

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES

----- x  
 In the Matter of Arbitration :  
 Between: :  
 :  
 DAVID AVEN, et al., :  
 : UNCITRAL Case No.  
 Claimants, : UNCT/15/3  
 :  
 and :  
 :  
 THE REPUBLIC OF COSTA RICA, :  
 :  
 Respondent. :  
 ----- x Volume 6

HEARING ON JURISDICTION AND MERITS

December 9, 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:

MR. EDUARDO SIQUEIROS T., President

MR. C. MARK BAKER, Co-Arbitrator

PROF. PEDRO NIKKEN, Co-Arbitrator

ALSO PRESENT:

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Secretary to the Tribunal

MS. SUSANNE SCHWALB  
Assistant to the Tribunal

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P R O C E E D I N G S

1  
2 PRESIDENT SIQUEIROS: Are we ready to proceed?

3 Then we'll proceed with the fifth day of the  
4 Hearing in the case of David R. Aven, et al., v. the  
5 Republic of Costa Rica.

6 We will continue the examination now of Mr.  
7 Luis Ortiz, the Expert Witness that has been submitted  
8 by Claimants in respect to Costa Rican law.

9 Good morning, Mr. Ortiz.

10 THE WITNESS: Good morning.

11 PRESIDENT SIQUEIROS: You concluded yesterday  
12 your presentation with respect to the principles that  
13 you deemed fit to describe with respect to primarily  
14 Costa Rican Administrative Law. We appreciate your  
15 presentation.

16 Now we will proceed with the examination; and  
17 as I identified yesterday, there will be some questions  
18 presented to you by counsel to the Republic of Costa  
19 Rica.

20 I'm not certain whether you did yesterday  
21 confirm your report, whether that has been taken care  
22 of, which I don't recall that it did. So, perhaps



1 counsel to Claimants may simply wish to make a brief  
2 direct in this respect, to be followed by the  
3 examination of Respondent.

4 Thank you.

5 MR. BURN: Thank you, sir. You anticipate,  
6 sir, a point I had intended to raise. But thank you  
7 for that.

8 LUIS ORTIZ, CLAIMANTS' WITNESS, RESUMED

9 DIRECT EXAMINATION

10 BY MR. BURN:

11 Q. For the sake of the record, Mr. Ortiz, could  
12 you take the file to your right.

13 Now, you've already given your confirmation  
14 that you will only give truthful answers to questions  
15 and truthful evidence in these proceedings, so, we do  
16 not need to go through that. But we do need to confirm  
17 that the report that appears before you is, indeed,  
18 your Expert Report and give you the chance just to  
19 check that it is in the correct form and you have no  
20 revisions to make to it.

21 So, I'd like you--first of all, do you see the  
22 document that's at the top of that file? If you

1 just--it's a long document, I know, but if you just  
2 flick through it to check whether it appears to be a  
3 good copy of the Expert Report you submitted earlier in  
4 these Proceedings.

5 A. Yes, counsel, it is. I confirm it is my  
6 Report.

7 Q. Thank you. Do you have any changes,  
8 amendments or corrections to make?

9 A. No.

10 Q. Could you look at Page 69 of 69.

11 A. Uh-huh.

12 Q. Is that your signature?

13 A. That's my signature.

14 MR. BURN: Thank you. No further questions.

15 CROSS-EXAMINATION

16 BY MS. BOUCHENAKI:

17 Q. Good morning, Mr. Ortiz.

18 A. Good morning.

19 Q. My name is Amal Bouchenaki. I have a few  
20 questions regarding your presentation yesterday and  
21 your report.

22 So, yesterday you referred to the Concession

1 that Claimants are including as part of their  
2 investment, and you mentioned the case of Ivcher  
3 v. Perú, the Republic of Perú, the Inter-American Human  
4 Rights case.

5 That case--just to clarify, are you relying on  
6 that case because you consider that it is relevant to  
7 the assessment of the ownership of the Claimants in  
8 relation to the Concession or the legality of their  
9 ownership?

10 Could you just briefly clarify the relevance  
11 of the case, please.

12 A. Okay. First of all, I don't think there is  
13 any illegality in the Concession.

14 Q. I'm sorry to interrupt. Just really if you  
15 could focus your response on the relevance of the case.

16 A. However, if hypothetically, one could consider  
17 that there was a time when a Costa Rican did not own a  
18 51 percent of the shares, I think that case is totally  
19 applicable, because the case was--Ivcher Bronstein was  
20 a citizen of Israel. In Perú, there are laws that  
21 prohibit foreigners to own television--

22 Q. Channels.

1           A.     --channels.  So, Ivcher Bronstein converted  
2 into a Peruvian in order to be the holder of this  
3 television channel.  However, this television channel  
4 issued information on Vladimiro--

5           Q.     I--so, you're--I'm sorry.  So, in fact--but  
6 isn't the focus of that case the issue--the fact that  
7 the Peruvian State granted him nationality and then  
8 withdrew his nationality after he had relinquished his  
9 Israeli nationality to acquire Peruvian nationality?

10          A.     Yeah.

11          Q.     Wasn't the focus of that case really the  
12 legality of that aspect of what happened?

13          A.     The rationale of that case is that the  
14 Inter-American Human Rights Court established the rule  
15 that in regards to human rights, the only  
16 discrimination that can--that sovereign--sovereignty  
17 can be authorized is regarding political rights.

18          Q.     Are you suggesting, then, that the--oh, I'm  
19 sorry.

20                 ARBITRATOR NIKKEN:  Sorry, Mr. Ortiz.  I think  
21 that your interpretation is somewhat optimistic.

22                 In Ivcher Bronstein, the subject of political

1 rights was not covered. Ivcher Bronstein was a case  
2 where precisely, because the difference between the  
3 treatment of nationals and foreigners regarding  
4 television property was legitimate.

5 Mr. Bronstein's nationality was withdrawn to  
6 make him become a foreigner and take the television  
7 channel away. But the Court did not cover the subject  
8 of political rights nor the valid differences between  
9 nationals and foreigners.

10 The first case--I don't know if it's the only  
11 one--where the case did cover conceptually the subject  
12 of discrimination was in a consultive opinion regarding  
13 Costa Rica, Number 4, by the way, where it established  
14 that the differences in treatment were not necessarily  
15 discriminatory, but only if they went against the  
16 nature of things. If they were disproportionate, these  
17 are subject that come from Administrative Law and  
18 reasonable.

19 But differences in treatment between  
20 foreigners and nationals, that can happen without that  
21 necessarily meaning that one is violating the  
22 nondiscrimination rule.

1           Here, for instance, we have not discussed, as  
2 far as I can recall, the subject of Costa Rican law  
3 which ensures that owners of real estate in the Coast  
4 or near the borders be Costa Ricans, be Costa Rican  
5 nationals, because that has its rationale due to State  
6 security reasons. So, it's not necessarily  
7 discriminatory.

8           The difference in treatment between nationals  
9 and foreigners can happen outside of the ambit of  
10 political rights, and as long as they're not  
11 irrational, contrary to the nature of things, and  
12 according to the Court's jurisprudence, they are  
13 perfectly legitimate.

14           And in this case, in the case of Mr. Bronstein  
15 specifically, this subject that you mentioned--and  
16 yesterday, by the way, I decided to check on it--there,  
17 it was not mentioned in that decision. This is a  
18 decision that I've had to handle a lot during my  
19 academic and professional career, and since I was at  
20 that Court, I was always very interested in its case  
21 law.

22           And there, what they stated was that Mr.

1 Bronstein arbitrarily--his nationality had been  
2 withdrawn in a very characteristic case of power  
3 deviation to--in order--by taking away his nationality  
4 to obtain that result.

5 As for the reason, I would like to add, from  
6 the factual point of view, that the videos were shown  
7 on television, that is, the ones on Montesinos, shortly  
8 before the fall of the President.

9 There were some news that came through the  
10 Bronstein channel that were not to the liking of Mr.  
11 Montesinos, but they are not what--they're called the  
12 "Vladivideos."

13 But this is something that is actually  
14 anecdotic as far as the merits of the case are  
15 concerned.

16 THE WITNESS: May I have clarification?

17 PRESIDENT SIQUEIROS: Basically, if you want  
18 to make any statement.

19 THE WITNESS: Yeah. I agree with you, Mr.  
20 Nikken; however, my interpretation of that ruling from  
21 the--from the Inter-American Human Rights Court is that  
22 it implicitly states that there shouldn't be any

1 discrimination between foreigners and nationals dealing  
2 with the freedom of enterprise.

3 And even more, our Constitutional Court has  
4 indeed issued a Resolution specifically regarding the  
5 rule of the 51 percent that has to be on Costa Rican  
6 citizens regarding the exploitation of airlines.

7 So, in our country, there is, in fact, a  
8 precedent.

9 BY MS. BOUCHENAKI:

10 Q. Precisely, Mr. Ortiz, regarding that  
11 precedent, that's the TACA case to which you referred  
12 yet; right? Correct?

13 You have to say "correct" for the--

14 A. Yeah, correct.

15 Q. And so, in that case, wasn't it the case that  
16 what the Constitutional Court opined on was that the  
17 rule on the ownership was implemented in a regulation  
18 rather than a law, which, in fact, is the case in the  
19 case of Las Olas, because the limitation, as you know,  
20 for the 51 percent ownership on coastal land is in a  
21 law.

22 A. Uh-huh.



1 Q. And my understanding would then--and it is my  
2 understanding that our--Costa Rica's Expert on  
3 Administrative Law agrees that that case specifically  
4 related to the fact that it was the--the 51 percent  
5 ownership rule was not included in the proper  
6 instrument? Wasn't that the case, rather?

7 A. That was part of the rationale of the ruling;  
8 but the other part, it's a substantial rationale on the  
9 discrimination between foreigners and nationals.

