven, the first
8 question concerns citizenship.

9 THE WITNESS: Yes.

10 ARBITRATOR BAKER: Allegations have been
11 made that you represented yourself in your business
12 dealings in Costa Rica as an Italian citizen. Would
13 you comment on that, please.

14 THE WITNESS: Well, if you look, there's
15 a--I think many times that I was--represented myself
16 as a U.S. citizen. In fact, if you look at the first
17 documents that we initiated the purchase agreements
18 in 2002, it clearly says--identifies me as a U.S.
19 citizen.

20 I do have dual nationality. But I don't
21 have any attachments to Italy. My dominant residence
22 has always been the United States. I don't do any

1 business in Italy. I don't have any bank accounts,
2 own property. I don't vote there. I don't have
3 anybody I correspond with over there.

4 I haven't been there in ten years. I mean,
5 been totally to Italy probably five times in my life.
6 So--so my dominant residence is, no question, United
7 States.

8 I was born in New Castle, Pennsylvania,
9 graduated high school there. Graduated college from
10 Baylor University in 1964. So--and been living and
11 working in the United States all of my life except
12 for the time period I was living in Costa Rica.

13 ARBITRATOR BAKER: So, as you sit here
14 today, do you remember ever representing yourself in
15 any of the transactions in Costa Rica as an Italian
16 citizen?

17 THE WITNESS: Yes, I do. And I--I did it as
18 a--you know, just as an option. You know, I just had
19 the Italian passport. And I, you know--on a number
20 of occasions I did. But, I mean, I think for the
21 Project, it was mostly--I was--I was held--I held
22 myself out as a U.S. citizen.

1 ARBITRATOR BAKER: Do you have an EU
2 passport too?

3 THE WITNESS: Say again.

4 ARBITRATOR BAKER: I said, "Do you have an
5 EU passport"?

6 THE WITNESS: I do not. Oh, wait a second.
7 I have an Italian passport. So that's an EU
8 passport, I think; right?

9 ARBITRATOR BAKER: Yeah. Right.

10 THE WITNESS: Yeah.

11 ARBITRATOR BAKER: I didn't know if there
12 was still a separate Italian identity card that went
13 with the EU passport or not.

14 THE WITNESS: No. I think they're all EU
15 passports now.

16 ARBITRATOR BAKER: Yeah, that's what I
17 thought too. Okay.

18 So the next set of questions, then, comes to
19 what due diligence you did before you bought the
20 property. So, as I understand your testimony, you
21 and Mr. Janney were in Costa Rica, and you saw this
22 property. And you came to the decision pretty

1 quickly that--you saw--spotted a lot of opportunity
2 there; is that right?

3 THE WITNESS: Yes. Well, let me--yeah. Let
4 me explain that. This is an interesting story. I
5 was living in Fort Lauderdale at the time. And David
6 Janney was living in Orlando. And we had been
7 friends for many, many years.

8 And so--and I was looking around Florida,
9 you know, to do something. And it was so expensive.
10 I mean, this was in the--2000, and things were really
11 expensive. And, you know, it was kind of booming.
12 And a lot on a canal--I remember this clearly. A lot
13 on a canal in Florida in 2000 on a--not a nice canal.
14 Maybe, I would say, 200 by--200 by 200 square feet,
15 something like that, not big--was a million dollars.

16 So when David Janney asked me to go down to
17 Costa Rica--I had never been there. And he was doing
18 some mission work down there. So I said okay. So I
19 went down there, and we just started looking around.
20 I went down with him a number of times.

21 So we found--so one of the trips we made was
22 to Esterillos. And we hit--and we looked at a number

1 of properties. But a lot of them were inland, and
2 they didn't appeal to me. And I knew--I knew the
3 real value of property was near the water because
4 that's where people want to be. They want to be near
5 the water.

6 So when we saw this property in Esterillos,
7 it was like 100 acres on a beautiful beach in an area
8 that had roads all around it, gently rolling hills,
9 and built up community around it with restaurants and
10 shops and homes and condos and everything. And this
11 was in an area that was elevated. It was gently
12 rolling hills. For a little more than what they
13 wanted for this small lot in Fort Lauderdale.

14 So I said, "David, this is--this has to be a
15 good deal." And it was--it's two hours from the
16 States.

17 So part of the due diligence you asked about
18 is looking at Costa Rica as very close to--access to
19 the United States, Canada. Had--I think at the time
20 I checked, 2 million visitors a year were coming. A
21 lot of American expats were moving there. A lot of
22 Canadians were moving there. It had a huge expat

1 presence.

2 So we, you know, immediately--you don't have
3 to be a rocket scientist to figure this out. You get
4 100 acres for what they're selling a small lot on a
5 canal in Fort Lauderdale for. And people are coming
6 down and moving down there. It was to us a
7 no-brainer that this--this could be a very profitable
8 investment.

9 So, that was, you know, the basis of our
10 reasoning and the due diligence we did comparing what
11 was two hours from Costa Rica and that people were
12 coming there.

13 And, also, don't forget another thing was
14 happening. This was right after 9/11. So, people
15 weren't traveling that much. And there was things
16 ramping up quickly in the Far East and Mid East.
17 People weren't traveling. So we thought that there
18 would be more people traveling down to Central
19 America.

20 Because, really, Costa Rica--I love Costa
21 Rica. I was their biggest fan. I mean, I was
22 telling everybody, "Costa Rica is great. The people

1 are wonderful. They're friendly." You know, and I
2 was encouraging people to move to Costa Rica because
3 I believed in it so much.

4 And so we--I was--and I became a resident
5 there. So, I was in--full in with Costa Rica. But I
6 did do a lot of due diligence before I, you know,
7 moved down there.

8 ARBITRATOR BAKER: So specifically, did you
9 hire anybody or consult with anybody before you made
10 the purchase about land development restrictions or
11 environmental regulations in Costa Rica, or did that
12 come after you all had secured the purchase?

13 THE WITNESS: No, I think before--before I
14 bought. I mean, I--you know, it was considered by.
15 I mean, you don't invest that kind of money without
16 doing your due diligence. And I--I met the owner of
17 Los Sueños, Bill Royster. Had conversations with
18 him. There was another development down from us,
19 Mr., I think, Ramirez was running it, Rancho Santa Fe
20 Development.

21 Juan Carlos Esquivel, who I was introduced
22 to in Escazú, San Jose. He had a lot of experiences.

1 His great-grandfather, I think, was ex-president of
2 the country. So--and we talked a lot about what the
3 procedures would be to do a development project. And
4 he stepped me through that. And he was a key
5 guy--the key attorney that--that really handled
6 things from 2002 until I moved down there in 2005.
7 He was the one handling everything for me after we
8 bought the Project--the property.

9 ARBITRATOR BAKER: So after you acquired the
10 property and you began to a retain land use
11 development firm in order to assist where the
12 development of your ideas and then you began to hire
13 the other professionals that you've told us that
14 you've relied upon for the beginning of the EV
15 process--right?

16 THE WITNESS: Yes.

17 ARBITRATOR BAKER: How did you--those
18 professionals come to your attention? How did you
19 decide to hire the people that you did hire?

20 THE WITNESS: Well, some of them came to my
21 attention through Juan Carlos.

22 And--and then Mauricio Mussio came to my

1 attention because I knew he was--he was working on
2 the Costa Montaña project, which was a huge project
3 not too far from Esterillos. And I actually,
4 frankly, met Mauricio. I remember meeting him at
5 the--this La Sirena Hotel that was in Esterillos when
6 we were having a meeting there--community meeting
7 there about just community problems, right. And
8 Mauricio happened to be there. And so we were
9 talking. We struck a--you know, started a
10 conversation. He told me what he was doing and--with
11 Costa Montaña.

12 And, I--you know, I did some checking on
13 him. And he had a fairly good reputation. So,
14 that's how I started a relationship up with him.

15 ARBITRATOR BAKER: So when the process
16 really got going in terms of the applications being
17 made--we heard from Mauricio yesterday about the way
18 in which the team contributed to the development of
19 the D1.

20 Did you have the D1 explained to you since
21 you are not capable of operating in the Spanish
22 language? Or tell us how that happened before it was

1 filed.

2 THE WITNESS: Okay. So the process was
3 depending upon how big of the--big of a project you
4 have, what kind of density you have for homes--say,
5 for example, you have a home you want to put on 5,000
6 square meters. That takes nothing--there's no even
7 checking--not even checking on that. It's just,
8 "Okay. 5,000 square meters, one home, get a permit."

9 The more dense--the more density you have,
10 the more--then there's more requirements. The D1 was
11 for the most-dense type of projects. And that was
12 the most extensive type of approval process you had
13 to go through. And so Mussio came up with the--the
14 conceptual design for the condo project. And there's
15 a lot of talks about the easements. And I heard--I
16 heard every--all the conversations, and Mr. Nikken
17 was asking questions about it.

18 But let me be clear about this because
19 it's--it's talked about a lot. And--like we did
20 something--another something we did illegally.
21 There's no illegal things going on here. Before we
22 did anything with the Project I--I got a--my attorney

1 at the time, Gavridge Pérez, gave--recommended that
2 I--that this--the law in Costa Rica was that you
3 could subdivide off parcels from the main highway.
4 And this is the law. And that you could put a
5 60-meter easement into--into the--off of the main
6 highway and build--and put four lots off of each side
7 of the road.

8 So I heard Mr. Nikken question about--like
9 what is--you know, the easement. The--the thing with
10 that is it's--the easement means that the road is an
11 easement to the lots. It's not an easement into the
12 proper--you know, into the condo property, but it's
13 an easement that will go through the center, and then
14 that easement will permit the lot owners to access
15 their lots. Once the homes are built, I think there
16 was a plan to donate the street to the municipality.
17 That's what our plan was.

18 So those lots were subdivided along the main
19 road. And once those lots were subdivided,
20 then--then Mussio--Mauricio Mussio applied for the
21 condo permit. Did the--the concept, the master site
22 plan for the condo project. And that's what was

1 submitted.

2 And there was--and I don't want there to be
3 confusion because there was confusion at the criminal
4 trial where Mr. Martinez was accusing me of
5 subdividing the Project after we got the permit,
6 which was totally wrong. All right. Totally just
7 wrong.

8 But that's what was being purported. And I
9 got, you know, a--legal advice from an attorney
10 again. Look, as I said, I don't know what the laws
11 are in Costa Rica. So I have to depend upon the
12 legal professionals to do things. And this was--this
13 was one of the suggestions that was made by Gavridge
14 Pérez, the attorney I was using at the time. And he
15 handled everything. He did all the legal work on
16 that.

17 ARBITRATOR BAKER: So if I understand the
18 point of the easements--I understand the access
19 point. But is it also--was it done that way because
20 the law gives you a right to do the subdividing up to
21 a certain number? Did I hear that right in your
22 testimony?

1 THE WITNESS: The subdividing up to a
2 certain number. You mean on the--on the easement?

3 ARBITRATOR BAKER: For the easements.

4 THE WITNESS: Yeah.

5 ARBITRATOR BAKER: For the lots for the
6 easements.

7 THE WITNESS: Yeah. The easement was 60
8 meters.

9 ARBITRATOR BAKER: Right.

10 THE WITNESS: This is the law. And off of
11 those--off of that road you can put four lots. And
12 so that was--that's what was done. And that's what
13 Mr. Pérez set up. He registered the whole thing,
14 and we got--we got it subdivided. He took care of
15 all the legal aspects of that.

16 ARBITRATOR BAKER: Okay.

17 THE WITNESS: And another--another point I
18 want to make because I heard this yesterday. That
19 they were--the counsel was making a big deal about
20 the--with Mr. Bermúdez about him getting a permit to
21 move earth for the--for the easement. And he--I
22 think I heard--I think I heard this. Now, if I'm

1 wrong, I can be corrected on this.

2 But I think I heard that we represented that
3 to get--to get the construction permits. But,
4 actually, that earth-moving permit was on--I checked
5 it this morning--was on July 22nd, that--that exhibit
6 they were looking at. And we got the construction
7 permits on July 16th.

8 So--and we immediately wanted to work on one
9 of the easements.

10 And this just goes to show you. I didn't
11 need to get that earth-moving permit. There wasn't a
12 lot of dirt we were moving. But I said, "Look,
13 Esteban. This is more dirt than we're permitting to
14 move legally. I mean, it's a little bit more dirt.
15 But I don't want to be doing anything illegally.
16 Let's get--could you get me the earth-moving permit?"

17 And he says "Sure." And that's what he made
18 the application for. Like--like he was saying
19 yesterday--which I was viewing--that it doesn't
20 matter if you get an earth-moving permit for a
21 project or--or a single--a single home. They're all
22 the same. So--but I just wanted to make it clear

1 that that was not misrepresented because at the time
2 he got that earth-moving permit, we already had the
3 construction permits for the easements.

4 ARBITRATOR BAKER: Also yesterday, and the
5 first day for that matter, we heard the terms
6 "fractionalization" and "fragmentation." And I've
7 come to understand, I believe, that one of those is
8 fully permissible, the other apparently may not be.

9 Would you comment on the Mussio plan to
10 either fractionate or fragment or whatever you'd like
11 to say about that.

12 THE WITNESS: Well, actually, that wasn't
13 Mussio who came up with it. But my lawyer, Gavridge
14 Pérez, is the one that actually did it. It wasn't
15 Mussio that did that. The lawyer recommended that
16 whole--and I'm not a lawyer. I'm not--I don't know
17 the distinction between what--fractionalization or
18 fragmentation. I mean, I don't know. I mean, I have
19 no clue. And that's why I depended on lawyers at all
20 times.

21 So, at all times I relied upon attorneys,
22 Costa Rican attorneys. I didn't just go out there

1 and just do things because I want to do them. You
2 know, we have a multi-million-dollar project. You
3 have to be having--making the right moves and doing
4 the right things and getting the right advice and
5 getting the right legal work and getting the right
6 professional work that you need done.

7 And we're not--I'm not going to be
8 doing--like--like the earth-moving permit. I didn't
9 need it. I didn't need to get it. Nobody would know
10 it. But I knew it. And I said, "Look, I'm not going
11 to do--I'm not going to--it's not worth doing
12 something wrong and having problems with it.

13 Another thing I want you to point--to share
14 with you is that Minor Arce testified yesterday.
15 And--and I think--you know, they went into great
16 detail about the September forestry report he had
17 done for it. I ordered that out of an abundance of
18 caution. I wasn't required to get that. I--we--but
19 were starting the development in the--in that--in the
20 Project. We were going to be starting it. And I
21 wanted to know, "Hey, what is permit-able under law
22 with regard to what trees can be cut down?"

1 And--and so that's why that report--I
2 commissioned that report by Minor Arce. And he told
3 me. He says, "Look, any trees planted along the
4 fence line can be cut. Any fruit trees, any planted
5 trees, anything under 15 centimeters." And he was, I
6 think, pretty specific with me in terms of what we
7 could do.

8 And this--this notion--another--this notion
9 that we cut 400 trees down illegally is another
10 fabricated fake--fake news story that's been going
11 around there. I don't remember seeing any pictures
12 of huge amounts--of 400 trees cut down. In fact, on
13 May--on May 15th, when the prosecutor, Mr. Martinez,
14 came down to the project site two weeks after the
15 INTA report was, you know, had gotten to us.

16 I thought we were going down there just--and
17 I thought we were going to meet Mr. Martinez and he
18 was going to say, "Look, based upon the INTA report,
19 you know, we can't proceed because now we've got
20 two"--think about this. You're attorneys.

21 We've got two contradictory reports, and
22 he's trying to make a claim about--accusing me for a

1 crime. Now we've got two contradictory reports. One
2 from INTA saying there's no wetlands, which counsel
3 said he couldn't understand why they did that.

4 Well, INTA is the professional. I mean,
5 they're the professional organization. So--and the
6 MINAE report said wetlands. How can you proceed with
7 a criminal case against the person when you've got
8 two contradictory reports by government agencies that
9 you asked for? I mean, it's mind-boggling. So--

10 But what I wanted to say, I remember asking
11 the prosecutor when he said--and then he said--he had
12 a group of--a team of MINAE people there. And he
13 said, "We're going to--can we borrow some of your
14 guys?" We want to go stake out the wetlands?"

15 I said, "What? Stake out what wetlands?
16 Didn't you read the INTA report?"

17 And Mr. Martinez said--and that was
18 translated--my attorney was there. And he said--and
19 this is what he said to me. "I don't believe that
20 report."

21 Now, I want you to think about that
22 statement coming from the mouth of a criminal

1 prosecutor. "I don't believe that report." Is the
2 law based on a belief system, or is the law based on
3 facts and evidence?

4 A prosecutor, one that's competent and
5 operating the right way is--that's objective
6 evidence. You don't have an option to not believe.
7 You have to believe it. In fact, when we talked to
8 Esaú Chavez, Manuel and I, and I was telling him all
9 about this, and I showed him the copy of the
10 April 2nd MINAE report that they needed to--before
11 they cleared the land environmentally, and I said to
12 him--Mr. Chavez--I said, "Mr. Chavez, did you get
13 this report?"

14 "Yeah, we got that."

15 I said, "Did you believe it?"

16 Know what he said? "We have to believe it.
17 We have to believe it. We have no choice."

18 But yet when Mr. Martinez gets a copy from a
19 government agency that he ordered, he says he doesn't
20 believe it? I mean, that's just mind-boggling.

21 Now, one more--in that same--I don't mean to
22 belabor, but it's so interesting. I kept saying to

1 him--he says--he started out, "You cut 400 trees."

2 I said, "Where's the 400 trees we cut? Show
3 them to me. Where are they?" I kept insisting.

4 So, finally, he says--he takes us to the far
5 end of the project. We walk from the end of the
6 Project all the way to the road, which was a long
7 way, all the way back. There was nothing there.
8 Nothing. And it was pristine because we weren't even
9 working back there.

10 So--so he--so I get back to the beginning
11 where we started. And I was so frustrated. And
12 Esteban Bermúdez was with me and Jovan. And I--I was
13 mad.

14 I says, "Where's the 400 trees? Where's the
15 400 trees you said we cut?"

16 And so him and Mr. Picado--they got mad now.
17 They got mad because I was calling them on "Where's
18 the 400 trees?"

19 They go 50 meters into the property, and
20 they go--they go like this (indicating). Okay. So
21 Esteban and I walk in. And he points to a tree, and
22 it's like this big (indicating).

1 And I said, "That's a small tree." And
2 here's what he says to me. And to get an idea into
3 the mentality of this guy, he says, "Well, if you
4 kill a small child, isn't that murder?"

5 And I said, "Are you relating cutting a
6 small tree with killing a child?"

7 He says "Yes."

8 Now, what are you going to do with this kind
9 of thinking?

10 ARBITRATOR BAKER: Well, I'm going to ask
11 you a different question. That's what I'm going to
12 do.

13 THE WITNESS: Okay.

14 ARBITRATOR BAKER: So what I want you to
15 react to is a slide that I saw in Respondent's
16 opening.

17 THE WITNESS: Okay. Which one is it?

18 ARBITRATOR BAKER: And if I could ask for
19 this to be handed to the witness. It's not in the
20 binder in front of you. But I want you to comment on
21 this, please, so that the record is clear--

22 THE WITNESS: Okay.

1 ARBITRATOR BAKER: --with your testimony.

2 Thank you.

3 So, what we have--this was in Respondent's
4 opening remarks, and it's a chart which has three
5 columns. And the first column is labeled--or headed
6 as "Site," and then it has "EV" across the top, and
7 then "Construction Permits."

8 It's a simple chart. If I get this wrong,
9 I'm sure my friend will correct me. But it's--I take
10 this chart to mean that the first condominium
11 site--it says an EV was granted. Do you agree with
12 that?

13 THE WITNESS: Sir, you know, why can't the
14 Respondent put in dates here? Because there
15 was--there was EVs--a number of EVs issued by SETENA.
16 And when he was going through his chronological order
17 that I saw, he left off a number--he left off a
18 SETENA resolution. He didn't include that. He left
19 off a--the November 15th SETENA resolution. He
20 didn't even include that.

21 So without some kind of--the Condominium
22 Section, unlawfully obtained, unlawfully obtained.

1 This is--

2 Yeah. Yeah. I have it. Yeah, I've got it
3 here.

4 MR. BURN: All right.

5 THE WITNESS: So--

6 ARBITRATOR BAKER: Well, you've anticipated
7 what was going to be my next question after I had
8 gotten on your answer on the EV. Because it seemed
9 to me that there were a whole series of documents
10 that took place at different points in time that had
11 expirations, that had requirements for things to be
12 done in certain periods of time.

13 But as you sit here today, you can't tell
14 me, without having something in front of you, as to
15 which ones were granted when and where for each one
16 of the parts of the development?

17 THE WITNESS: Well, there was--there was
18 numerous ones. Okay? And I'll tell you what I can
19 recall.

20 ARBITRATOR BAKER: Okay.

21 THE WITNESS: 2004 SETENA resolution, 2006
22 SETENA resolution, 2008 SETENA resolution, 2010

1 SETENA resolution, an April 2nd, 2008, MINAE
2 clearance letter for the--for the EV that we got
3 in--and when I say "resolution," it's an EV. Okay?

4 Because once the permit is--I call it a
5 permit--is issued into a resolution, then at that
6 point in time, according to Julio Jurado, it becomes
7 a government order that everyone is required to
8 comply with, all public and private institutions are
9 required to comply with.

10 And the problem, as I said in my statement,
11 is that none of the functionaries in the Costa Rica
12 government complied with it.

13 And we have the testimony--you don't have
14 to--and so--"Okay. David Aven is saying this.
15 Don't--don't--you know, he doesn't know what he's
16 talking about. He's"--you know.

17 But there's a guy that we got a statement
18 from, Mr. Jorge Briceño from the Municipality, who
19 dug deep into what was going on in Las Olas and even
20 went to the TAA in San Jose to do his due diligence.
21 And this is a guy that--and you probably read his
22 statement. And what did he say? What did he tell

1 the government functionaries?

2 "Everything you're doing is illegal, and
3 it-and it even can cause civil and criminal penalties
4 on you--on you--on you guys, and it could cause
5 serious damage to the treasury."

6 What happened? Nobody paid attention to
7 him. So, this is not David Aven saying it. This is
8 not George Burn saying it. This is a guy in the
9 government saying it.

10 If you look at Fernando Zumbado's statement.
11 And he was an ex-president--an ex-foreign minis--I'm
12 sorry--ex-housing minister. His statement--and I
13 know--I knew him personally. Got to know him in
14 2006.

15 And I was working with him, when he was a
16 housing minister, to put low income housing down into
17 the Esterillos area. What did they do? He wanted to
18 run for president. So, what do they do?

19 They falsely charge him with a crime, just
20 like they did with me, and he had to resign. And
21 that killed his ability to run for president and also
22 killed his reputation.

1 What did he say? Here's what he said. This
2 is--this is a guy that was an ex-U.S. ambassador,
3 ex-UN representative, two-time foreign minister and
4 was going to run for president of the country, and
5 they did the same thing to him as they did to me.
6 They charged him falsely with a crime.

7 And here's what he said in his statement
8 that I remember. "This kind of criminality has to
9 stop because if it doesn't, it's going to really
10 impair the ability of Costa Rica to attract foreign
11 investment."

12 Now, these aren't U.S. investors saying
13 this. These are seasoned Costa Rica dignitaries and
14 high-ranking government officials. Well, Jorge
15 Briceño wasn't high ranking, but Mr. Zumbado
16 certainly was.

17 ARBITRATOR BAKER: Same discussion with--my
18 understanding is that the construction permits were
19 ultimately issued by the Municipality; is that
20 correct?

21 THE WITNESS: That's correct.

22 ARBITRATOR BAKER: Okay. And to your

1 knowledge, were construction permits obtained as
2 required for each section of the development?

3 THE WITNESS: Yes, they were. Absolutely.
4 And this nonsense about the Condominium Section
5 unlawfully obtained. This is--this is just false.
6 Easements and other lots. What does that X mean? I
7 don't even know what this X means. It's not
8 explained. It says "X."