10 Q. So, your position is that the case is relevant  
11 to the ownership of coastal land in Costa Rica.

12 A. Yes, it is.

13 Q. Now, moving on to your opinion regarding the  
14 15-day rule--the 15-day deadline that you mention,  
15 you--can I take you, please, to your Tab Number 1 in  
16 your binder, which is Article 99 of the Organic  
17 Environment Law?

18 A. Uh-huh.

19 Q. So, can I ask you to read it quickly, the--so,  
20 in--or I can just read it.

21 It's "In the event of a violation of the  
22 environmental protection--of the environmental

1 protection regulations or harmful conduct to the  
2 environment clearly established in this law, the Public  
3 Administration will apply the following Protective  
4 Measures and penalties," and then it lists a series of  
5 measures, including restrictions, partial or total, or  
6 order to immediately cease the acts that give rise to  
7 the complaints; correct?

8 A. Uh-huh.

9 Q. Do you agree that this--that this rule does  
10 not set out any specific--any specific time frame other  
11 than a reasonable time frame?

12 A. Yeah. This rule does not--this specific rule.

13 Q. Okay.

14 A. And--and if I may, this refers to penalties,  
15 what is different to interim relief injunctions.

16 Q. Well, it is the rule that the first two--and  
17 I'll read the Spanish. Maybe that's "protección--  
18 protectoras" Yes?

19 A. Uh-huh.

20 Q. So, it is penalties and Protective Measures;  
21 right?

22 A. Well, the title says, "Administrative

1 Penalties." That's what the title of the--of the  
2 Article says.

3 Q. The title of the Article does; but the Article  
4 itself does refer to Protective Measures.

5 (Overlapping speakers.)

6 BY MS. BOUCHENAKI:

7 Q. I'm asking precisely about the text of the  
8 Article itself. It does refer expressly to Protective  
9 Measures in addition to penalties; right?

10 A. Yes. It says, "Protective Measures."

11 Q. And "sanciones"; right?

12 A. And sanciones.

13 Q. It does provide for both.

14 A. Exactly.

15 Q. Now, you refer in your report, and it's  
16 the--the article I'm going to refer to is in Tab 2 of  
17 your binder. And in there, we have Article II.1 of the  
18 Public Administration Administrative Law that reads  
19 that "The rules of this law which govern the activity  
20 of the State shall also apply to the other public  
21 entities in the absence of special rules for them."

22 Correct?

1           A.    Uh-huh.  Yes.

2           Q.    Now, would you agree that the rules on  
3 environmental protection do constitute special rules  
4 and special applications?

5           A.    Uh-huh.  Yes.  This article refers to another  
6 hypothesis, absolutely.

7                    If you read it carefully, it says, "entes  
8 públicos—entes públicos."

9                    INTERPRETER.  Public entities

10                   How I explained yesterday, Costa Rican  
11 Government or Public Administration is made up of the  
12 Costa Rican State, that it's "a persona jurídica" and  
13 other entities.  These other entities might be the  
14 municipalities, the autonomous institutions, and other  
15 public entities.

16                   SETENA is not a public entity.  Therefore,  
17 this Article does not refer to SETENA.  SETENA is part  
18 of the executive branch, part of the MINAE of the  
19 Environmental Ministry.

20                   So, this article does not apply to SETENA.

21           Q.    Okay.  Now, moving on to your--Paragraph 31 of  
22 your Report, you refer to Resolution 2004-09232 of the

1 Constitutional Court, which you say affirms the  
2 Principle of a reasonable period--a short period of  
3 time after an injunction is issued by a public entity;  
4 right?

5 A. Yeah. Sure.

6 Q. And you say in Paragraph 32 of your Report  
7 that the case law on this matter has evolved to  
8 determine that the relatively short period of time is  
9 15 days; correct?

10 A. Correct.

11 Q. Now, you cite to a number of cases, including  
12 this Constitutional Court case; and then the one to  
13 which you refer in Paragraph 31, and then to other  
14 cases, four cases, that you say support the position  
15 that there is a 15-day rule in order to follow on the  
16 issuance of an injunction; correct?

17 A. Correct.

18 Q. Would you agree that none of those cases  
19 relate to Environmental Law matters?

20 A. Yes, I agree, it--they--

21 Q. I--yes. So, you agree that none of them--

22 A. Uh-huh.

1 Q. --okay.

2 A. However, there are cases--

3 Q. I understand that you--if there are cases that  
4 are relevant to Environmental Law, then wouldn't you  
5 agree that they would have had to be in your Report in  
6 order to fully inform the Tribunal on the state of  
7 Environmental Law on this issue?

8 A. Not necessarily, because the general  
9 principle--this--these rules from the Constitutional  
10 Chamber do not refer to a specific matter of law. They  
11 refer to every governmental entity. It says clearly--

12 Q. Mr. Ortiz, my question was about the case law  
13 that you could find in order to support your position  
14 that in the Environmental Law area and in the practice  
15 of Environmental Law in Costa Rica, this 15-day rule  
16 applies in the same way as it applies for telecom  
17 regulation and the other areas of Administrative Law to  
18 which you refer--

19 MR. BURN: Sorry to interrupt, but just  
20 because Ms. Bouchenaki is interrupting the witness on  
21 several occasions.

22 Just to clarify, your question, Ms.

1 Bouchenaki, was if there are cases that are relevant to  
2 Environmental Law, then wouldn't you agree that you  
3 would have to be in your report in order to fully  
4 inform the Tribunal on the state of Environmental Law  
5 on the issue? So, your question actually refers to the  
6 state of Environmental Law, not just the cases.

7 Mr. Ortiz was attempting to answer the  
8 question as you put it, and then you cut him off. I  
9 think it's going to work best if he's allowed to give  
10 his answers as fully as appropriate.

11 MS. BOUCHENAKI: Right, and my question was  
12 really about the case law in support of the state of  
13 Environmental Law, which, you know, in the interest of  
14 time, it would be best to encourage the witnesses to  
15 address the questions rather than expound.

16 You had an hour yesterday to present your view  
17 of Environmental Law in general.

18 THE WITNESS: Mr. Chairman, may I clarify?

19 PRESIDENT SIQUEIROS: Sir, we explained  
20 yesterday, you should first respond to the question; if  
21 there is need to clarify, you may thereafter make a  
22 clarification.

1           There might be a point in time when the line  
2 of questioning of the counsel to Respondent may require  
3 that you address other questions. Your answer may be  
4 in subsequent questions. But if that is not the case,  
5 I am certain that counsel to Claimants will allow you  
6 to make proper clarifications in due course.

7           THE WITNESS: Okay.

8           MS. BOUCHENAKI: Thank you.

9           BY MS. BOUCHENAKI:

10          Q. Now--so, my question was really about the case  
11 law, because as you are aware from reading his Report,  
12 the Expert for the Republic of Costa Rica does not  
13 share your view that this 15-day rule applies in the  
14 practice of Environmental Law in Costa Rica.

15           And so, my question to you was that we  
16 observed in your Report that all of the cases on which  
17 you rely relate to other areas of Administrative Law;  
18 and then second, that to the extent that you were aware  
19 of cases that support this practice that you allege  
20 exist also in the Administrative Law field, you know,  
21 why would--why would you not include them in your  
22 Report or in your presentation yesterday, since you had



1 an opportunity, in fact, to address Mr. Jurado's  
2 Report?

3 A. May I ask, what's the specific question?

4 Q. The question is: To the extent--are you  
5 opining that these cases of environmental--these cases  
6 from, for example, administrative environmental  
7 tribunals, the TAAs, exist where the--this 15-day rule  
8 is implemented and--as an obligation, the way that you  
9 are saying that it exists in other places.

10 And then if those cases exist, why would they  
11 not appear either in your presentation yesterday or in  
12 your Report?

13 A. Okay. That is because I considered it  
14 unnecessary, as the rationale of that Constitutional  
15 Court relates to governmental entities. It doesn't  
16 matter what is the substantial topic. It doesn't  
17 matter if it's child protection, telecommunications,  
18 Consumer Law, competition, or Environmental Law. It  
19 relates to every--and every governmental agency. And  
20 SETENA is a governmental agency. The TAA is a  
21 governmental agency. SINAC is a governmental agency.

22 Q. Thank you.

1           And so, this is a point on which, obviously,  
2 the Experts are in disagreement.

3           Now, moving on, assuming, for the sake of  
4 argument, that a Provisional Measure is issued and that  
5 no process is initiated within the 15-day period--and I  
6 am placing this hypothetical in the area of  
7 Environmental Law, to be clear--what are the avenues,  
8 what are the remedies, for the administrado, for the  
9 developer, say, for example, in a situation like this  
10 under Costa Rican law?

11          A.    He may request a reversal of the interim  
12 relief injunction before the same Agency that ordered  
13 it. He may also file a judicial review before the  
14 Administrative Jurisdiction; or he may file a writ of  
15 "amparo" before the Constitutional Court.

16          Q.    Okay. Are you also--and you are familiar with  
17 the measures of--that are called "contracautela" before  
18 the (in Spanish)?

19          A.    Yes.

20          Q.    And this is also a remedy that is available to  
21 a user of the administration who would have been denied  
22 this 15-day rule that you allege; right?

1           A.    No.  It is not a remedy.  The "contracautela"  
2 is a condition in which a governmental agency or the  
3 Administrative Jurisdiction may order an interim relief  
4 injunction.  And what it tries to do is to balance  
5 interests.

6                   And let's say a third party requests an  
7 interim relief injunction to SETENA.  On--another  
8 party, on the developer, then SETENA may request the  
9 party that is requesting the injunction to issue a  
10 "contracautela" in order to protect the interests of  
11 the developer.

12                   But it is not the person that is being subject  
13 to the order of the injunction that has to render the  
14 contracautela.

15           Q.    What I mean is, isn't it the case that if you  
16 are the subject of an injunction--for example, if you  
17 are aware of--if you are the subject of an injunction  
18 that suspends the works on your property, don't you  
19 have the avenue of going to the Tribunal and asking for  
20 a counter--Interim Measures, that would suspend the  
21 suspension?  Isn't that a proceeding that is available  
22 under Costa Rican law?  It was my understanding that it

1 does exist.