9 ARBITRATOR BAKER: I think that means the
10 allegation is that there were no EVs.

11 THE WITNESS: There what?

12 ARBITRATOR BAKER: That there were no EVs.

13 THE WITNESS: Well, they weren't required.
14 The EV--and this is--look, this is not my rules.
15 This is Costa Rica's rules.

16 If--if--we followed the rules. It's
17 like--look, what is this business about if you follow
18 the rules and you do the things the right way, they
19 come along and say, "Oh, those weren't the rules"?

20 No. I mean, the lawyers we got advice from
21 told us what we--what the rules were, and we followed
22 them. And then when we followed them, they

1 arbitrarily turn around and say, "Oh, that's a
2 different interpretation. That's not what it means."

3 So I totally reject this kind of arbitrary,
4 capricious decision-making where they can just
5 arbitrarily--you know, look, when governments issue
6 valid permits, the developers have to be able to rely
7 on those permits. You can't make it a game of now
8 you see it, now you don't. It's not a magic trick.
9 You have to be able to rely on those.

10 You're spending millions of dollars
11 developing a project, and it has to be stable. You
12 have to have a stable environment, a stable
13 government that when you know you follow the rules,
14 you pay a lot of money to get permits, they're not
15 going to be yanked away by some rogue prosecutor that
16 for whatever reason decides he's not going to follow
17 the government law.

18 ARBITRATOR BAKER: When for the first time
19 did you become aware that environmental processes, in
20 your words, could be used in order to cause
21 previously issued permits to be canceled? Was that
22 before or after you bought the property?

1 THE WITNESS: Oh, much later. Much later.
2 We bought the property in 2002.

3 ARBITRATOR BAKER: So none of your due
4 diligence before buying the property had shown you
5 that there had been the use of environmental laws in
6 the way that you're just describing?

7 THE WITNESS: I'm not sure I understood that
8 question.

9 ARBITRATOR BAKER: I'm just trying to find
10 out what you knew and when you knew it--

11 THE WITNESS: Oh, okay.

12 ARBITRATOR BAKER: --about the way in which
13 the environmental laws you say could be used in a
14 capricious fashion, if you had seen examples of that
15 prior to making your investment. That's my first
16 question.

17 THE WITNESS: Okay. Good--okay. I'm glad
18 you asked that question. It started becoming
19 apparent to me when--when Mr. Martinez came on the
20 scene in February of 2011. And I want you to
21 understand this clearly.

22 Because when he came on the scene in

1 2011--something you've seen in this chronology--a
2 couple things--a couple--things were happening. And
3 there's a certain situation with respect to the
4 project where it was.

5 In 2000--summer of 2010, Mr. Bucelato
6 started making complaints. He's a competitor, so he
7 made a complaint with SETENA. And other agencies.
8 But SETENA.

9 So, what does SETENA do? SETENA and MINAE.
10 So, what did they do, SETENA and MINAE? SETENA sends
11 down an inspector to say, "Okay. We got a
12 complaint."

13 And I'm going to tell you what. SETENA
14 absolutely was the proper agency. I never had a
15 minute's problem with them except one time when they
16 canceled the permit in--in April.

17 But they came down and did the inspection.
18 They issued the permit. I mean issued the resolution
19 in--September 1st, 2010. They rejected Bucelato's
20 complaint. And now that resolution was another
21 law--another government order that the functionaries
22 were--and public and private people were required to

1 comply with.

2 Bucelato was a private person. Martinez was
3 a public official. So they rejected. And
4 specifically Bucelato is mentioned in that
5 resolution. So, what happens? Five months later
6 Bucelato takes his complaint to Martinez, the
7 prosecutor, according to his statement, on
8 February 2nd, I think he says. And he started a
9 complaint.

10 And six days later he gets a complaint from,
11 I think, Picardo. Luis Picardo. Or vice versa. I'm
12 not sure which comes first, but one of--I think it
13 was--Bucelato made his complaint on the 2nd and
14 Picardo makes his complaint on the 8th.

15 Now, think about this? Is that a
16 coincidence that Martinez got those two complaints
17 six days apart?

18 And what did Martinez do next? The very
19 thing he said he--on the February 8th, he immediately
20 seized the SETENA files. Is that a normal reaction?
21 Would you think somebody would call SETENA, would
22 call me, would call somebody, talk, say "What's going

1 on here?"

2 No. He immediately seizes the files, which
3 has to tell you something. So when he sees the
4 files, what did he have to see? He had to see that
5 September 1st resolution that SETENA rejected
6 Bucelato's complaint.

7 Now, to me, a competent prosecutor, after
8 seeing the resolution that SETENA issued on
9 September 1st--and now Bucelato is making the same
10 complaint to the prosecutor five months later. It
11 would seem to me a competent prosecutor would say,
12 "Mr. Bucelato, you made this complaint to SETENA five
13 months ago. They--they ruled on it. They made a
14 determination. They rejected your wetland complaint.
15 So why are you--so I must tell you something. That
16 do you know by law that you're required to comply
17 with this complaint? You're a private citizen, and
18 you are required to comply with government orders."

19 He didn't tell him that. He should have
20 said, "And I am required to do that too."

21 What did he do? He takes Bucelato's
22 complaints and runs with it, and he refuses to comply

1 with a government order. This--he could have stopped
2 it right there and then. If he would have let--if he
3 would have let SETENA and MINAE would have let SETENA
4 just carry out their prime directive in being the
5 agency that was given the authority by the government
6 and the courts as the only agency that has the power
7 to issue these EVs and they put the force of law
8 behind it to--to make sure everybody would be
9 required to follow it.

10 And I said in my statement what the
11 government was trying to do is to stop the
12 dysfunction that's happening--happened in our case
13 that has led us here.

14 So if--if Mr. Martinez would have just
15 followed the law and complied with his own law, we
16 wouldn't be here.

17 ARBITRATOR BAKER: Thank you, Mr. Chairman.

18 PRESIDENT SIQUEIROS: Thank you, Mr. Aven.

19 I just have a few questions for you.

20 You describe in your statement--and in
21 Claimants' Memorial there is a reference to the
22 participation that each one of the Investors has.

1 And roughly it reads that you have 28 percent of the
2 investment whereas Samuel Donald Aven has 44 percent
3 and others complete the 100 percent of that
4 investment.

5 But I note in your statement that in the
6 overall investment that has been placed in the
7 Project, you have invested roughly 50 percent of the
8 amounts of the Project, and this includes the
9 investments and the income earned by lot sales.

10 Because you state that your initial
11 investment was \$797,000, and you made an additional
12 \$4 million roughly. This is in Paragraph 32 of your
13 First Witness Statement.

14 THE WITNESS: Okay.

15 PRESIDENT SIQUEIROS: How is it that if you
16 have made a very significant amount of investment in
17 the Project, way beyond what the other Investors you
18 have stated have made, you have 28 percent of the
19 investment only?

20 THE WITNESS: Well, this is a family-type
21 business. My sisters, my brother, good friends, a
22 cousin. And this was just a decision that was made

1 among the family. And I--and I was going to--I was
2 going to profit when the Project was developed, all
3 right, when it was successful.

4 So this was a decision how we were going to,
5 you know, divide it up between us. But my--the
6 revenue I would really--I was really going to earn,
7 as well as David Janney and Roger--my cousin Roger
8 Raguso was going to be doing the construction
9 management and also the management of the facility
10 once it was built.

11 And I was going to make my money on the back
12 end. All right. And I was willing to put additional
13 money up to get this thing going and get my--make my
14 profits on the back end of the Project, which I
15 thought--you know, I thought would be fair.

16 So, I didn't take--you know, I didn't take
17 any money out. I didn't take a salary. I didn't
18 take any money out of this for--for my services. I
19 didn't make a penny on this. So I--and David Janney
20 didn't either. Nobody did. None of the U.S.
21 Investors took any money out of this.

22 All the money that we got from the sales was

1 plowed back into the Project 100 percent. So this
2 was just a family decision, how we wanted to divide
3 the profits up. But, again--I know what you're
4 talking about. But I was going to make my money on
5 the back end, and, you know, I--significant money.

6 PRESIDENT SIQUEIROS: When you referred to
7 "back end," could you please explain just--

8 THE WITNESS: When it was finished. When it
9 was developed.

10 PRESIDENT SIQUEIROS: When it was developed.

11 THE WITNESS: When it was developed, yes.

12 PRESIDENT SIQUEIROS: You would be making
13 28 percent--I understand 28 percent of the whole
14 business profits on the venture?

15 THE WITNESS: Yeah. Well, that. But also,
16 then, I was--I would--we had arranged what we call
17 success fees, you know. In other words, when you're
18 successful at something, you get paid for it. And so
19 I was going to take my success fee, which was
20 significant, on the back end.

21 And, like I say, this was just a family
22 arrangement. And we were, you know, assigned to

1 various interests based upon--

2 PRESIDENT SIQUEIROS: Do you recall what
3 your success fee was going to be?

4 THE WITNESS: Based upon the profits. Based
5 upon the profits.

6 PRESIDENT SIQUEIROS: Was there a specific
7 percentage, or were you going to identify it later,
8 or were the Investors--

9 THE WITNESS: Well, we were--I was thinking
10 in the neighborhood of 25 to 30 percent. But, look,
11 everything is fluid. Everything is adjustable.
12 Nobody knows what the future is going to be. So, you
13 know, just like when the crash came in 2008, we had
14 to adjust. So--but, you know, the plan was to--you
15 know, between 25 and 30 percent success rate on the
16 back end.

17 PRESIDENT SIQUEIROS: Okay. The other
18 question that I have deals with what you were
19 mentioning that you wanted to correct, and this was
20 on the ownership of La Canícula--

21 THE WITNESS: Yes.

22 PRESIDENT SIQUEIROS: --the company that has

1 the ownership of the Maritime Zone property.

2 THE WITNESS: Yes.

3 PRESIDENT SIQUEIROS: My understanding, and
4 I believe your understanding also, is that a Costa
5 Rican national must have 51 percent--no less than
6 51 percent of the shares of a company which holds
7 property in that area. Is this correct?

8 THE WITNESS: That's correct.

9 PRESIDENT SIQUEIROS: And you mentioned and
10 you accompanied a copy of an agreement that was
11 executed with Ms. Paula Murillo.

12 THE WITNESS: Yes.

13 PRESIDENT SIQUEIROS: But as I read this
14 agreement, then--perhaps it's my training as a
15 lawyer, I--do you identify this--I'm not sure this is
16 attached to the cross-binder in your case.

17 But it is the exhibit that your lawyers have
18 submitted as C-242. And perhaps your counsel may
19 provide a copy of that to you. But you may recall
20 that this is the agreement whereby 51 percent of the
21 shares of La Canícula presumably transferred to
22 Ms. Paula Murillo.

1 THE WITNESS: Yes. Yeah, I'll explain that.
2 I mean, let me get a copy of it and I can look at it.

3 PRESIDENT SIQUEIROS: Yes. I think it would
4 be best if you had a copy.

5 THE WITNESS: Okay. Thank you, Louise.

6 Okay. What is your question on this now?

7 PRESIDENT SIQUEIROS: My question is, as I
8 read this document, I see that there is no transfer
9 of ownership because there's reference to a service
10 that Ms. Murillo is going to provide. That she is
11 not the true owner because she will neither receive
12 the income of any business gain and you have the
13 opportunity at any time to replace her with another
14 person without payment of any purchase price by
15 appointing a different owner.

16 THE WITNESS: This is one of those quirky
17 things in Costa Rica you have to understand. That
18 they have this law that if you--foreigners
19 invest--buy property on the Concession, that a
20 foreign national has to have 50--own 51 percent.

21 But it's understood that this--and normally
22 the foreign nationals are attorneys or people--you

1 know, people, you know, you have confidence in. They
2 won't steal it. But normally it's understood that
3 they're just holding it. You know, it's like a
4 placeholder. Okay.

5 And you generally have an arrangement where,
6 okay, they're holding this as a placeholder, but
7 they're holding it like--almost like in trust for
8 the--the person that bought it, the foreigner that
9 bought it.

10 So, you're right. I mean--but there's--this
11 is the way they do things down there. I mean, this
12 is--before--okay. So before Paula. Let me--let me
13 explain the chain of events in here.

14 The first person that owned the--the
15 Concession, the 51 percent interest, was Juan Carlos.
16 Because he's the--he's the guy that was handling
17 everything for me from 2004 until--I mean 2002 until
18 2005 when I moved down there.

19 So--so he was the--he was the 51 percent
20 owner. But, actually, there was a--I don't know if
21 you saw the purchase agreement, the trust agreements,
22 and all. Well, we did--Roger Guevara, who is

1 the--one of our--one of probably the top attorneys in
2 Costa Rican with the Batalla Law Firm, looked at that
3 very carefully. And he--and I'm not a lawyer, and
4 I'm not--you know.

5 But he critiqued the documents. And his
6 conclusion was that at all times a Costa Rican held
7 the--the interest in that. And he got--he had some
8 other documents--he found some other documents
9 somewhere that it shows that Juan Carlos held--was
10 holding 100 percent in trust for the Investors.

11 And so what happens when--when-the way you
12 register the ownership is there's a shareholder book
13 in the corporate books. And you record the
14 shareholders' interest in those shareholder books.
15 So, when you make a change, you just--you know, you
16 have a meeting, and you have a resolution. This
17 person is going to transfer their shares to another
18 Costa Rican.

19 So this was just a letter of intent between
20 Ms. Murillo and my--my--the U.S. Investors. But the
21 actually event took place when Juan Carlos resigned
22 and Paula's name was entered in the shareholder book

1 as the 51 percent owner.

2 PRESIDENT SIQUEIROS: But when you
3 transferred this to her, she did not pay a purchase
4 price to you? It was, rather, the other way around.
5 You would be paying to her for her services.

6 THE WITNESS: It's--yeah. Okay. Now
7 for--exactly. So look. Of course, anybody that does
8 this, it's just--I'm sure a lot of attorneys hold
9 things in trust for their clients or they do things,
10 you know, for their clients. And, you know, you
11 charge them the service fee too. Attorneys charge
12 them a service fee too. And we paid Juan Carlos a
13 service fee for that, of course.

14 But it was always under the
15 assumption--under the understanding that, look, the
16 Costa Rican didn't put the investment in. The Costa
17 Rican didn't put any money in. This was just a--one
18 of the quirky things in Costa Rica law. And it's
19 done commonly. This is the way it's done down there.
20 We didn't invent this, the way things are done.
21 We--again, another example of following the rules
22 that are established in Costa Rica. So this is the

1 way it's done.

2 PRESIDENT SIQUEIROS: I think there's a big
3 risk there that Ms. Murillo or--indeed, if she were
4 to predecease you if she decided she wouldn't sell or
5 assign back. I think that--your attorneys, I think,
6 weren't being very careful in advising you or you
7 yourself because this would be almost a common-sense
8 issue of the risks that you would have if Ms. Murillo
9 decided not to, quote, sell back that percentage to
10 you.

11 THE WITNESS: You're right. And that's why
12 you have to be careful who you do business with and
13 assign the 51 percent to.

14 PRESIDENT SIQUEIROS: Now, I--the final
15 question. And I know you've been through a long day,
16 and everyone is ready for a break. Just the last
17 question.

18 You had mentioned in a response to Mr. Baker
19 about how the easements were separated from the rest
20 of the property.

21 THE WITNESS: Yes.

22 PRESIDENT SIQUEIROS: As I understand, but,

1 you know, please correct me, when the Property--and
2 I'm referring right now to the several lots that were
3 acquired that comprised the Property except the
4 Concession. Let's leave the Concession aside--or the
5 Concession area--the property owned by La Canícula
6 aside.

7 The rest of the Property was comprised by
8 several lots that you, through the companies that
9 were established, acquired Inversiones Cotsco
10 and--you acquired through different periods of time.

11 THE WITNESS: That's right. Correct. From
12 Carlos Monge.

13 PRESIDENT SIQUEIROS: Correct. Why was
14 it--and you mentioned how it was not Mr. Mussio but
15 an attorney who carried out the separation--the--let
16 me call it--because I think that's the word that has
17 been used before--the fragmentation of the easement
18 from the whole of the property, the development.

19 What was the business purpose of separating
20 that area from the rest of the property? Was there a
21 business decision, or was this the legal decision?
22 Because there was not a project decision, as I

1 understood you to say, because this was not the idea
2 of Mr. Mussio but, rather, was the idea of the
3 attorney.

4 THE WITNESS: Yes.

5 PRESIDENT SIQUEIROS: What was the business
6 rationale?

7 THE WITNESS: Okay. That's a fair question,
8 a good question.

9 PRESIDENT SIQUEIROS: Because it has been an
10 issue in this arbitration. It's not--my question is
11 simply because this is an issue that has been raised
12 in the arbitration.

13 THE WITNESS: Absolutely.

14 So, getting back to your first--first
15 observation. You're right. After we made the
16 initial purchase from Carlos Monge, he had, I think,
17 three more parcels in there that we--we bought.

18 And--and then later--I believe it was Juan
19 Carlos. And they were in separate, you know,
20 cadastrals. And Juan Carlos then merged them into
21 one--one property. So, we had this one property that
22 was--that we bought from Carlos Monge.

1 In discussions with the--my attorney,
2 Gavridge Pérez--and I think maybe I had some
3 discussions with Juan Carlos about this as well. But
4 they said, "Look, you got road frontage all around
5 the Project."

6 And the law in Costa Rica is if you're on a
7 road that you can get access to, you don't--you don't
8 need to get--to do extensive permitting processes
9 with--with EV--EV process. But you can, you know,
10 just come off of the main road, put a--put a--get a
11 permit for that for whatever reason you want to get
12 and--and build.

13 So that's why it was done. Because it was
14 easy to get to along the main road, you could have
15 access to these various lots. And you could--and the
16 business plan was that you could develop these things
17 fairly quickly because according to Costa Rican law
18 now--you know, again, I want to stress that we
19 followed the law.

20 This--we didn't do something illegal. I
21 mean, again, they're jumping on all this illegal
22 stuff we did. But all of this was done with the

1 advice of counsel. And so I'm relying on the
2 attorneys down there. And the one document that the
3 prosecutor showed me was from Rolando Laclé. And his
4 father is a famous--they know him all around Costa
5 Rica--famous politician.

6 And we were--and he--I said--I said, "Look,
7 come up with a, you know, a plan for, you know,
8 something." I forget what he--what I asked him to do
9 but--it was years ago. But he came up with a formal
10 plan of doing something on the Concession.

11 So--so the same thing with--with Gavridge
12 Pérez. We were talking. And he said, "Look," he
13 says, "the law is if you have property on the main
14 road, you can subdivide it out, and you don't have to
15 be concerned with the EV because it's along the main
16 road."

17 And things along the main road--they have
18 access to everything. They have access to electric.
19 They have access to the road. They have access to
20 the water. The water main runs along the road.

21 So it's not like you're developing something
22 on the interior where you have to put heavy

1 infrastructure in like, you know, roads and
2 underground electricity and sewage treatment plants
3 and all of that--all of the rest of it.

4 So that was the--that was the motivation for
5 that. It was--but it was based upon legal advice
6 from an attorney. And as far as--as far as I was
7 told, it was perfectly legal. And from what I've
8 heard from our legal experts, and I think you'll hear
9 from Mr. Ortiz later, but it was perfectly legal.

10 PRESIDENT SIQUEIROS: Those are the only
11 questions I have, Mr. Aven. I don't know if counsel
12 for--your counsel or counsel for Costa Rica have any
13 follow-up questions on those that have been presented
14 by the Tribunal.

15 MR. BURN: Not really a question, sir. But
16 just for the record, when you took Mr. Aven to the
17 document at C-242, you heard him refer to other
18 related contracts. And just for your reference,
19 those documents--there's a trust agreement which is
20 at C-237, and there's the agreement for purchase
21 which is at C-8.

22 PRESIDENT SIQUEIROS: Correct.

1 MR. LEATHLEY: Nothing further from us, sir.
2 Thank you.

3 PRESIDENT SIQUEIROS: Thank you very much,
4 Mr. Aven. You are now released as a witness. And,
5 of course, you can continue to remain here in the
6 hearing room.

7 THE WITNESS: I want to thank the panel for
8 listening to me. And maybe--I apologize for any--any
9 things I did that was a little bit, you know--I don't
10 know--out of the way . But I appreciate your--

11 PRESIDENT SIQUEIROS: Nothing that anyone
12 else in your position would not have done.

13 THE WITNESS: Thank you. Thank you.

14 PRESIDENT SIQUEIROS: So should now be a
15 good time to take a ten-minute break?

16 MR. BURN: Indeed, sir.

17 PRESIDENT SIQUEIROS: Okay. Thank you.

18 (Brief recess.)

19 HAZEL DÍAZ, RESPONDENT'S WITNESS, CALLED

20 PRESIDENT SIQUEIROS: Okay. So, we continue
21 the Hearing, and we will now proceed with the first
22 Respondent witness of fact in this case, which is Ms.

1 Hazel Díaz.

2 MR. BURN: So, just to avoid any
3 confusion--because obviously, Mr. Leathley needs to
4 introduce the witness. But just to make the
5 logistics clear, given it's our pack of materials
6 from which the witness will be reading, the First
7 Witness Statement of Ms. Díaz in its English and
8 Spanish versions appear under Tabs 1 and 2; and the
9 second will be much further down in the pack at
10 Tabs 53 and 54.

11 PRESIDENT SIQUEIROS: Okay. Ms. Díaz, you
12 have signed Witness Statements both in English and in
13 Spanish. Could you advise the Tribunal whether you
14 will be examined in English or in Spanish?

15 THE WITNESS: In Spanish.

16 PRESIDENT SIQUEIROS: In Spanish. Very
17 well.

18 The Hearing, as you must have heard from the
19 legal team of the Republic of Costa Rica, will be
20 carried out in the following way: You will first
21 hear some introductory questions from the legal team
22 of the Republic of Costa Rica, followed by the

1 counter-examination by the attorneys for the
2 Claimant; and then you will have a recross that will
3 be carried out by the attorneys for the other Party.

4 Then the Tribunal may have some questions.
5 It could be during, but it could also be at the end
6 of all the questions. If you hear a question that
7 you do not understand clearly, you will have an
8 option to seek clarification of the question.

9 When you answer, I will ask you to first
10 respond to the question; then, if you have any
11 additional comment, you can do so following your
12 answer to the question.

13 Lastly, I would like to ask you--you will
14 have on the right--find on the right-hand side of the
15 table, there is a card--that one, yes--with a
16 statement that we ask you to kindly read.

17 Please speak fairly close to the microphone,
18 and--we maybe hear you well, but it has to be heard
19 clearly also for records and for the Interpreters,
20 who are translating your words into English.

21 Thank you.

22 THE WITNESS: Thank you very much. I

1 Furthermore, we are a national institution
2 for human rights based on the United Nations'
3 principles.

4 In the institution, I'm responsible right
5 now for the administrative management control; and at
6 the time of the case under consideration, I had
7 oversight over quality of life that, among other
8 things, had to do with the environment, health,
9 et cetera.

10 Q. Thank you very much.

11 MR. LEATHLEY: I have no further questions.

12 PRESIDENT SIQUEIROS: And a last request to
13 you. Because of there being simultaneous
14 interpretation, if the question is in English, please
15 wait to hear the interpretation into Spanish before
16 responding. Otherwise, there is overlapping of the
17 two languages, and it becomes very difficult for the
18 Court Reporters and others.

19 Thank you.

20 MR. BURN: Thank you, sir.

21 And Ms. Woods, to my right, will be
22 conducting this cross-examination.

1 MS. WOODS: Thank you, sir.

2 CROSS-EXAMINATION

3 BY MS. WOODS:

4 Q. Ms. Díaz, I think I'm right in understanding
5 that that you've worked in Defensoría your whole
6 career?

7 A. Yes, indeed. I have worked at the Defensoría
8 for 22 years now.

9 Q. You mentioned before that you are currently
10 at the level of special advocate; and that's the case
11 since 2004, if I'm not misunderstood?