2 A. No. You may challenge the interim relief  
3 injunction, but it is not a suspension of the  
4 suspension. I mean, it's not an injunction of the  
5 injunction. Either the injunction is reversed or it is  
6 not reversed. Or it may be changed. But it's--it is  
7 not a suspension or an injunction. It is a reversal.

8 Q. Okay. So, it was my understanding that the  
9 avenue existed under Costa Rican--in the practice of  
10 Costa Rican Administrative Law, or maybe that's not a  
11 type of practice that you have experienced; correct?

12 A. As I explained, what you're talking about, the  
13 contracautelela, it's used, but in a judicial avenue  
14 where there are, most of the time, three parties. Then  
15 one of the Parties' requests to the Tribunal to issue  
16 an injunction, and the Tribunal may order the  
17 injunction, but ordering, as well, to this third party,  
18 the claimant, or the party that is requesting the  
19 injunction, to render a contracautelela to protect the  
20 party that is being subject to the injunction.

21 Q. Thank you.

22 Now, yesterday you stated that Environmental

1 Law was--I'm quoting from the transcript that we  
2 received last night. It's not the final transcript,  
3 but just for convenience--Administrative Law qualifies  
4 by Environmental Law. I think in Spanish you said "(in  
5 Spanish)." You said that Environmental Law was a form  
6 of Administrative Law. It qualifies Administrative  
7 Law.

8 But, I mean, are we in agreement, nonetheless,  
9 that the principles that govern Environmental Law are  
10 principles that are specific to Environmental Law and  
11 that are not found in other areas of Environmental Law;  
12 correct?

13 A. I agree. However, as I explained yesterday,  
14 these principles are of substantial law, not of  
15 procedural law. Procedural law, the--the law that  
16 applies in procedures is the Administrative Law.

17 So, yeah, indeed, as we have tax law, well,  
18 tax has its own substantial procedures--I mean,  
19 substantial principles; but the procedures are governed  
20 by Administrative Law or Public Law or Consumer Law or  
21 Competition Law.

22 Q. And just to clarify, I meant to be found in

1 other areas of Administrative Law, obviously, not  
2 Environmental Law.

3 But--so--and in those cases, those substantive  
4 principles that govern the specific area--in our case,  
5 Environmental Law, they're governed by their own  
6 rules--they're interpreted according to their own facts  
7 and sort of the creative body.

8 For example, you refer to--to the Principle of  
9 Precaution. It's a principle that has developed into  
10 sort of a universe of implementations and  
11 interpretations; correct?

12 A. Correct. In dealing with injunctions, the  
13 only difference with the other areas of Administrative  
14 Law is that the principle or the requisite to order an  
15 injunction, which is to have a grave--a grave impact  
16 of--

17 Q. And I'm very sorry to interrupt. It's just--I  
18 have moved on from injunctions. I was just trying to  
19 ascertain what we're talking about. We're talking  
20 about a series of principles of Environmental Law that  
21 are specific to Environmental Law and that are--sort of  
22 that have their own universe of rules and

1 interpretation; correct?

2 A. Yes. So, my answer would be yes, I agree.

3 Q. Okay.

4 A. Each area of law--Administrative Law has many  
5 areas, many specialties, and there are, in each one,  
6 substantial law principles but not procedural  
7 principles, which are all governed by Public Law,  
8 because that's a guarantee for the citizen--

9 Q. You've already made this point. Thank you  
10 very much. Okay.

11 And so, would you agree that, then, in terms  
12 of Environmental Law in Costa Rica, there was a--a  
13 constitutional reform in 1994 that really defines--that  
14 really defines the--sort of what Environmental Law in  
15 Costa Rica is today, and that these principles that  
16 exist, that you mentioned yesterday, derive from this  
17 Article 50, in particular, of the Constitution?

18 A. Uh-huh.

19 Q. That is a point with which you are in  
20 agreement with--

21 A. Yes, there was a reform to Articles 46 and 50.

22 I would say those principles do not derive

1 from those articles, but the Constitutional Chamber,  
2 using, for example, the Rio Declaration and many other  
3 treaties and the Constitution has derived those  
4 principles.

5 Q. Thank you.

6 And so, in Paragraph 76 of your Report, you  
7 quote the--you mention the Principle of Precaution.  
8 And you indicate that in accordance with that  
9 principle, there is an inversion of the burden of  
10 proof.

11 A. I'm sorry. What page?

12 Q. Paragraph 76 of your Report.

13 A. Uh-huh. Yes.

14 Q. And would you agree that a key practical  
15 implication of this principle is that developers bear  
16 the burden to prove that the environmental impact of  
17 their works does not affect a protected area, such as  
18 wetland or forest, for example?

19 A. I agree that is the case when the Preventive  
20 Principle has not been applied.

21 Q. I'm sorry. So, that means that you agree,  
22 that, say--the principle implies that a developer has a



1 duty to prove, or certainly to make a fair  
2 representation of any areas that might be protected  
3 areas on its property; correct?

4 I'm talking at the very beginning. No  
5 Protective Measures--nothing is in place yet.

6 A. No, I don't agree with that interpretation.

7 Q. Okay. So, you don't agree that when a  
8 developer makes a first filing to the administration,  
9 it has a duty in accordance with the Principle of  
10 Inversion of the burden of proof that--to make a  
11 truthful representation of the conditions on the land?

12 A. The Precautious Principle does not apply in  
13 those cases. The Precautious Principle applies when  
14 the project is in execution.

15 The principle that applies when there are  
16 going to be studies like the Environmental Viability is  
17 the Preventive Principle. That is totally different.  
18 One applies in one stage of the projects, and another  
19 applies in another stage.

20 Q. And then regardless of the Principle of  
21 Precaution or the Principle of Good Faith, would you  
22 nonetheless agree that that is the duty of the

1 developer in Costa Rica; that in Costa Rica, a  
2 developer has to make a truthful and exhaustive or  
3 thorough representation of what the conditions on the  
4 land are when he makes--he or she makes a filing with  
5 an environmental authority?

6 A. Yes.

7 Q. Now, with respect to the inversion of the  
8 burden of the proof, and once the proceedings--or once  
9 a process is ongoing, would you agree, then, that there  
10 is this--that it is for the developer to prove that it  
11 has not breached Environmental Law?

12 A. If we did not apply the Preventive Principle,  
13 that is, if we don't have studies or, for example, the  
14 Environmental Viability, then that is the case in which  
15 that principle applies.

16 I mean, when someone innovates and becomes--I  
17 don't know--he's going to talar.

18 Q. Cut.

19 A. Cut. He is going to cut corn plants, let's  
20 say, and there have not been any reports or any  
21 environmental studies that have already confined the  
22 possible damages, then those are the cases in which the

1 Precautious Principle and the inverse burden of the  
2 proof applies, not when the Environmental Viability has  
3 been already granted, because precisely, you have  
4 already confined the possible damages.

5           The Precautious Principle and the burden of  
6 proof applies when there is no certainty of the damages  
7 that a new activity can cause.

8           Q.    But then do you agree that the viability  
9 application, the Environmental Viability application,  
10 it has--it includes a sworn statement that the  
11 conditions on the land are what the developer says they  
12 are; correct?

13           A.    Yes.

14           Q.    And so, the administration--the  
15 administration's role in granting the EV, the  
16 Environmental Viability, is not to second-guess what  
17 the developer is representing; there is a Principle of  
18 Good Faith that is assumed and that the developer is  
19 expected to comply with. That's correct, yes?

20           A.    Yes.

21           Q.    So, would you not agree that once this  
22 Principle of Good Faith--if there's evidence that the

1 Principle of Good Faith has not been complied with by  
2 the developer and that the EV has been obtained in  
3 violation of that principle, would you not agree that  
4 it is for the developer to demonstrate that the  
5 conditions on the land are in compliance with what its  
6 original D1 Application was?

7 A. That is a complete hypothesis; but under that  
8 hypothesis, the first thing that the governmental  
9 agency, or SETENA, would have to do is to nullify--to  
10 declare null and void--the Environmental Viability  
11 permit. That is the first thing it has to do, because  
12 it is valid.

13 Q. Okay. Thank you.

14 So, now, I'd like to move on to your  
15 statements yesterday about fragmentation.

16 A. Uh-huh.

17 Q. And also about the easements that--and the  
18 sort of--the regulations on easements in Costa Rica.

19 So, can I take you to Paragraph 108 of your  
20 Report, please.

21 So, in that paragraph, you refer to "The  
22 Regulation for the National Control of Fragmentation

1 and Urbanization, which is in Tab 10 of your binder, if  
2 you'd like to look at it. I'm just going to refer to  
3 some articles.

4           So, this Regulation and Article II (2)(1) of  
5 this Regulation authorizes the segregation of land into  
6 lots, provided that the lots have access to a public  
7 street.

8           I'm not quoting verbatim, but that's generally  
9 what the rule is; correct?

10           And that if a--I'm sorry. I'm just finishing,  
11 and then I'll let you confirm. But if it's not  
12 possible for the lot to have access to a public road,  
13 then an easement needs to be created.

14           So, it's just Article II (2)(1) of the  
15 Regulation.

16           A.    Yes.

17           Q.    That is a fair representation of the Article;  
18 correct? Or would you prefer that I just read the  
19 article?

20           A.    Yeah. Just a second.

21                    Can you repeat, please?

22           Q.    So, I'm just going to read the article; that

1 way we don't have to--"Lots in Front of an  
2 Easement"--that's the title of the Article.

3 "All parcels resulting from a segregation will  
4 have a direct access to the public road. In special  
5 cases, INVU and the Municipalities can admit the  
6 subdivision of lots through easements provided that the  
7 following rules are complied with, and the easement  
8 shall be accepted in special lands where, because of  
9 its location or dimension, it can be demonstrated that  
10 it was impossible to segregate without an adequate  
11 access to existing public roads."