12 A. Indeed. I have the level of special
13 defense--defendants since 2004.

14 Q. So, it's fair to say that you're experienced
15 in the general functioning of the Defensoría?

16 A. That is correct.

17 Q. And I know you've just touched on this a
18 little bit with counsel for the Respondent; but just
19 to confirm my understanding, that is to supervise
20 independently the functioning of the public sector to
21 ensure that the various administrative institutions
22 carry out their roles and responsibilities in

1 accordance with the applicable law.

2 A. That is correct, with applicable law, and
3 also compliance of human rights.

4 Q. Thank you.

5 And you do that by examining the legality of
6 the institutions' acts or, in some cases, omissions.

7 A. Yes, it could be an examination of the action
8 or the omission and actions undertaken by public
9 administration.

10 Q. And so, the end game with your investigations
11 is to determine whether or not the administration has
12 acted properly; and if not, to make recommendations
13 to rectify the position?

14 A. Correct. What we want to do is determine
15 that the administration's actions are legal.

16 Q. And in your First Witness Statement, you
17 explain how this works in practice. So, the
18 Defensoría, if it receives a complaint, will transfer
19 that to the relevant institution, such as SINAC, for
20 example, and request information from them?

21 A. That is correct.

22 Q. And you or the Defensoría have a period of

1 two months in which to consider a complaint and
2 respond, but there is a--an extension available if
3 the case is complex.

4 A. That is correct. The Defensoría's law
5 provides that in more complex cases, the defender,
6 the defensor, can allow the office hearing the case
7 to extend the period in order to resolve and settle
8 the complaint that has been filed with them.

9 Q. Thank you.

10 Now, talking about the specifics of this
11 case--and I believe you mentioned that you received
12 Mr. Bucelato's complaint on the 20th of July of 2010;
13 is that correct?

14 A. Not entirely correct. The Defensoría
15 received the complaint on that date; but I am not the
16 person within the Defensoría who directly receives
17 requests for intervention of this office, but it is
18 received by the admissibility office. That is the
19 first one to receive and take care of such requests.

20 Q. Thank you.

21 So, as far as the Defensoría is concerned, I
22 think we can agree that the two-month period in which

1 to investigate and respond to the complaint would
2 have expired on the 20th of September, 2010.

3 A. Indeed, if we consider the original date of
4 the request, the period would have lapsed on the 20th
5 of September.

6 Q. And there was no outcome within this period
7 in this case, was there?

8 A. No. In this case, the Defensoría did not
9 finalize its general investigation, because one of
10 the conditions of the Defensoría to suspend its
11 actions is that they be outstanding judicial case or
12 a case that is presented to the courts, and there was
13 a criminal case in this instance, which meant that we
14 have to abstain from conducting the investigation and
15 concluding it.

16 Q. Right. But I understand that that wasn't
17 until much later.

18 A. Much later than the two months, you mean?

19 Q. Yes.

20 A. Yes. It was after the two months, yes.

21 Q. I think you say in your Witness
22 Statement--your First Witness Statement at Paragraph

1 28, that the notification of suspension of the
2 Defensoría's investigation was not sent to Mr.
3 Bucelato, whom you refer to as the complainant, until
4 the 28th of February, 2011?

5 We can look at that, if you like. That's
6 your First Witness Statement at Paragraph 28.

7 A. Yes, if you'll give me a moment, please.

8 What I say in this Paragraph 28 is that we
9 informed the complainant--in this case, Mr.
10 Bucelato--that the investigation was being suspended.

11 Q. So, this two-month period was extended, then?

12 A. Yes. In this case, and in many other cases,
13 the Defensoría finds that the two-month period is
14 insufficient and, therefore, it is extended until one
15 can hopefully reach the truth of events; and
16 otherwise, the necessary corrective measures are
17 adopted during that period.

18 But it's a two-month period that even the
19 judicial tribunals say that it is valid to seek an
20 extension of that period.

21 Q. Thank you.

22 There's no evidence of this extension having

1 been sought or granted in the papers that you've
2 given us in this Arbitration, is there?

3 A. It's not--there's no written request for the
4 extension. It's an institutional practice that, as
5 the formalities continue, and--if the Defensoría de
6 los Habitantes doesn't receive the document, then the
7 period is automatically extended.

8 Q. Coming back to the Defensoría's role in
9 transmitting the complaints that they receive to the
10 various authorities involved--I just want to make
11 sure I'm clear on the process.

12 We've already agreed that the
13 Defensoría--not you--received Mr. Bucelato's
14 complaint on the 20th of July, 2010, and it was
15 transferred to your department--I think that's the
16 directorate for the quality of life--sometime to the
17 prior to the 7th of the August, 2010, when your
18 colleague, Ms. Alejandra Vega, sent the initial
19 letters to the TAA, the Municipality of Parrita,
20 SETENA, and SINAC; is that right?

21 A. It is correct. Ms. Alejandra Vega, to who I
22 assigned the research and the investigation,

1 requested the transfer of request for information to
2 the different institutions; and as the director, I
3 verified those requests. This is the normal action
4 of the Defensoría de los Habitantes; it's how we
5 proceed usually.

6 Q. Thank you.

7 I'd like to look briefly at Tab 16 of the
8 bundle you have in front of me, so that's the
9 Defensoría's letter to the Municipality of Parrita.
10 And that's dated 7th of August, 2010.

11 And you can see, if you look at the top, the
12 date, 7th of August, 2010. And it's addressed to--I
13 believe that's the mayor at the time of the
14 Municipality. It's from you, and it's copied to Mr.
15 Steve Allen Bucelato. Do you see that?

16 A. Yes.

17 Q. And what you're doing here is you're
18 notifying the mayor, as was your duty, of the
19 contents of Mr. Bucelato's complaint. And we can see
20 that from the third paragraph on the first page
21 through to the end of that page, where you
22 essentially summarize the basis of the complaint

1 that's been made; is that right?

2 A. That's correct.

3 Q. And you note towards the bottom of that
4 page--I think it's the penultimate paragraph--that
5 Mr. Bucelato had presented a complaint approximately
6 three weeks earlier to the Municipality, and that it
7 was received by Ms. Mónica Vargas; but that as of the
8 date of your letter, she had not received a response.

9 Do you see that?

10 A. Yes, that's correct.

11 Q. So, at this point, your colleague, Ms. Vega,
12 who was in charge of the day-to-day aspects of this
13 file, if I understand correctly, she had spoken to
14 Ms. Vargas about the complaint.

15 A. No, that's not correct. In this case, Ms.
16 Vega was conveying the facts of which Mr. Bucelato
17 had personally reported in the Defensoría de los
18 Habitantes when he filed his claim.

19 The director to my office hadn't yet taken
20 any action. All we're doing is conveying--it's to
21 convey to the institutions the complaint as submitted
22 by Mr. Bucelato.

1 Q. Okay. Well, let's just look briefly at Mr.
2 Bucelato's complaint to the Defensoría, which is at
3 Tab 14 of the bundle in front of you, and that's
4 R-40. And I'd just like you to look through this
5 document.

6 I don't see any mention of Mónica Vargas in
7 here, do you?

8 A. No, ma'am.

9 Q. So, in your letter of the 7th of August,
10 which is the first communication from the Defensoría
11 to the Municipality, which, according to you, just
12 sets out the basis of Mr. Bucelato's complaint based
13 on that complaint, there's a specific reference to
14 Ms. Vargas having received it.

15 A. Well, if you know about the process--and
16 here, I'm referring to the process within the
17 Defensoría and how complaints are processed--Mr.
18 Bucelato personally goes to the Defensoría to file
19 his complaint.

20 What does the civil servant do, the one
21 receiving that complaint, and what Mr. Bucelato is
22 complaining about? They listen to him, they hear

1 him. And that is what we are conveying in our report
2 to the institutions.

3 To, that report, we attach the documents
4 left by Mr. Bucelato's evidence. He's alleging two
5 things. He says two things at first. First, there
6 might be a violation to the response that the
7 complaints were filed by the neighbors; and second,
8 potential damages caused in the region through
9 construction and other works.

10 What we do in this case, then, what the
11 admissibility professional does at the Defensoría,
12 what that person wrote down about the complaint at
13 that time; and then the person to bring in the
14 evidentiary documents. Then he brings these
15 documents, and these are the ones that, together with
16 the report, we convey to the other authorities or
17 institutions.

18 Q. Thank you.

19 So, when you convey to the other authorities
20 or institutions, you convey more than just the
21 content of the complaint.

22 A. We convey both the content--it might be an

1 oral or telephone complaint, because we also receive
2 complaints by fax, by phone, verbally, orally,
3 et cetera.

4 Plus, the evidentiary documents that the
5 person attaches to the complaint that they're filing
6 with the institution. All of this is to ensure that
7 the public institution may see the context of the
8 complaint filed by the neighbor.

9 In this case, what it further indicates is
10 that no response had been received concerning the
11 situation.

12 Q. Thank you.

13 I'd like to turn back to Tab 16 now, and
14 that's your Defensoría letter to the Municipality of
15 the 7th of August 2010 that we were just looking at.
16 And if we can just look at the second page, at the
17 very top.

18 I think we see that you notify the mayor
19 that Mr. Bucelato's complaint has been admitted. And
20 you go on to request a response to the allegations
21 contained in the complaint within five working days.
22 I think your exact words are--sorry. I'm translating

1 from the Spanish, so--I'll let you tell me what your
2 exact words are. But I understand it to mean that
3 you're requesting that the Municipality remit to this
4 institution--and by "this institution," you mean the
5 Defensoría--the corresponding report; is that
6 correct?

7 A. Yes, indeed. What we're doing in this
8 paragraph is refer to what is provided in Article 20
9 of the Defensoría law, where it says that the civil
10 servant has five business days to send the report
11 that is being requested by the Defensoría.

12 Q. Thank you.

13 And if we go on, we see that that's not all
14 that you ask the Municipality, is it? You--you state
15 that aside from referring to the acts that make up
16 the aforementioned complaint, your account should
17 contain the corresponding proofs and details of the
18 following.

19 And then you go on to list five separate
20 points, and I think you can see them numbered 1 to 5
21 in the letter.

22 Do you see that?

1 A. Yes, I see it.

2 Q. Now I'd like to look at Tab 17, which is just
3 the next tab along in the binder. And this is your
4 letter of the same date to SETENA. And the letter is
5 in your name again, and it's copied, again, to Mr.
6 Bucelato.

7 Do you have that?

8 A. Yes, I see it.

9 Q. And, again, you're notifying SETENA this
10 time, as was your GC, of the contents of
11 Mr. Bucelato's complaint. And here, you've set out,
12 actually, in--in full, I believe, the complaint that
13 he made in bold; is that correct?

14 A. If you just allow me a moment to look at the
15 document.

16 Q. Yes, of course. Take your time.

17 A. Incomplete, and why incomplete?

18 Q. I'm sorry. Perhaps you misunderstood my
19 question, and that might be my fault; it was rather a
20 long one.

21 All I want to ask you is: This is
22 essentially you doing exactly the same thing to

1 SETENA as you did to the Municipality in the letter
2 we just looked at. You're transmitting the complaint
3 to them.

4 A. Yes, correct. We're conveying the complaint
5 to each institution, depending on their competences.
6 For each institution, we have a series of questions
7 that we ask, things that we need to know based on the
8 institutional competences of each of the
9 institutions, because, after all, they don't have the
10 same.

11 Q. Thank you.

12 And then just on the second page at the top,
13 I can see that, again, you inform SETENA that the
14 complaint has been admitted by the Defensoría, and
15 you request a response within five working days.

16 And then you go on to list, this time, three
17 items that you would like SETENA to address.

18 Do you see that?

19 A. Yes, I see it.

20 Q. Thank you.

21 Now, if we could just turn to Tab 18. And
22 this, again, is dated the 7th of August, 2010, is the

1 same letter, and it's to the TAA. Again, a copy to
2 Mr. Bucelato. And this is you doing the same thing
3 again.

4 The only difference here, I believe, is that
5 you--you simply ask the TAA whether they're already
6 aware of the complaint and what actions they've
7 taken; is that correct?

8 A. Yes, it is correct.

9 Q. Okay. And finally, very quickly, I'd just
10 like to look at your letter to SINAC, which was also
11 cc'd to Mr. Bucelato. Unlike the other letters, this
12 is dated the 9th of December 2010, and that's at
13 Tab 28.

14 Do you have that? Tab 28.

15 A. Yes, I do have it.

16 Q. This isn't the first letter that the
17 Defensoría sends to SINAC about this complaint, is
18 it?

19 A. No, it's not the case.

20 Q. So--I don't believe we have an earlier letter
21 on record, so, if you could just point me to that.

22 A. No. What we have, you can see in the second

1 page. It's a paragraph where it says, "According to
2 our conversation with Mrs. Alejandra Vega on 9
3 December, please refer to a copy of the technical
4 report carried out in the area."

5 What does this mean? It means by law, we
6 can do all the necessary procedures that we require,
7 formal and informal, for the investigation process,
8 which means that Mrs. Vega communicated with this
9 official, asking or requesting to find out if an
10 inspection had been made in the area. That official
11 says that it has, and--she says--oh, he says ask for
12 me--ask for it in writing and then this way we will
13 tell you. You see that is where this document
14 arises, this document.

15 Q. Thank you.

16 So, you formulate your questions to the
17 different institutions, I think you said a little bit
18 earlier, based on their different competencies?

19 A. Yes. That is the case, depending on what we
20 want to investigate. And based on the specific work
21 or duties of each institution regarding the case
22 we're working on.

1 Q. So, for example, you'd ask the Municipality
2 about construction permits and SETENA about an
3 Environmental Viability.

4 A. Yes. That was the case, as you can see from
5 the way we conveyed this.

6 Q. Now, you touched a little bit earlier on the
7 admissibility process for complaints, and you mention
8 it in your First Witness Statement. If I've
9 understood you correctly, that's not something you
10 had anything to do with.

11 A. In effect. It is an independent process of
12 the Defensoría, which what it tries to do is to
13 channel all complaints that are received
14 continuously.

15 Q. Thank you.

16 I'd just like to look at the Notice of
17 Admissibility, which is appended to your First
18 Witness Statement. So, you'll find that at Tab 15,
19 and that's R-43 for anyone else.

20 So, we can see that this is dated the 23rd
21 of July 2010, three days after the complaint was
22 filed. And the Notice summarizes the content of the

1 complaint as it was received; correct?

2 A. Yes, that is correct.

3 Q. And then at the bottom of the page, we can
4 see that after having analyzed the complaint, the
5 director of admissibility resolves to admit the
6 complaint. That's the penultimate paragraph on the
7 first page.

8 Do you see that?

9 A. Yes, I do see it.

10 Q. The notice doesn't explain the admissibility
11 criteria or how those criteria were applied, though,
12 does it?

13 A. No, that is not the case.

14 Actually, if you look at the law of the
15 Defensoría, it states that the Defensoría must
16 receive complaints received by all--or presented by
17 all inhabitants of the country. It only provides
18 exceptions for specific cases that have to do with
19 actions that may be before the judicial branch and
20 with questions having to do with private--the private
21 sphere, as well as topics having to do with election
22 subjects or decisions that should be taken by a judge

1 of the Republic.

2 Apart from that, all complaints initially
3 must be admitted. What we have done is actually to
4 regulate this process through an internal manual that
5 we have.

6 Q. Okay. So, aside from those specific
7 exceptions that you just referenced, the
8 admissibility process is essentially a bit of a
9 formality?

10 A. Well, it's not a formality, because it is a
11 process that allows the Defensoría to do a number of
12 things. It can find out what are the main violations
13 that are being complained about. It allows it to
14 give an immediate response to the person about who
15 will be receiving his or her complaint, before whom
16 the person can request information, and also the
17 administrative--internal administrative processes
18 begin, which is also under a number of regulations
19 and that allows us to report on that process.

20 Q. I appreciate that obviously when--what you're
21 saying is that when a complaint is admitted, there
22 are a number of processes or procedures that flow

1 from that, and you've just described them.

2 But what I'm asking you is, in terms of the
3 decision to admit a complaint, unless it falls within
4 those limited exceptions that you mentioned earlier,
5 it is, essentially, a formality.

6 A. Well, I don't have the power to refer to
7 that. It would be the advocate who would--this is a
8 personal decision, where this is delegated to the
9 office or director of admissibility, who's the only
10 one who can admit the complaint themselves.

11 Q. Okay. So, we have no way of testing that
12 with you or by reference to this notice of
13 admissibility.

14 A. That's correct.

15 Q. Now, we just talked a little bit earlier
16 about how Mr. Bucelato's complaint was received on
17 the 20th of July 2010. I just want to look again at
18 the complaint in a little bit more detail, and that
19 was at Tab 14, R-40.

20 And I'd just like you to look at the
21 signature block, where it says, "Muchas gracias," and
22 it's signed by "Los"--excuse my pronunciation--"Los

1 Vecinos de Esterillos Oeste e," the Neighbors of the
2 City of Oeste .

3 A. Yes, in effect.

4 Q. There are around a dozen signatures
5 underneath that?

6 A. Yes. 12 signatures, yes.

7 Q. And those signatures don't include
8 Mr. Bucelato, do they?

9 A. In effect, they do not include that name.

10 Q. But all of your letters that we've just
11 looked at sent on the 7th of August 2010 and the one
12 on the 9th of December 2010, they're all copied to
13 him.

14 A. Yes, that is the case.

15 I would like to remind you that who came to
16 the Defensoría to bring the complaint. It was
17 Mr. Bucelato. And what he brings are the different
18 steps that the community had taken that have not
19 received the reply; but in addition, he brings before
20 the Defensoría an alleged environmental damage.

21 So, our obligation is to determine if this
22 was happening or not.

1 Q. So, there are interactions between the
2 Defensoría and Mr. Bucelato that are not recorded in
3 the documents.

4 A. Well, the first interaction is recorded. We
5 have a system at the Defensoría that records these
6 first interventions, which is when he came to bring
7 the complaint. That is recorded.

8 And then any other intervention that
9 happened within the administrative file of the
10 Defensoría would--could have been when he came with a
11 neighbor and wanted to consult to see where his file
12 was. Well, there, there will also be a note in the
13 file that states this person came to consult on his
14 affair.

15 Q. Well, we haven't seen any notes in any files.
16 So, are there such notes? And if so, where are they?

17 A. The administrative file of the Defensoría may
18 include margin notes--that is, the physical file
19 includes this margin notes, where the professional in
20 charge of the investigation brings--or has a
21 chronology of the actions taken. So, that when the
22 case is seen--well, it is something independent. The

1 professional is carrying out an investigation, and
2 that investigation, which we, and I as the director,
3 also must respect, generates a number of actions that
4 the person himself or herself will take note of as
5 formal or informal actions.

6 Q. And did you provide these physical files to
7 Respondent's counsel in this Arbitration?

8 A. Well, the files of the Defensoría are public.
9 Anyone can have access to these files. There's no
10 secret there.

11 (Overlapping interpreter channel with
12 speaker.)

13 BY MS. WOODS:

14 Q. I'm sorry. I just said that would include
15 the notes that you were referring to, the notes in
16 the margin, I think you said.

17 A. Yes. These are notes that are in paper and
18 pencil, saying: I called so-and-so. This person did
19 not answer. I did such and such. There was no
20 answer. These are the notes that any professional
21 does during an investigation. But this is perfectly
22 normal. It's normally--that is normally in any file,

1 and in this case, it is in the Defensoría's file.

2 Q. I'm just going to ask you my question again.
3 Did you provide these physical files to the
4 Respondent's counsel?

5 A. We supplied the information to the Ministry
6 of Foreign Trade, which is the one that has led this
7 process of Costa Rican institutionalization, and they,
8 through the Ministry--

9 THE INTERPRETER: Can you go a bit slower,
10 please?

11 THE WITNESS: Yes. And they, through the
12 Ministry, had access to the document.

13 BY MS. WOODS:

14 Q. Is that COMEX you're referring to?

15 A. Yes, in effect.

16 Q. And that's the files, the file--the physical
17 files themselves, the documents? You gave them to
18 COMEX?

19 A. Well, a certified copy of the administrative
20 file was given, the file that is at the Defensoría.

21 Q. The one that you just said had all of those
22 notes in the margin?

1 A. Well, let's see. What I'm trying to say
2 here--maybe, if I may, I may elaborate on this
3 explanation, what I'm indicating is that in the
4 investigation that the advocate's investigator does,
5 it's very likely that within the investigation, in
6 his or her documents, she takes notes. If one day he
7 called someone, if that person did not answer, that
8 must be--so, if he took notes on the margin, they
9 must be there.

10 This is not something that I need to follow
11 up on, if he did or--if he did take notes within the
12 file or not. That file--that is, the person may work
13 on it. He may generate those notes that will allow
14 him to then find documents and resolve issues more
15 easily.

16 Q. Perhaps you misunderstood my question. I
17 wasn't asking if you followed up with other people
18 within Defensoría to see if they took notes and put
19 them on the file.

20 I was asking you if the file that you
21 referred to earlier that would contain these notes
22 was given to COMEX or the Respondent's counsel in

1 this Arbitration.

2 A. The administrative file was provided. That
3 is, a copy was provided, in effect.

4 Q. Turning back to--

5 PRESIDENT SIQUEIROS: If I may, let me just
6 clarify because I've been listening to both the
7 question and the answer, and I think there might be a
8 misunderstanding. I'll address the question in
9 Spanish.

10 The question is: If the file with notes on
11 the margin was provided, this would presuppose that
12 the file includes certain notes; however, from what I
13 understand from what has been said here, it's not
14 that necessarily that file had notes.

15 So, if that file had no notes on the margin,
16 that must be clarified to the attorney, because she
17 has the impression that you stated that there were
18 notes on the margin in this file.

19 So, it wasn't quite clear if the notes were
20 there or not, and if your comments make reference to
21 this specific file or that once in a while files have
22 notes.

1 THE WITNESS: Thank you very much for that
2 clarification. In effect, I will try to then reply
3 in greater detail.

4 The administrative file, of which a
5 professional is in charge in general, that as a whole
6 was photocopied, provided, and certified and given to
7 COMEX.

8 However, if that file--I'm not saying that
9 that file specifically had notes. I'm saying that if
10 there had been--were notes there that the
11 professional put down in the file, they would be
12 there. I'm not saying that I reviewed it and that I
13 can suggest, in effect, the file had notes in the
14 margin. What I'm saying is that if the file did have
15 notes, they would be there. They're not put anywhere
16 else.

17 MS. WOODS: Thank you, sir.

18 BY MS. WOODS:

19 Q. So, if we were to proceed for a second on the
20 basis that perhaps there are no notes relating to
21 conversations with Mr. Bucelato in the file, because
22 we haven't seen any, how did you know to write and

1 copy to Mr. Bucelato on the 7th August, 2010, when
2 he's nowhere to be found on this complaint?

3 A. Well, I repeat that Mr. Bucelato was a person
4 who appeared at the Defensoría to present the main
5 complaint.

6 The first thing we ask a person when they
7 come to bring a complaint is that they leave their
8 address where we can communicate with him.

9 Otherwise, how can he find out about the stage of the
10 process? That's what Mr. Bucelato did; and from then
11 on, our legal obligation is to send him a copy of all
12 interventions that we do, of all actions carried out.

13 Q. And if we can just look at the body of this
14 complaint, it's largely about the existence of a
15 supposed wetland at Las Olas that was allegedly
16 impacting wetlands through an illegal construction;
17 is that correct?

18 A. Yes, in effect, that is one thing; the other,
19 the possible floods that had happened in some houses
20 in the area. And in one way or the other, they're
21 asking the--the institution make a decision on that.

22 Q. Thank you.

1 Now, at Paragraph 22 of your First Witness
2 Statement, you also mention that the Defensoría
3 received a note signed by several neighbors of the
4 project on the 23rd of November, 2010.

5 I can take you to your Witness Statement, if
6 you like, but it might be easier to just go straight
7 to the document that I'm talking about, which is at
8 Tab 24.

9 So, we can see that this is addressed to
10 SINAC, and it's on the headed paper of the San José
11 law firm called "Jimenez" (in Spanish, [y
12 Asociados]); is that correct?