12 And it goes on to the last sentence, which is,  
13 "Preferably, these easements should be used for cases  
14 when there are--or there is existing housing in the  
15 lots."

16 Right?

17 A. Yes. That's what it says.

18 Q. Okay. So, you would agree that, according to  
19 this language, an easement is a rather exceptional  
20 mechanism under Costa Rican law; that is, the  
21 segregation happens--not exceptional in terms of how  
22 often it happens; but rather, exceptional in terms

1 of--it says "in special cases," right?

2 A. Yes, that's what it says. However, it's very  
3 common in Costa Rica.

4 Q. Yeah, and my question was "exceptional" in the  
5 legal term, not in the--sort of how often does it  
6 happen.

7 And so, are you familiar with the  
8 configuration of the Las Olas site? And I'm not going  
9 to go to a factual question, but just show you a  
10 map--just so that you have a view of how the property  
11 is structured.

12 I suppose you've already seen it; right?

13 A. Yes.

14 Q. And so, the property is divided in three large  
15 areas which--there is the area to the south, which is  
16 the Concession; then there is a large middle area,  
17 which is the Condominium; and then to the west, where  
18 you see the yellow circles, is--and all this line along  
19 the road there, is an area that the Claimants refer to  
20 as the Easement.

21 So, if we--we can get maybe the closer map?  
22 Yeah. And so, the Easements are shown there more

1 closely.

2           So, the roads that appear in there, they are  
3 internal roads in the--that go into the Easements.

4           You do agree that they do not go all the way  
5 to all the lots; right? So, not all the lots are  
6 covered by these internal roads.

7           A. I cannot answer that question from that map.  
8 I would have to be in the site and--and I mean, I'm not  
9 an expert to decide on that.

10          Q. I'm just--I mean, it's a visual--the road  
11 doesn't seem to go all the way to provide--assuming  
12 that the map is correct, would you say that it goes all  
13 the way to the end of the Easement?

14          A. No, really, I can't say from the map.

15          Q. Okay. Now, under Article II.1.3 of the same  
16 Regulation, the number of lots into which an easement  
17 can be segregated are limited to six lots per easement;  
18 correct?

19          A. Which article? I'm sorry.

20          Q. II.1.3.

21          A. Okay. What it says here is that the lots  
22 should have all the minimum services existing in the



1 area.

2 Q. It says, "In case easements"--in case "Lotes  
3 frente a servidumbre."

4 A. Oh, okay. That's II.2.1.3. Uh-huh.

5 Q. I'm sorry. Yes.

6 A. Yes.

7 Q. So, in the case of Las Olas, the Easement,  
8 this area that the Claimants refer to as the Easement,  
9 is composed of nine, actually, contiguous areas that  
10 they characterize as easements. And cumulatively, this  
11 area has, in fact, comprises 72 lots, all belonging to  
12 the same companies controlled by Claimants and to which  
13 the Claimants refer to as "the Enterprises."

14 Now, let's say if the Claimants had wished to  
15 comply with the regulation, and if they had wished to  
16 consider that this accumulation of easements and these  
17 72 lots really constituted an urbanization more than  
18 easement--and I'm not asking you to say that that's  
19 what they did. I'm just asking you to consider that as  
20 a hypothetical.

21 If that's what they wanted to--they had done,  
22 if they had gone to the INVU and the Municipality with

1 an urbanization plan rather than an easement, what  
2 would have been their--the steps that they would have  
3 been--they would have had to take before the various  
4 administrations in order to get their project going on  
5 these 72 lots?

6 A. I really don't know. It's hypothesis, and I  
7 would have to look with enough detail, with sufficient  
8 detail, what really could have happened. But I  
9 cannot--cannot imagine--

10 Q. But could you say a developer that  
11 starts--that submits an urbanization plan--what are the  
12 type of steps that they have to go through, what type  
13 of authorizations do they obtain? Are you familiar  
14 with that?

15 A. No.

16 Q. So, you're not familiar with what developers  
17 have to do when they start a project in Costa Rica?

18 A. It's probably--yeah, of course, I'm familiar.  
19 But, I mean, if I had to tell you all of the permits  
20 and all of the procedures that they have to do, we  
21 would last here all day long.

22 Q. Would you say that they would have had to get

1 an Environmental Viability from SETENA?

2 A. It would depend on the conditions. As I told  
3 you, when the project was carried on--well, when the  
4 easements were carried on, there were several--

5 Q. And I'm asking you to--

6 A. --SETENA resolutions.

7 Q. Thank you.

8 And I'm asking you to consider the hypothesis  
9 where we're not talking about easements, we're talking  
10 about--

11 A. Yes.

12 Q. --an urban development plan with 72 lots.

13 A. Uh-huh.

14 Q. For a plan like that, would you have to go to  
15 SETENA and obtain an Environmental Viability?

16 A. I cannot tell, because it depends on the  
17 conditions of that urbanization. It depends on its  
18 location. It depends on many elements. I mean, it's  
19 not a recipe.

20 Q. Have you ever seen a development of 72 lots in  
21 an area such as this one, and with this size of  
22 development, that does not--that goes forward in Costa

1 Rica without obtaining an EV?

2 A. Have I seen?

3 Q. Are you aware, have you--I mean, is--I mean,  
4 you--that's an area in which you've practiced; correct?  
5 I mean, is that something that--have you ever heard of  
6 an urban development of this size that goes forward in  
7 Costa Rica without obtaining an Environmental  
8 Viability?

9 A. I have not seen, and I have--I have seen--I  
10 mean, in both cases, I have not seen or--not seen;  
11 that's the answer.

12 Q. But it is your testimony that for an urban  
13 development of this size, with that many lots, you--you  
14 could go forward and initiate works without obtaining  
15 an EV, an Environmental Viability.

16 A. No. My testimony is that I would have to look  
17 exactly to the conditions in which it is being  
18 developed, because it depends of many elements.

19 Q. Okay.

20 A. Once again, SETENA has issued, over its  
21 history, a lot of resolutions in which it has exempted  
22 certain projects from the EVs. And a clarification is

1 that I don't practice in real estate. Once again, my  
2 expertise is in Administrative Law.

3 Q. Right, but this is a matter of Environmental  
4 Law, really, because it's--the question is under Costa  
5 Rican Environmental Law, if--can you develop a property  
6 of that size without conducting an Environmental  
7 Feasibility Study and submitting it to SETENA? Is that  
8 something that you could do in Costa Rica?

9 A. Once again, I cannot answer the question under  
10 those hypotheses. I would have to look at the case and  
11 its elements.

12 Q. Okay. Now, would it be also--wouldn't it be  
13 also the case that, for a development of this size--an  
14 urban development of this size, you would have to  
15 dedicate, my understanding is, 10 percent of the area  
16 to some form of public park or--that would be--that you  
17 would be dedicating to--essentially--to the  
18 Municipality, where the urban development takes place?

19 A. I understand that if it's an urbanización,  
20 that would be correct.

21 Q. Yes, and that's what I'm talking--yes, an  
22 urbanization plan. That was my question. So, that

1 would be correct.

2 A. Uh-huh.

3 Q. Now, in Paragraph 109 of your Report, you said  
4 that there were no steps or authorization to be sought  
5 by Claimants if--and I quote you--that--"Simply in  
6 order to fragment the easement and create the easement  
7 lots."

8 A. Paragraph 109?

9 Q. 109.

10 A. Yes. Yes.

11 Q. So, essentially you're saying, as long as it  
12 was just to create the easement, there was no--nothing  
13 to be done--no EV to be obtained.

14 Now, would you say that nine contiguous  
15 easements with a total of 72 lots, would you--in your  
16 opinion as an expert in Administrative Law, would you  
17 consider that that falls within what the law intended  
18 when it's provided for these easements?

19 A. I'm sorry. I did not understand the question.

20 Q. What you have before you here is nine  
21 contiguous easements with 72 lots altogether, with a  
22 plan to develop the easements into, you know--into

1 building--you know, houses.

2           Would you say that this--this project as I'm  
3 describing it to you, falls within the scope of the  
4 authorization, which you explained was exceptional, of  
5 an easement?

6           A.    I'm sorry, but I still don't get the--the  
7 question. I'm not understanding the question.

8           Q.    So, you wouldn't think that in order to evade  
9 SETENA the--the SETENA Environmental Viability, the  
10 Claimants would have subdivided this whole area into  
11 nine easements? That is not something that you would  
12 say could be said to be true in this case?

13          A.    No.

14          Q.    Okay.

15          A.    At least, I don't have the--the elements  
16 to--to say it or neglect it.

17          Q.    Okay. So, still at Paragraph 109 of your  
18 Report, you say, "The developer will need an EV"--an  
19 Environmental Viability--"to be able to make use of the  
20 fragmentation. That is, an EV will be required prior  
21 to construction."

22          A.    Yes.

1 Q. This is still--and you said that yesterday as  
2 well.

3 A. Yes.

4 Q. Correct?

5 Now, could you please take a look at Paragraph  
6 278 of the Claimants' Memorial, which--oh, it's on the  
7 screen; sorry. And I'll just read it to you.

8 "In the circumstances, it was perfectly  
9 legitimate for the Claimants to have carved out the  
10 easements and subdivided the Easement Section into lots  
11 without obtaining what would have been an unnecessary  
12 Environmental Viability."

13 And then I follow, Paragraph 280, "Further, as  
14 Mr. Mussio and Mr. Bermudez explained in their Witness  
15 Statements, based on their extensive experience in  
16 dealing with this complex real estate developments in  
17 Costa Rica, it is common for developers to divide their  
18 projects into stages and apply for the relevant  
19 permits, and as and when those stages are to be  
20 developed."

21 And I'd like to take you to Tab 11 of your  
22 binder--and if you go--it's the provisional transcripts



1 of Claimants' Opening Statement. And if you go to Line  
2 17 to 22 of Page 128.

3 And so, here Mr. Burn was speaking about,  
4 again, this area, and he says, "But this type of  
5 fragmentation is entirely consistent with Costa Rican  
6 law and Costa Rican practice, especially where, as  
7 here, there are different phases of construction."