13 A. Yes, it is correct.

14 Q. And the date of this letter is the 18th of
15 November, 2010, almost four months after Mr.
16 Bucelato's initial complaint.

17 A. That's correct.

18 Q. And this time, the group of individuals that
19 signed this included Mr. Bucelato.

20 Do you see that?

21 A. Yes. It is the last name there.

22 Q. And if you look at the first name, Franklin

1 Carmiol, do you know who he is?

2 A. No, I don't.

3 Q. And Rosemary Chamberlain, who's the third
4 name on the list, have you ever met or spoken with
5 her?

6 A. I've not spoken to any of the people who are
7 in this list. Never.

8 Q. And if you go to the bottom of the letter,
9 you can see that the Defensoría, SETENA, the legal
10 department of the Ministry of Environment, and the
11 Environmental prosecutor, are all copied.

12 Do you see that?

13 A. Yes, in effect, I see it here, the copy to
14 each one of these institutions.

15 Q. Now, I'm afraid we don't have an English
16 translation of this document, so, for the purposes of
17 the transcript, I'm just going to ask you to read
18 from where it says "Nosotros" all the way to the end,
19 where it says, "David Aven," please, if you would.

20 A. Okay. We--the signatories, we come before
21 you for your good offices to request if the attached
22 document that makes reference to the following:

1 "SINAC Report 67389RNVS-2008, National Wildlife
2 Refuge Area of Conservation, Esterillos Oeste."

3 It is an official and valid report or
4 document given that the signature of the people who
5 sign it show great questions, especially--or after
6 having consulted biologist Gabriel Quesada Avendaño,
7 who indicated categorically that it is not his
8 signature and he has never issued said report, and
9 the signature of Mr. Ronald Vargas Brenes, comparing
10 it with the signature on other documents, does not
11 appear--seem to be his signature, closed parentheses,
12 as well as the numbering of the report and the type
13 of report--

14 (Overlapping speakers.)

15 THE WITNESS: We believe it is not
16 consistent with the sequence--the numerical sequence
17 of SINAC.

18 And finally, as far--in addition, and as far
19 as we know, there is no regional office in Esterillos
20 Oeste. This alleged Report that we attached has been
21 the basis for SETENA granting an Environmental
22 Viability to the residential condominium project, Las

1 Olas, Administrative File Number DI-1362-2007-SETENA
2 on behalf of Cotsco--Inversiones Cotsco C & T, S.A.,
3 represented by Mr. David Aven.

4 BY MS. WOODS:

5 Q. Now, I'm sure you've heard in the context of
6 this Arbitration about an allegedly forged document.
7 This complaint is about that document; right?

8 A. Yes. In effect, this complaint refers to
9 that.

10 Q. There's no mention of flooding or alleged
11 wetlands or illegal construction.

12 A. In effect, that is not mentioned.

13 Q. And on the basis of this complaint, you
14 immediately wrote to SINAC, requesting an
15 explanation?

16 A. Yes, that is the case. We must bear in mind
17 that we have an investigation that has been opened
18 for which require all the elements that will allow us
19 to determine if there is others--there is no
20 irregularity by the administration.

21 In this case, this matter, on--to which this
22 document refers, is related to the investigation that

1 we were carrying out.

2 For us, it was important to find out if the
3 administration was aware of what the inhabitants told
4 them and what actions had been taken.

5 Q. So, if I've understood you correctly, you say
6 this was related to your investigation. You viewed
7 this complaint as part of the same investigation that
8 you were already conducting?

9 A. Yes, that is the case.

10 Q. Even though the subject matter is completely
11 different?

12 A. In an investigation related to any human
13 right, we can find a whole breadth of interrelated
14 subjects.

15 In this case, environmental--in the
16 environmental area, we have to see what the
17 inhabitant asks and what is the relationship that can
18 be generated on the basis of the investigation.

19 In this case, they let us know about the
20 fact that there is an administrative complaint; and
21 what we ask is, was this complaint admitted or not?
22 Do we need to consider it in our investigation in

1 doing the substantive analysis, or do we not consider
2 it, or is it something different?

3 Q. I think you mention in your First Witness
4 Statement that you have a Master's in Environmental
5 Law; is that correct?

6 A. Yes, that is correct.

7 Q. But your main professional experience has
8 been in administrative law issues.

9 A. Yes, I do have experience in administrative
10 law and governance and human rights, and subjects
11 also relating to environmental law.

12 Q. I see from your personal website or blog that
13 you take a particular interest in human rights.

14 A. Yes. I am a university professor of human
15 rights.

16 Q. Is that what drew you to the Defensoría or is
17 it, perhaps, the other way around; that as a result
18 of that career focus, you became more interested in
19 those sorts of issues?

20 A. Well, actually, I became--I went into the
21 Defensoría because I was really fascinated by the
22 idea of improving Costa Rican institutional; and

1 once I found out about human rights, as happens to
2 most of us, it's impossible not to fall in love with
3 that.

4 Q. And the fact that the Defensoría's role, as
5 you described, is to ensure the proper functioning of
6 the different public institutions and to make sure
7 that they're adjusted for legality, morality, and
8 justice, that's--that's important to you?

9 A. Yes. In effect, that is the essence of the
10 actions of the Defensoría and of mine as an official
11 there.

12 Q. And the Defensoría essentially does that by
13 keeping an independent watch over the various public
14 institutions and passing recommendations to improve
15 their compliance with Costa Rican law; correct?

16 A. That is correct, on that basis and on the
17 basis of the other work the Defensoría does, which
18 has to do with education regarding human rights.

19 Q. You described the Defensoría as a court of
20 conscience in Costa Rica. By that, do you mean that
21 it exists to hold institutions to account on behalf
22 of Costa Rican citizens and other citizens in Costa

1 Rica?

2 A. Well, I would like to clarify that I do
3 not--I'm not the author of that description. The
4 Defensoría is a kind of ombudsperson. What they do
5 is do mediation. They are a channel to improve
6 relationship between public administration and people
7 in general.

8 Q. And that's because it's important that public
9 authorities comply with their legal obligations and
10 that citizens' rights are respected.

11 A. Yes, that is the case. In effect, the center
12 of the actions of public administration are people
13 and the protection of their rights.

14 Q. So, when individuals are dealt with by State
15 entities in a capricious way, that could have
16 negative consequences. That's something that you
17 would try and avoid.

18 A. I didn't quite understand your question.
19 Maybe if you could rephrase it.

20 Q. When individuals are dealt with by State
21 entities or public institutions in a poor way, a
22 capricious fashion, that can have negative

1 consequences for those individuals. You would agree
2 with that?

3 A. Yes. If I understand what you're trying to
4 say, is that the action of administration is--is
5 incorrect or does not comply with the law, that will
6 have an impact on people's rights. Of course, it
7 will.

8 Q. So, if bribery were allowed to go
9 unchallenged, for example, that would pose a serious
10 risk and threat to a transparent and predictable
11 environment?

12 A. Yes. Bribery is a crime. It is a crime and,
13 as such, it has to be punished. And, of course, it
14 has to be denounced.

15 Q. So it's important that as part of a stable
16 and predictable regulatory environment, each State
17 institution does what it it's intended to do.

18 COURT REPORTER: I'm sorry. I didn't hear
19 the interpretation. Please repeat.

20 BY MS. WOODS:

21 Q. I just asked you--

22 MS. WOODS: Are you getting that?

1 BY MS. WOODS:

2 Q. I just asked whether it's important that as
3 part of a stable and predictable regulatory
4 environment each State institution does what it's
5 intended to do.

6 A. Yes. That is called governance, that every
7 institution complies with its role, the role that
8 corresponds to it.

9 Q. So that is that institutions must respect the
10 limits of their jurisdiction, their authority?

11 A. The institutions should act within the limits
12 of their competencies.

13 Q. And as we've already discussed, your
14 knowledge of the different responsibilities of the
15 various institutions--SINAC, SETENA, the TAA,
16 MINAE--shaped the questions that you asked each of
17 them in your letters of the 7th of August 2010?

18 A. Those questions were the questions that were
19 proposed by the professional that was investigating
20 the case and that this director had endorsed.
21 Because they were part of the investigation, and it
22 was the strategy of the investigation that the

1 professional had with regard to the case.

2 Q. Presumably, you endorsed those questions
3 because you agreed with them. So, for you it was
4 logical to ask SETENA about the Environmental
5 Viability and, for example, the Municipality about
6 the existence of construction permits. You were
7 recognizing the limits of each of those institutions'
8 remit and authority.

9 A. The questions that are initially posed if you
10 look at what was forwarded from the Ombudsman--well,
11 first, it's "Tell me everything you know about this
12 case." And then there are questions that for us as
13 investigators are important in many cases to
14 actually--in addition to everything they can tell us,
15 well, to ask them guiding questions, and those are
16 the questions that we pose.

17 Q. Right. And I think this is just quite a
18 simple question, and I don't think we'll disagree.

19 But you used your knowledge of the various
20 institutions' different roles within the Costa Rican
21 government to inform how those questions were put.

22 So, Ms. Vega said to you, "I'm going to

1 write this letter to SETENA, and I'm going to ask
2 them about an Environmental Viability." And that
3 seemed sensible to you because that's what SETENA
4 deals with?

5 A. Indeed. The questions that were posed were
6 endorsed.

7 Q. Are you aware of a SETENA resolution dated
8 the 1st of September 2010 that relates to the Las
9 Olas case?

10 A. Is it a document that is in this file?

11 Q. Yes, it is. I was just asking if you were
12 aware of its existence.

13 A. We transmitted documents to SETENA about the
14 case, and then they forwarded us to--forwarded us a
15 report where the secretary had indicated that they
16 were going to make an inspection. They send us a
17 report that was done in the area. I don't know if
18 you are referring to that report.

19 Q. No, I wasn't. Let's turn to Tab 44. Do you
20 have that? So, this is a SETENA resolution. And you
21 can see in the heading it's dated the 1st of
22 September 2010. And I imagine this is what--in terms

1 of the form, this is what most SETENA resolutions
2 look like.

3 If you just glance down the page under the
4 first heading, "Resultando," which I think means
5 "whereas," the sixth item in that list. And you will
6 say it says "sexto." If you would just read that out
7 for the transcript, please.

8 A. "6: On 13 August 2010, Letter Number
9 08949-2010-DHR is received by which the Ombudsman
10 forwards an environmental complaint to the
11 Secretariat against the Las Olas residential
12 horizontal condominium project, Administrative File
13 Number D1-1362-2007-SETENA, filed by Mr. Steven Allen
14 Bucelato, resident of the area of the Project due to
15 the impact on the wetlands and lakes in the area as
16 well as the vegetation in the place because there was
17 land that was filled and also the trees on the site
18 were cut."

19 Q. That's a reference to your letter of the 7th
20 of August 2010 to SETENA; correct?

21 A. Yes. SETENA refers to the request for the
22 report that we had sent to SETENA.

1 Q. And if you could just turn over to page 5 of
2 that resolution, please, and you'll note this is now
3 the substantive section of the resolution where the
4 Plenary Commission resolves. And if you could just
5 read Item 1 which is "Primerero."

6 A. "First, the complaint filed by Mr. Steve
7 Allen Bucelato has been dismissed. Mr. Bucelato is a
8 resident of Esterillos Oeste. This has been
9 dismissed because it's considered that in the area of
10 the Project there are no movements of soil nor was
11 there evidence that there were bodies of water,
12 lakes, or wetlands in the area of the Project or in
13 the areas that are adjacent to it."

14 Shall I continue?

15 Q. If you could just turn over the page. And on
16 the next page there's Item 6. If you could just read
17 that one out loud.

18 A. "6. Notified the Office of the Ombudsman
19 with respect to Letter Number 08949-2010-DHR.

20 Q. So here the SETENA Plenary Commission
21 resolves, amongst other things, to dismiss
22 Mr. Bucelato' 20th of July 2010 complaint on the

1 basis that there's no evidence of land movement,
2 bodies of waters, lakes, or wetlands on the site?

3 A. Yes. In keeping with the resolution that you
4 have mentioned, yes.

5 Q. You don't mention this resolution in either
6 of your witness statements. Presumably, you received
7 it at the time, though.