8 Now--and then last point--last--I'm taking  
9 you, then, to your Tab 14, which is Paragraph 60 of Mr.  
10 Aven's First Witness Statement--

11 A. 60?

12 Q. 60, of his First Witness Statement. And there  
13 he says, "There would be five phases of development.  
14 Phase I would be the 72 lots coming off the easement,  
15 going into--the easements, going into Las Olas"; and  
16 then he describes the other phases.

17 Now, could you please go to Article 94 of the  
18 Biodiversity Law, which is the next tab, Tab 15,  
19 please.

20 A. Article 99--98? What Article? Pardon me?

21 Q. 94 of the Biodiversity Law. It's Tab 15.  
22 It's Exhibit C-207.

1           And the Article reads, "The Environmental  
2 Impact Assessment, as it relates to Biodiversity Law,  
3 shall"--actually, "Biodiversity, shall be undertaken in  
4 its entirety even when the project is to be developed  
5 in stages."

6           You are familiar with this article; correct?

7           A.    Yes.

8           Q.    Yeah.

9           Then one last tab I will take you to, please,  
10 for this question.  And it's Tab 13, please.

11           That is a Resolution of SETENA which states in  
12 its Paragraph 2, for example, "The technical criteria  
13 determined that"--sorry, there is one--so, it was a  
14 determination regarding a project with adjacent  
15 properties.

16           And they say that "The technical criteria  
17 determined that it is one and the same project  
18 involving three adjacent properties with the same  
19 developer and for similar works; namely, the movement  
20 of earth to provide access to a road, being such that  
21 the Secretariat cannot permit, for the sake of other  
22 interests or factors, the violation of the

1 environmental legislation permitting a separation,  
2 which I think is probably here a segregation of the  
3 Environmental Assessment, in applying less rigorous  
4 Environmental Assessment instruments or of less  
5 environmental significance to the detriment of the  
6 environment and in violation of the law."

7           Now, in light of these rules, would you  
8 continue to say that these nine adjacent easements, for  
9 which Claimants has consistently confirmed that they  
10 were going to be the object of construction and that  
11 they were part of the overall project, would you  
12 continue to maintain that--that they are not--that they  
13 don't--that these easements are not in violation of the  
14 Biodiversity Law in that there was no obligation to  
15 submit for an EV in this particular case, an  
16 Environmental Viability?

17           A.    Yes, for at least three reasons.    The  
18 first--bear in mind that this Resolution from SETENA is  
19 from 2015.  As I told you, when the easements were  
20 being issued or prepared or concreted or executed,  
21 there were at least four resolutions from SETENA that  
22 exempted certain projects from EVs.

1           Which projects? Well, what those resolutions  
2 did was that they technically defined what type of--of  
3 projects were exempted from that. So, SETENA might  
4 have had, as is common, changed its mind. And this is  
5 2015.

6           Second, because, although Article 94 says what  
7 it says, the Environmental Organic Law also states that  
8 the EVs are necessary to initiate activities or  
9 projects. Therefore, if the activity, which is  
10 construction, or the project, which is  
11 construction--and we--bear in mind that in that time,  
12 the developer probably didn't know if he was going to  
13 really develop--if he was going to build condominiums  
14 or houses or--or another club. If he has not initiated  
15 the activities or the projects, then the hypothesis  
16 that the Organic Environmental Law establishes to get  
17 an EV was not complied with, was not being complied.

18           So, yes, I maintain my--my position.

19           Q.    Okay. Just to clarify that, to make sure I  
20 understand you correctly, are you saying that the  
21 SETENA Resolution doesn't apply because it was issued  
22 after the project was initiated?

1           A.     Not only because of that, but because we would  
2 have to analyze the--case by case.

3           Q.     Of course.  But--however, the assessment that  
4 SETENA is making here is simply--SETENA is simply  
5 interpreting Article 94 in this Resolution; and  
6 Article 94, if I'm not mistaken, was introduced in the  
7 Biodiversity Law in 1998.  So, this is a law that has  
8 existed in Costa Rica for many years before; correct?

9           A.     Indeed.

10          Q.     Yes.  So, really, the fact that the SETENA  
11 interpretation that I'm quoting to you is from 2015, it  
12 might be that there are SETENA resolutions before that  
13 that I haven't quoted; but the fact is, it was  
14 interpreting a provision of the law and a practice that  
15 existed since way before that; correct?

16          A.     No, I wouldn't say that that practice existed  
17 a long way before, because, once again, during the  
18 execution of the easements, there were at least four  
19 resolutions from SETENA that exempted certain  
20 activities and certain projects.

21          Q.     Precisely.  Going back to this point, I'm  
22 referring, really, to the fact that when this project

1 was submitted to SETENA for Environmental Viability,  
2 you do agree that at that time, and based on the  
3 Claimants' consistent statements, the project was  
4 already designed to include the easements, correct, and  
5 the easements were in fact--per Mr. Aven's testimony,  
6 Phase I of that project.

7           So, what I'm talking--I'm not placing myself,  
8 you know, at a point in time where there may have or  
9 may have already been SETENA resolutions. I'm placing  
10 myself at the time when Claimants have filed--have  
11 approached the Costa Rican authorities to obtain  
12 authorization on their project.

13           At that point in time, they crossed out the  
14 property in order for them to only apply for the  
15 condominium part, and they left the easement part out.  
16 So, at that time there was no SETENA Resolution. There  
17 was only this project that was initiating.

18           So, my question here is that--Article 94, even  
19 absent any interpretation from SETENA, is fairly clear;  
20 wouldn't you say that according to the obligation of  
21 good faith of the developers, there was a major  
22 omission, to put it nicely, to not include the

1 easements in the SETENA application in the D1 Form that  
2 was accompanied by a sworn statement by Claimants?

3 A. What I can tell you is that it's a valid  
4 interpretation, that these easements did not require an  
5 EV.

6 And also, it is important to say that these  
7 easements are not made liberally. These easements need  
8 the "visado municipal," and the municipalities also  
9 have environmental competence or empowerment.

10 So, if the EV was, indeed, necessary, the  
11 municipality would have neglected the "visado  
12 municipal."

13 Also, these easements had to be through INVU.  
14 And if the EV was indeed required and everybody was in  
15 agreement that it was required, then the INVU would  
16 have neglected the visado. The Municipality would have  
17 neglected the visado.

18 And after that, these easements have to be  
19 registered in the National Cadastre and the Public  
20 Registry.

21 So, I mean, it was not an interpretation only  
22 of the developer, but of the Municipality and INVU.

1           Q.     And I'm focusing on the conduct of the  
2 developer solely, because, in fact, under Costa Rican  
3 law, the burden is on the developer; as you explained,  
4 before anything else happened, the burden is on the  
5 developer to be truthful, so--to the administration.

6                     So, the reason I'm focusing on that and before  
7 they approached the Municipality, before they  
8 approached INVU, it wasn't their obligation to look at  
9 this property, to look at the fact that they knew from  
10 the beginning that, in fact, the construction on the  
11 easements was Phase I, as Mr. Aven says in his Witness  
12 Statement, of the development of this project; and then  
13 include the--either, if they really thought that this  
14 needed to be a separate section, either include the  
15 submissions for the EV for everything and then several  
16 submissions; or just the condominium--or--or, you know,  
17 one EV for everything.

18                     But wouldn't there be--I mean, wouldn't you  
19 agree that, given the burden that was on the Claimants  
20 under Costa Rican law at that time, wouldn't you say  
21 that not having done so has misled the administration  
22 substantially?



1           A.     I think you're confusing the burden that the  
2 developer has to his right to a valid interpretation  
3 based on SETENA rules--or SETENA resolutions during the  
4 time that the easement was executed.

5           And that relying on that, if the Environmental  
6 Viability had to, indeed, be obtained, the Municipality  
7 would have had to have raised a red flag and neglect  
8 the permit for the easement, or INVU or the National  
9 Cadastre or the National Registry.

10           I mean, once again, if you need an  
11 Environmental Viability or not, sometimes it is very  
12 easy to determine. But it is not a recipe. There are  
13 many gray zones that you can interpret one way or the  
14 other.

15           So, my interpretation is that this was a valid  
16 and reasonable legal interpretation by the developer.

17           Q.     So--I will be concluding shortly, but I just  
18 wanted to clarify something.

19           How familiar are you with the facts of this  
20 case?

21           A.     I am familiar with all that I have been able  
22 to see and interiorize from the whole file.

1           I was not present, I had no participation  
2 during the project, and I don't know if the project was  
3 in this--presented to the Municipality or if it's the  
4 intention--or if it was the intention of the developer.

5           I mean, I took knowledge of this case in July  
6 of this year and what I have seen is all the  
7 administrative--of the file.

8           Q.    Okay. Mr. Ortiz, but you are aware of the  
9 fact that one of the disputes here is that  
10 Claimants--certainly, Costa Rica's position is that  
11 Claimants have, through sort of a doctoring of their  
12 submission--initial submission to SETENA, that they  
13 have concealed the existence of a protected area on the  
14 site; correct?

15          A.    Of course. That's why my initial presentation  
16 was my--my first point was your theory of the case is  
17 that the permits all are null and void because there  
18 was defects on--

19          Q.    And, in fact, that is not exactly correct.  
20 And I won't go there, unfortunately, because I--

21          A.    Well, it's what it says in Paragraph 709 of  
22 your Counter-Reply.

1 Q. And it's--it's null and void--so, these  
2 permits were--they were not appropriately obtained.

3 Today, these permits are suspended.

4 So, just to clarify, so, in terms of  
5 Costa Rican law, the Costa Rican law analysis is not  
6 that they are--they have been voided or that they have  
7 been annulled; they're suspended. But that was not--my  
8 question was, the protected areas--I just wanted to  
9 mention to you--in this case, the disputed--the  
10 undisputed protected areas are, in fact, surprisingly  
11 on the easements, where the yellow circles are.