8 A. Let me see. Let's recall. What we had at
9 the Office of the Ombudsman was an open
10 investigation, an investigation that was closed
11 because there was a suspension, what we call a
12 suspension because there's a pending judicial
13 proceeding. So, we don't go in to look at the
14 analysis of the proof. In other words, this has been
15 suspended.

16 Q. I asked you if you had received the letter
17 the--sorry, the resolution. It clearly says at Item
18 6, as we just saw, that SETENA was resolving that you
19 be informed at the Defensoría of the contents of the
20 resolution. Did you receive the resolution at the
21 time?

22 A. No. In the file of the Ombudsman what we

1 have is the notification that the--that SETENA makes
2 where they send us the inspection done in the field.
3 But--perhaps later, yes. We were notified but not at
4 that point.

5 Q. That's interesting because you seem to have
6 received other communications from SETENA. But we'll
7 move on.

8 I just want to ask you whether you'd agree
9 with me that for the purposes of an investigation,
10 such as the one that you knew that was ongoing into
11 potential wetlands and unlawful construction at Las
12 Olas, this would have been a significant document.

13 Because here it shows SETENA, the agency
14 with jurisdiction over Environmental Viability
15 permits, dismissing Mr. Bucelato's complaint on the
16 basis of a lack of evidence.

17 A. At this time I don't have the competence or
18 am I authorized to refer to this for the following
19 reason, the investigation of the Ombudsman's Office
20 is suspended. It's not closed.

21 So the Ombudsman's Office--when the judicial
22 proceedings finalize, we could take this up again at

1 the administrative level. So I cannot issue an
2 opinion about this. I am not the Director of Quality
3 of Life now, and I don't have the competence to refer
4 to these matters.

5 Q. Perhaps I could ask you in a slightly
6 different way. In your--so not in your capacity as
7 Director of Quality of Life. As someone with
8 experience working in government institutions and
9 with a vast knowledge of how these different
10 institutions interact, would you not agree with me
11 that a resolution from SETENA, the agency that has
12 jurisdiction over Environmental Viability permits,
13 dismissing in its entirety a claim about wetlands
14 made by Mr. Bucelato, the very same claim that was
15 the subject of the Defensoria's ongoing
16 investigations and multiple other
17 investigations--would you not agree that that is
18 significant?

19 A. I am here to refer the facts that relate to
20 me in the investigation. I think everything else is
21 speculation.

22 : I would ask the Tribunal if you have to

1 answer the question that has to do with technical
2 criteria and that don't have to do with the file.

3 PRESIDENT SIQUEIROS: It seems that the
4 witness statement you gave is with respect to the
5 facts. The cross-examination should refer to, of
6 course, the facts.

7 MS. WOODS: I have no further questions.
8 Thank you.

9 PRESIDENT SIQUEIROS: Mr. Leathley.

10 MR. LEATHLEY: No. We have no further
11 questions. Thank you.

12 QUESTIONS FROM THE TRIBUNAL

13 PRESIDENT SIQUEIROS: Pedro?

14 ARBITRATOR NIKKEN: I have a question,
15 Ms. Díaz. Throughout this did you receive any
16 pressure from any political or social sector to lean
17 one way or another, or did the Ombudsman not have to
18 defend itself from any undue interference?

19 THE WITNESS: Well, this case was a very
20 fluid case with regard to its processing. We weren't
21 pressured by anyone. We began it. We asked for the
22 reports. We were sent the information. And we

1 suspended it when we found out that there was pending
2 judicial proceedings, but there was no problem with
3 the ordinary processing of the case.

4 PRESIDENT SIQUEIROS: Mr. Baker.

5 ARBITRATOR BAKER: Is there anything in the
6 investigation, to your knowledge as the Ombudsman in
7 this case, that is different from the way you would
8 have treated any other environmental complaint?

9 THE WITNESS: No, sir. This is a typical
10 case of environmental complaints that are received.
11 There is usually community participation. People
12 complain about issues that is really their belief
13 about what's happening, and we don't find anything
14 really in particular about this case that's
15 different.

16 ARBITRATOR BAKER: Let me see if I
17 understand. Is it the pendency of the criminal
18 matter itself that deprives the Defensoria of its
19 ability to act? Is that your testimony?

20 THE WITNESS: Yes, sir, in as much as our
21 law hinders us from the beginning or we have to
22 suspend as soon as we find out that there is any

1 pending legal matter. We cannot in a parallel way be
2 dealing with this matter if it is in our court
3 system.

4 ARBITRATOR BAKER: So the Defensoria doesn't
5 do anything to police or investigate complaints
6 against prosecutors or judicial officers, for
7 instance?

8 THE WITNESS: In the case of the judicial
9 branch, the competencies of the Ombudsman's
10 Office--well, if there are violations of
11 administrative regulation, yes. But not--we never
12 interfere in what is judicial--at the judicial level.

13 ARBITRATOR BAKER: So, hypothetically
14 speaking, without regard to anything that may or may
15 not have happened in this case, if a prosecutor
16 exercises his discretion to commence a criminal
17 action against someone, that has the--or always has
18 the follow-on effect of depriving you of jurisdiction
19 to do anything, even if it turns out that that
20 prosecutor was off on a frolic of his own and did not
21 bring a case in a proper way. Do I have that right?

22 THE WITNESS: I don't know if I understood

1 the question in this case. Could you repeat it,
2 please.

3 ARBITRATOR BAKER: I'll give you a silly
4 example to maybe illustrate the point.

5 Let's say that I'm a prosecutor and I decide
6 that anyone that has blond hair is automatically
7 guilty of something and so, therefore, I charge them
8 with that, which on its face is pretty silly and
9 stupid. But that would deprive you if there was an
10 ongoing complaint just because I have done that,
11 right, of jurisdiction to act?

12 THE WITNESS: Well, directly, no. What
13 could eventually happen is that we could let the
14 judicial branch know that internally that there
15 should--there should be a supervision process of
16 their own officials because that exists. Well, that
17 we--this is not our competence or jurisdiction,
18 however.

19 ARBITRATOR BAKER: Okay. So, in my crazy
20 example, the fact that the prosecutor, or I as
21 prosecutor in my example, decided to bring an action
22 for whatever reason has to be investigated only by

1 the judicial branch itself?

2 THE WITNESS: Yes. If you are analyzing the
3 action of the official, we cannot intervene. For
4 example, if there is a judicial officer--I'm going to
5 give you also a crazy example--who applies torture,
6 of course, the Office of the Ombudsman could
7 intervene to protect someone's human rights, the
8 person who might have been tortured.

9 But within the discretionality and a
10 hearing, for example, or being involved in a judicial
11 matter, we cannot intervene unless there are
12 procedural steps that we could take.

13 ARBITRATOR BAKER: Okay. Thank you.
14 Chairman, thank you.

15 PRESIDENT SIQUEIROS: Mr. Nikken, do you
16 have another question?

17 ARBITRATOR NIKKEN: Yes, there is something
18 else. I suppose that SETENA is under the
19 jurisdiction of the Ombudsman's Office.

20 THE WITNESS: Yes.

21 ARBITRATOR NIKKEN: If the proceedings have
22 been suspended at this point, when they are

1 re-established, Mr. Bucelato, could he file a
2 complaint about what SETENA decided?

3 THE WITNESS: Yes, Mr. Bucelato could
4 complain or Mr. Aven or any inhabitant.

5 ARBITRATOR NIKKEN: But since Mr. Bucelato's
6 complaint was dismissed, could he go to the
7 Ombudsman's Office and complain? When does this end?
8 That's my question.

9 THE WITNESS: Well, the first thing we try
10 to assure--well, is we want the public sector--Public
11 Administration to respond in a timely way. If
12 Mr. Bucelato complained again, he'd have to do this
13 with SETENA.

14 And SETENA would respond and say, "This
15 issue has been answered with this resolution." He
16 will go to the Ombudsman's Office. "Well, SETENA
17 said it's been resolved."

18 Well, we can say, "Yeah, it's been
19 resolved."

20 There's been no omission on the part of the
21 Public Administration. The only possibility is that
22 he could go to SETENA to reactivate the process.

1 SETENA doesn't respond. And then he goes to the
2 Ombudsman's Office and says, "My right to a response
3 is being infringed." We're getting involved because
4 of the fact that he has a right to be responded to
5 not because of the matter itself.

6 PRESIDENT SIQUEIROS: I don't have
7 questions, Ms. Díaz. You are released from this
8 examination. Thank you.

9 So being a little before 5 to 6:00, I would
10 ask the parties what they would propose for the rest
11 of the day.

12 MR. BURN: Sir, we have, of course, had a
13 discussion, Mr. Leathley, you, and I, briefly about
14 needing to finish today at 6:15. Perfectly happy to
15 begin with Mr. Martinez, if that's the preference,
16 but equally happy to begin first thing tomorrow.

17 Again, I appreciate the difficulty. If we
18 begin Mr. Martinez, it creates the overlapping
19 evening issue. But from our side, there will be no
20 issue either way.

21 PRESIDENT SIQUEIROS: Correct. For the
22 record, you mentioned that we did have a

1 conversation. Indeed, we identified that in
2 following the procedural order establishing the
3 timetable and concluding at 6:00 for this evening.
4 We could not replicate yesterday's event when we went
5 for an additional hour, a little bit over.

6 But, yes, considering that it is the turn of
7 the Respondent to cross-examine the next witness, I
8 would ask whether Respondent has a preference to
9 started today or start and conclude tomorrow morning.

10 MR. LEATHLEY: Thank you, sir. Can I just
11 consult because I'm being told something, and I
12 didn't want to interrupt listening to you. So, I'd
13 like to just--

14 PRESIDENT SIQUEIROS: Of course.

15 MR. LEATHLEY: Thank you.

16 (Pause.)

17 MR. LEATHLEY: Mr. President, I'm so sorry
18 to interrupt. And this is purely--we don't feel
19 strongly one way or the other. Just a thought,
20 though. Given the lateness of the day, it might be
21 more convenient to go all the way through in one
22 session.

1 And I know from our conversations, we're
2 also going to have to be buying flowers and wine for
3 perhaps our Reporters and Interpreters if we may
4 squeeze more out during the course of the week given
5 some other immovable milestones. So--

6 PRESIDENT SIQUEIROS: I see some smiles.

7 MR. LEATHLEY: We're entirely in your hands,
8 sir. But our only consideration--perhaps it makes
9 sense to do Mr. Martinez all in one session.

10 PRESIDENT SIQUEIROS: I think it does,
11 especially for Mr. Martinez. So, we should, if the
12 parties don't have an objection, start tomorrow.

13 MR. BURN: That's--for our side, that's
14 absolutely fine. Just one point to put on the
15 record. I think given his earlier comments today,
16 Counsel for the Respondent already owes the Court
17 Reporters bottles of wine and flowers.

18 PRESIDENT SIQUEIROS: And some flowers.

19 MR. LEATHLEY: Noted.

20 PRESIDENT SIQUEIROS: Should we then
21 commence tomorrow morning at 9:00?

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

1 PRESIDENT SIQUEIROS: Thank you.

2 Any issues before we conclude? There might
3 be some on the part of Claimants.

4 MR. BURN: Just to say, as a matter of
5 logistics, Mr. Ortiz when he is giving his expert
6 testimony will give a presentation in Spanish, and I
7 believe will--is happy to have cross-examination in
8 English. But I'm sure there will be a bit of
9 fluidity around that. But that's just to manage
10 expectations.

11 PRESIDENT SIQUEIROS: Okay. You do not have
12 an objection to that, Mr. Leathley?

13 MR. LEATHLEY: No objection. Thank you,
14 sir.

15 PRESIDENT SIQUEIROS: So the presentation
16 would be in Spanish. Cross-examination would,
17 nonetheless, be in English. Okay. Fine.

18 Don't have a problem with that?

19 ARBITRATOR BAKER: Nope.

20 PRESIDENT SIQUEIROS: That's fine.

21 (Whereupon, at 5:57 p.m., the Hearing was
22 adjourned until 9:00 a.m. 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.



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MARGIE R. DAUSTER