12 Would you maintain, though, that you  
13 don't--you don't think that there's a possibility that  
14 in submitting their initial filing for Environmental  
15 Viability, somehow the--the Claimants were trying to  
16 circumvent Article 94 of the Biodiversity Law by not  
17 submitting a full EV in this case?

18 A. Once again, my response to that question is  
19 that it was a reasonable interpretation of the law. It  
20 is common in Costa Rica--it is common; it's not the  
21 first case. And there were several resolutions of  
22 SETENA that exempted VAs from certain type of projects

1 and activities.

2           And fourth, it is reasonable to interpret that  
3 if the activity is not going to be initiated or the  
4 construction is going to be initiated, we are only  
5 going to execute the easements, but no project is going  
6 to be carried on or no activity is going to start, then  
7 it was reasonable for the developer to interpret it  
8 that way.

9           Q.     But--so, just to--there is only--I mean, the  
10 Claimants don't really deny that there was going to be  
11 construction on there from the outset; it was their  
12 plan.

13           And then assuming--so, I'm not asking you to  
14 accept this; I'm just asking you to take this as a  
15 hypothesis. Assuming that there would be confirmed  
16 wetlands in these areas that the Claimants refer to as  
17 the easements, wouldn't you say that this--the way  
18 Claimants have filed their Environmental Viability was  
19 precisely what Article 94 was trying to avoid, which  
20 is, in fact, avoiding that by parsing out Environmental  
21 Viability filing, you would mislead the administration  
22 into thinking that the land was perfectly appropriate

1 for construction and that would sort of smooth out the  
2 permitting process that would follow after?

3 A. Okay.

4 Q. I'm just--hypothetically.

5 A. Assuming there, in fact, was--or is a wetland,  
6 and that SINAC had already reported that it was a  
7 wetland and that the PNH, the Wetland National Program,  
8 had already reported that it was a wetland, and that  
9 SETENA made an inspection and reported that it was a  
10 wetland, and we went on, absolutely. Absolutely, yes.

11 Q. Okay. And just for--for the record,  
12 obviously, this--precisely, this is what would have  
13 triggered all the inspections; right? I mean, this  
14 would--this is--if Claimants had identified that there  
15 were wetlands there, then, obviously, the  
16 administration would have taken the filing seriously,  
17 because they would have realized that there were  
18 conditions to be protected on the land. But--

19 MS. BOUCHENAKI: Thank you very much. I have  
20 no further questions.

21 PRESIDENT SIQUEIROS: Mr. Burn?

22 MR. BURN: Yeah. We do have certain

1 questions.

2           Before moving to those very few questions--and  
3 some of them will be from my colleague, Mr. Guevara--I  
4 just need to pick up one error that has been repeated  
5 several times by Ms. Bouchenaki in terms of the framing  
6 of this case and the evidence that is before you. The  
7 first time I spotted it--well, to be honest, Ms. Woods  
8 spotted it--is at Transcript Page 1349, line 15. But  
9 it has been introduced at a couple of other points  
10 where Ms. Bouchenaki said, "There are undisputed  
11 protected areas on the site."

12           That--the point being that they are saying  
13 that we have said, there are protected wetlands--I  
14 don't know if the point extends to forests, but there  
15 were protected wetlands on-site.

16           That is a fundamental misunderstanding and a  
17 mischaracterization of the evidence submitted by the  
18 Claimants and the case submitted by the Claimants. We  
19 will explore this with the environmental experts, but  
20 the point in the end is, there is expert evidence on  
21 our side that there are marginally hydric soil, or  
22 there is evidence of that. That is not the same thing

1 as saying there are wetlands. You've heard a lot of  
2 evidence as to the criteria for determining wetlands.

3 We are some distance from saying there are  
4 undisputed protected areas. So, a series of questions  
5 has been put to Mr. Ortiz based on that fundamental  
6 misunderstanding of our case.

7 I'd just ask the Tribunal to bear that in  
8 mind.

9 PRESIDENT SIQUEIROS: Note is, indeed, taken;  
10 and this is, indeed, one of the issues under dispute  
11 among the Parties.

12 MR. BURN: Thank you.

13 I'll hand over to Mr. Guevara now. I think  
14 he'll have a couple of questions for Mr. Ortiz; I'll  
15 have a couple of questions after that.

16 MR. GUEVARA: I will conduct my interrogatory  
17 in Spanish.

18 REDIRECT EXAMINATION

19 BY MR. GUEVARA:

20 Q. Mr. Ortiz, could you go to Tab 10, please, in  
21 your binder.

22 Going back to the article mentioned by our

1 counterpart, Roman Numeral II.1.3, that says, "With  
2 regard to easements, you can only segregate a  
3 maximum--or a maximum of six lots."

4 A. Uh-huh.

5 Q. Looking at the figure that we have on the  
6 screen and the circles that are in yellow that were  
7 made reference to, and in that order, they speak about  
8 nine easements and they've spoken of 72 lots.

9 So, assume, and that is in the reality, then,  
10 eight lots per easement. But the assumption is that it  
11 would seem to be illegal that there be eight per  
12 easement. So, my clarification is, then, that  
13 given--or in front of those easements, there's a public  
14 road, which means that two of those lots, their main  
15 access is by a public road.

16 Are you in agreement with that?

17 The witness' response is not recorded or  
18 audible.

19 So, this Article that says in front of the  
20 easements, we can only segregate a maximum of six lots,  
21 we are speaking about the three that are on both--on  
22 each side in front of a public easement. The first two



1 would not be in front of the public easement because  
2 they're actually in front of a public road.

3 A. It says in qualified cases--that means where  
4 there is no fronting to public--to public roads. So,  
5 when there is fronting to public roads, then they are  
6 no--no need for easements.

7 Q. And would you agree with me when I say that in  
8 order to establish--or determine an easement, then  
9 there has to be in front of a public road?

10 MS. BOUCHENAKI: May I just, Members of the  
11 Tribunal, object that this line of questions is  
12 completely leading. So, he's leading the witness into  
13 the answer that he's trying to obtain.

14 PRESIDENT SIQUEIROS: That is correct.

15 You should abstain, Mr. Guevara, from leading  
16 the witness into a response that is simply expected  
17 from him to conclude.

18 MR. GUEVARA: Perfect.

19 PRESIDENT SIQUEIROS: You understand the  
20 nature of a leading question?

21 MR. GUEVARA: Yes, sir.

22 PRESIDENT SIQUEIROS: Okay. So, your redirect

1 should avoid leading questions, please.

2 MR. GUEVARA: Correct.

3 BY MR. GUEVARA:

4 Q. Could you, Mr. Ortiz, go to Tab 15,  
5 Article 94.

6 Do you agree when I say that this article is  
7 also applicable to public administration, as such?

8 A. Of course. Every time the law states that you  
9 need a permit, an authorization, and an approval or any  
10 kind of previous permit from the administration or from  
11 governmental agency, then there is an in vigilando  
12 responsibility from the agencies. The agencies cannot  
13 rely--and that is the--precisely the idea of  
14 authorizations or permits.

15 The administration cannot rely, absolutely, in  
16 the particulars, because it has to do their job. There  
17 have--they have their chores to investigate and to make  
18 the inspections if that is the case.

19 Q. If that is the case--and bearing in mind that  
20 the Las Olas Project had a first EV in which SETENA  
21 assessed the whole property, including the Easement  
22 Project's totally different, but it is with regard to

1 the property.

2           And bearing in mind that later, a second EV  
3 was submitted for the condominium without taking into  
4 account the nine easements, and also bearing in mind  
5 that SETENA carried out two inspections related  
6 directly to the condominium; one, with regard to a  
7 complaint made by Mr. Bucelato where, clearly, in that  
8 inspection, he documented the existence of two private  
9 roads--

10           MS. BOUCHENAKI: This starts to be rather  
11 leading.

12           PRESIDENT SIQUEIROS: Let's continue--and  
13 please allow him to conclude his question first.

14           BY MR. GUEVARA:

15           Q.    --inspected the site of several occasions,  
16 aware of the existence and construction of these two  
17 roads and that Mr. Aven never--not stated that these  
18 were related projects in his advertising, would you  
19 agree that SETENA--if it considered--if it had  
20 considered that there was a violation to its  
21 authorization, should have said so?

22           MS. BOUCHENAKI: I'm sorry. That was leading.

1           PRESIDENT SIQUEIROS: Yes, Mr. Guevara. We  
2 just mentioned earlier that you should avoid making  
3 leading questions, and the nature of your last question  
4 was also clearly leading.

5           BY MR. GUEVARA:

6           Q. Hypothetically, Mr. Ortiz, if, for the  
7 establishment of an ease, the permits required by the  
8 fraction--fragmentation regulations of the Municipality  
9 are submitted, and if I put it hypothetically, several  
10 easement requests are submitted at the same time, do  
11 you agree that this article should be applied by these  
12 public institutions in case they believe that its  
13 application should be required?

14          MS. BOUCHENAKI: I'm sorry--

15          BY MR. GUEVARA:

16          Q. Is that an obligation to be required?

17          MS. BOUCHENAKI: --he's suggesting the answer  
18 to what the analysis of the Article should be. I'm  
19 really sorry. We have to object to this.

20          MR. GUEVARA: I'm not suggesting. I only say  
21 if it's applied for the operators.

22          PRESIDENT SIQUEIROS: Could you ask your

1 question in another way? Could you rephrase your  
2 question?

3 The concept of leading--you should avoid  
4 placing the response in anticipation of the witness.

5 So, if you could rephrase simply the manner of  
6 your question, I'm sure you could get the response that  
7 you're seeking--hopefully that you're seeking by  
8 rephrasing your questions.

9 MS. BOUCHENAKI: I'm so sorry--

10 PRESIDENT SIQUEIROS: For example, as  
11 Mr. Baker is indicating, if you could simply ask how  
12 this should be interpreted, how a provision should be  
13 interpreted without placing the conclusions in  
14 anticipation of.

15 MS. BOUCHENAKI: My apologies, but for this  
16 particular question, I believe he's already given the  
17 answer he wanted to obtain, though.

18 MR. BURN: The exercise is hearing from the  
19 witness.

20 PRESIDENT SIQUEIROS: The Tribunal--you know,  
21 we ask the Parties to please bear in mind that the  
22 Tribunal will have the ability to evaluate any

1 responses on the record.

2 But in order to avoid any unnecessary  
3 discussion, and in order to avoid any unnecessary and  
4 improper line of questioning, we ask the Parties simply  
5 to try to abide by the rules.

6 REDIRECT EXAMINATION

7 BY MR. BURN:

8 Q. Mr. Ortiz, thinking hypothetically about the  
9 process for establishing an easement, which--what  
10 provisions of law do you think would apply with respect  
11 to the public institutions who would handle  
12 those--those applications?

13 A. Environmental Law has something--that  
14 its--that its principles are transversal.

15 That means that not only the SETENA, not only  
16 the environmental administrative Tribunal and not only  
17 the fiscalía specialized in environmental--in  
18 environment are empowered to make--to apply the--the  
19 laws.

20 So, I mean, in this particular case of the  
21 easement, it is my expert opinion that the Municipality  
22 and our Constitutional Chamber and our legal--in our

1 leading cases has said it this way. The Municipality  
2 has also environmental empowerments to apply the law.

3 In fact, if you go to a Municipality and  
4 request a construction permit for a condominium project  
5 and you don't present the Environmental Viability, the  
6 municipality will say no, I cannot grant you the  
7 permit.

8 So, in this case of the easements specifically  
9 if the municipality that also has environmental  
10 empowerments thought that a VA was required, then the  
11 visado municipal that it had to grant to the  
12 **servidumbres** would have had to be denied. And if the  
13 municipality did not deny the visado, and indeed, the  
14 VA was required, then the municipality would be  
15 responsible, along with the developer.

16 Q. Thank you, Mr. Ortiz.

17 Before we--just going back a bit to the  
18 question of lots--and you still have the plan on  
19 site--you'll remember that Ms. Bouchenaki put a series  
20 of questions to you in relation to the way in which the  
21 lots on the easements would be sold.

22 Does--and she asked you about, essentially,

1 who bears responsibility with respect to the  
2 environmental protection for the land. Now, first of  
3 all, before lots are sold, who bears responsibility for  
4 compliance with environmental laws in Costa Rica? With  
5 respect to the land in question, that--what we call in  
6 this case the Easement Section? Who bears that  
7 responsibility?

8 A. The developer, SETENA, the Municipality, and  
9 all of the Costa Rican agencies that had participation  
10 in the project.

11 Q. Okay. So, the fact that there is no EV  
12 doesn't change your answer; the developer is still  
13 responsible?

14 A. I'm sorry. I didn't get the question.

15 Q. So, I just want to check that I understand  
16 your answer correctly. You said, amongst other people,  
17 the developer remains responsible for compliance with  
18 Environmental Law.

19 A. Uh-huh.

20 Q. The fact that for this section there is no  
21 Environmental Viability permit issued, is it--do you  
22 think that that changes things? Does the developer's



1 position in law--is it changed at all with respect to  
2 liability and responsibility under Environmental Law?

3 A. I'll try to respond to what I interpret.

4 If there was no EV, it is not only because the  
5 developer decided or made a reasonable interpretation  
6 that there was no need of an EV; but also, the  
7 municipality accepted that interpretation, the INVU  
8 accepted that interpretation, the National Cadastre and  
9 the Public Registry.

10 And in some way--and so, SETENA, because  
11 SETENA made inspections in the project and knew that  
12 there were easements there and did not raise any red  
13 flag, did not say that there was a need for an EV.

14 Q. Thank you.

15 And after a sale of a lot, who has  
16 responsibility for compliance with Environmental Law?

17 A. The owner of the lot.

18 Q. And what my--sorry.

19 A. And all of--all of these agencies always  
20 maintain their duties on Environmental Law.

21 Q. Does the activity of the new lot owner have  
22 any impact on how they might comply with environmental

1 law?

2 A. Sure. If someone buys one of those lots and  
3 decides to--to drill, to see if there is oil there, of  
4 course, the owner will be--will be the only one  
5 responsible.

6 Q. Okay. Thank you.

7 Now, you'll recall that Ms. Bouchenaki took  
8 you to Tab 13 of the file, which is SETENA Resolution  
9 0530-2015.

10 This was in the context of Article 94 of the  
11 Biodiversity Law. You remember those questions that  
12 were put to you?

13 A. Yes.

14 Q. Could you just look at the text--just quickly  
15 read through the text of this Resolution, see if  
16 there's anything that--bearing in mind the provisions  
17 of Article 94 which you were taken to, if there's any  
18 further comment you would wish to make.

19 (Pause.)

20 Q. Any comments, Mr. Ortiz?

21 A. Not for the moment. I'm only missing the last  
22 part.

1 Q. Do you have the right document there--it's  
2 definitely Tab 13?

3 A. Yes. Tab 13, R-344.

4 Q. Let me just check the "R" number. Yes. Okay.  
5 I mean, bearing in mind Article 94 of the  
6 Biodiversity Law with which you're familiar and the  
7 provisions about totality and so on, is there anything  
8 there that prompts any further comment from you? If  
9 not, that's fine. I just wanted to give you the  
10 opportunity to comment if--

11 A. Well, I read it very quickly, so--

12 Q. Okay. That's fine.

13 Just one final question for you, Mr. Ortiz.  
14 This goes right back to the beginning, and actually  
15 doesn't arise out of anything that Ms. Bouchenaki put  
16 to you, but--kind of, but you will recall that  
17 Professor Nikken had some observations in relation to  
18 the Bronstein and Perú case from the Inter-American  
19 court on human rights, so--there was--I think with all  
20 due respect to Professor Nikken, I think your initial  
21 response was being slightly cut off, and I just wanted  
22 to give you the opportunity to see whether your

1 opinion--or your comments on that case and its issues  
2 for--I think the comments you made related to  
3 ownership, but I just wanted to see if you had any  
4 further comments that you felt you hadn't had the  
5 chance to make clear on in relation to that one  
6 particular case.

7       A.     Indeed, well, I agree with Professor Nikken.  
8 The facts were not exactly if political rights could be  
9 discriminated or not or if only political rights were  
10 not--but to me, to my interpretation and with all due  
11 respect, Professor Nikken, I think the--that the Human  
12 Rights Court does implicitly say that not only was the  
13 citizenship taken away in an illegal way, in an illegal  
14 form, because due process of the law was, indeed,  
15 violated; also, the right of opinion and the right  
16 to--to press. But also implicitly, the Court says that  
17 discrimination in human rights is only, let's say,  
18 legal or valid when we are dealing with political  
19 rights, because that's the real sovereignty that  
20 a--that a government or a country has.

21               Obviously, each country can establish  
22 limitations for foreigners to vote or to participate in

1 unions or to participate in political parties.

2 But I also wanted to add that the European  
3 Human Rights Court has also developed this principle.

4 I mean, obviously, in Europe, we have a union,  
5 and they have also issued certain rulings in that  
6 respect in which discrimination in regards to human  
7 rights between foreigners and nationals is not valid.

8 I mean, you cannot discriminate dealing with  
9 free enterprise. You cannot discriminate dealing with  
10 the right to work.

11 Our constitutional tribunal, for example, has  
12 stated that it is unconstitutional provision from our  
13 laboral code that says that inequality of conditions,  
14 the--one should prefer the national worker and not the  
15 foreign worker.

16 So, I mean, that's my interpretation of what  
17 "implicitly," to me, the Human Rights Court said.

18 Also, related to what the European Human Rights Court  
19 has also issued as legal precedents.

20 MR. BURN: Thank you, Mr. Ortiz.

21 We have no further questions.

22 QUESTIONS FROM THE TRIBUNAL

1           PRESIDENT SIQUEIROS: Mr. Nikken, do you have  
2 any questions?

3           ARBITRATOR NIKKEN: Yes, I would like to make  
4 a comment with regard to this last comment. There  
5 is--of course, my interest is not to--in my position to  
6 discuss this with the expert, but I do want you to look  
7 for the word "discrimination "or the verb  
8 "discriminate." Do a search in the Bronstein decision,  
9 and you will see that that was not an issue in that  
10 case.

11           The word appears only once, and it is in the  
12 context of an article that it is quoted and mentions  
13 discrimination, but it was not applied to the concept.  
14 I may or may not agree with you. But in any case, I  
15 don't think that the Bronstein case applies here or  
16 applies to that that you mentioned, and I just simply  
17 felt that I needed to intervene to challenge the  
18 confusion which, in my opinion, is not appropriate.

19           Now--but, in any case, as for the rest, we  
20 will discuss it amongst ourselves here, among the  
21 members of the Tribunal. And I am not saying that your  
22 point of view, as a matter of principle is

1 hair-brained. It's just simply not part of the  
2 process.

3 Now, the other answer--basically, you answered  
4 it already, but I would like to see more precisely.  
5 You several times yesterday and today also  
6 mentioned--said that there should have been an EV from  
7 the time--from the moment that the municipality had  
8 seen the plans.

9 So, my question yesterday was if the  
10 municipality, in giving the authorization, had the  
11 jurisdiction to exempt from EV in case that was  
12 necessary. At one point, you said that the legal  
13 consequence of that authorization is not the exemption  
14 but the municipality would be responsible together with  
15 the developer.

16 So, in any case, I would like to ask from your  
17 point of view as an expert, what is the legal effect of  
18 a situation where the municipality has authorized  
19 without having checked that the EV was there?

20 THE WITNESS: Chairman, with your permission,  
21 I would like to answer this question in Spanish, and  
22 with the permission of the Government of Costa Rica.

1           PRESIDENT SIQUEIROS:  If there's no objection  
2 on Respondent's--

3           MS. BOUCHENAKI:  No objection.

4           THE WITNESS:  Thanks.

5           PRESIDENT SIQUEIROS:  Please.

6           THE WITNESS:  Professor Nikken, I will answer.

7           In the resolutions of SETENA of 2008, to which  
8 I made reference, SETENA--what it was saying,  
9 basically, is that there are projects that due to the  
10 fact that they have low impact or the certainty of  
11 their impact, it should be delegated to other  
12 authorities that also have jurisdiction--environmental  
13 jurisdiction.

14           And that was the case of the municipalities,  
15 so that the municipalities can decide that, analyze it,  
16 and then decide if this is part of the technical and  
17 legal elements that I established in the resolutions as  
18 far as exemption is concerned.

19           So, if the municipality authorizes these  
20 plans, the easements, it's not that it exempts them,  
21 but it simply interprets according to its environmental  
22 authority that this is a case in which an EV is not



1 necessary.

2           So, my position is that then it becomes  
3 co-responsible, because it expresses this as a state  
4 that comes up as one that says to the developer, "You  
5 can be sure that you went through me. I also have  
6 environmental jurisdiction. And I believe together  
7 with you that this does not require an EV."

8           ARBITRATOR NIKKEN: Thank you.

9           PRESIDENT SIQUEIROS: Mr. Baker.

10           ARBITRATOR BAKER: Thank you, Chairman. I  
11 have just a few.

12           Are you aware of any--well, let me back up and  
13 set the predicate.

14           It seems that there is a spirited competition  
15 over whether or not fractionalization or the submission  
16 of segmented land development programs is permissible  
17 or not. And you've said that this is not the only case  
18 that you have seen in Costa Rica.

19           Are you aware--since I assume everyone in  
20 Costa Rica who specializes in these problems is  
21 aware--of any interpretation from the Public  
22 Administration that would say any parcel of land

1 regardless of size owned or controlled effectively by a  
2 common or single developer must have an EV on all  
3 aspects of any parcel prior to beginning any  
4 construction work?

5           Wouldn't that solve the problem if that were,  
6 in fact, the interpretation? Isn't it just that clear?

7           THE WITNESS: Sure. There is no resolution or  
8 interpretation by any governmental agency in that  
9 sense.

10           ARBITRATOR BAKER: Okay. My next question is  
11 a more principle-based question. Sometimes when we  
12 speak of legal regimes--and I'll use the Tax  
13 Administration in my country as an example--we refer to  
14 that as being a regime of rules and regulations,  
15 whereas our British cousins would refer to it as a  
16 principles regime.

17           And the difference in interpretation is that  
18 in a rules and regulation regime, basically, anything  
19 that's a reasonable interpretation can fly, subject to  
20 being re-examined, whereas in a principles regime  
21 without more detailed specificity being required,  
22 people are supposed to apply the ultimate principle

1 rather than the technical nature of the rule or the  
2 regulation.

3           What is the Public Administration's view with  
4 respect to the understanding of its environmental  
5 regulations in Costa Rica?

6           THE WITNESS: Definitely principles. It might  
7 be interpreted one way or the other. And, in fact,  
8 leading cases have been changing and have been  
9 modified, and sometimes they refer to a precautionary  
10 principle as the preventive principle, and sometimes  
11 they refer to a preventive as precautionary. It's  
12 definitely principles. There are no exact rules or  
13 regulations established.

14           ARBITRATOR BAKER: So, from a principles-based  
15 regime, doesn't that indicate that people's conduct  
16 must be more conservative or on the safe side since  
17 they do not have the protection of an express  
18 regulation that they're pointing to?

19           THE WITNESS: Yes. And that's why the legal  
20 regime establishes not only SETENA but also transversal  
21 empowerments in which you cannot do as a developer or  
22 as a particular, you cannot do anything without going

1 to an administrative agency.

2           So, you should be conservative. But you also  
3 have the legitimate expectation that those agencies  
4 will tell you, "well, your interpretation--though valid  
5 to me, your interpretation is wrong."

6           ARBITRATOR BAKER: So, that brings me to my  
7 next question. And that is, you make application to an  
8 agency. I assume the agency's duties to discharge its  
9 functions as a matter of law and regulation is not  
10 delegable. They cannot avoid doing that. They must  
11 make a decision; correct?

12           THE WITNESS: Correct. Indeed, Article 66 of  
13 our General Administration Act states that  
14 duties--public duties are indelegable and--yeah. The  
15 answer is yes.

16           ARBITRATOR BAKER: Okay. So, after--you've  
17 taken great care to draw a distinction between before  
18 the issuance of an EV and after the issuance of an EV,  
19 and I want to make sure I understand the consequence of  
20 that distinction once the permit or the EV has been has  
21 been granted.

22           Does it create rights? You said it creates

1 legitimate expectations, but does it create legal  
2 rights in the holder of that EV when the agency has  
3 given it in response to a plan?

4 THE WITNESS: Sure. That is why the  
5 Constitutional Court and the Procuraduría General de la  
6 República--and here I want to make a clarification. We  
7 tend to translate "Procuraduría General de la  
8 República" as "Attorney General." And it's not quite  
9 the attorney general the Procuraduría. It's like the  
10 General Counsel for the government.

11 The Procuraduría has established that when you  
12 are going to declare EV as null and void, you have to  
13 follow that due process of the law.

14 ARBITRATOR BAKER: Okay. So, let me back up,  
15 then. Here we never had a situation where a permit was  
16 declared null and void. We had situations where they  
17 were injuncted.

18 So, do I understand the fair balance of your  
19 testimony is that the wrong remedy was used by the  
20 agency? It should have been declared null and void  
21 rather than injuncted? Is that the principal thrust of  
22 your testimony?

1 THE WITNESS: Exactly.

2 ARBITRATOR BAKER: All right. So, if that's  
3 the case and the wrong remedy was applied, tell me,  
4 under the 15-day concept that we've been discussing,  
5 whose duty is it to come forward and point out that the  
6 wrong remedy took place? Is it the agency who is the  
7 expert under the Public Administration in this that is  
8 supposed to revise itself, or is it the person whose  
9 rights were affected in the EV that was injuncted that  
10 has the duty to come forward and fix the problem?

11 THE WITNESS: Both. The--

12 ARBITRATOR BAKER: Both can. But who bears  
13 the principal responsibility?

14 THE WITNESS: The responsibility is of the  
15 agency. And it is expressly stated in the General  
16 Administration Act, Article 194, more or less, which  
17 states that if a wrongdoing from the administration has  
18 been detected, then the administration--no matter how  
19 much time it has--gone by, is obligated to annul its  
20 acts, resolutions, and conducts.

21 ARBITRATOR BAKER: So, then is it a fair  
22 summary of your testimony for me to take away that your

1 view is that regardless of whether the EV was properly  
2 granted, once an EV was properly granted, the duty for  
3 ending that grant through a remedy of ordering it to be  
4 null and void lies with the agency, and that is  
5 nondelegable? Is that a correct summary?

6 THE WITNESS: Exactly. I mean, restricted  
7 facts are deemed valid until they are declared null and  
8 void by the procedures that the legal scheme states.  
9 Meanwhile, if you have not annulled or declared them  
10 null and void, they have to be applied.

11 ARBITRATOR BAKER: All right. So, let me  
12 press you a bit on that. You're saying that even if  
13 the injunction was not rescinded or dissolved in any  
14 way that the Public Administration that issued that is  
15 in violation of its own rules and regulations? Is that  
16 what you're saying?

17 THE WITNESS: I'm sorry. Could you repeat?

18 ARBITRATOR BAKER: Yeah. I'm just trying to  
19 push you--and I'm going to push on the other end in a  
20 minute--to see how far your logic takes us.

21 Are you saying that even if an injunction was  
22 issued by the expert agency and it should have been

1 declared null and void because it applied the wrong  
2 remedy, is that agency responsible in damages for  
3 having used the wrong remedy? Is that what you're  
4 saying?

5 THE WITNESS: Of course. Because by doing it  
6 that way, by acting wrong, it has paralyzed or it has  
7 freezed the rights of that developer without following  
8 the legal procedure.

9 ARBITRATOR BAKER: All right. Let me go back  
10 to the back end and say--I want to explore a little bit  
11 about the contours. And this is my last set of  
12 questions, Chairman.

13 I want to explore a little bit of the concepts  
14 about before any application has been filed. And as I  
15 understand it, as long as we are talking about a virgin  
16 property that has not otherwise been classified by one  
17 of the environmental agencies in the country, your  
18 testimony is that there is a shared duty between the  
19 developer and the expert agencies in order to ensure  
20 that that property is appropriately classified at the  
21 EV application stage; is that correct?

22 THE WITNESS: Correct.



1           ARBITRATOR BAKER: Okay. So, let's just, for  
2 the sake of hypothetical, use your oil drilling  
3 example. And so, let's just say that the owner of the  
4 property decides that he's going to go ahead and put  
5 his--sink his well and do all of that. And yet when he  
6 goes to the application process, he mentions nothing  
7 about his well.

8           And at that point, where does the duty lie?  
9 We have a paper which is, obviously, false, because it  
10 is not complete in any real meaningful sense of the  
11 word. It's not a technical error. It's a serious  
12 omission.

13           And the agency has what duty at that point?  
14 May they rely solely on the paper, or do they have to  
15 get out of their offices and go check what is presented  
16 to them on the paper before they go to the next step?

17           THE WITNESS: They have to check. And Article  
18 94, if I'm right, of the Environmental Organic Law  
19 states it is a duty of SETENA to inspect. Also, the  
20 regulations states it as a--as a duty.

21           I mean, this case would be very radical  
22 because the owner of the property has already begun

1 drilling and everybody knows, even--even the lawyer  
2 would know that there is drilling. But there are  
3 certain cases, like a wetland, that it's not--that's  
4 not that obvious.

5 ARBITRATOR BAKER: I'm focusing on my extreme  
6 example. And the reason I picked the oil drilling is  
7 so for whatever reason, there are no community  
8 complaints either. Maybe they're all silent partners  
9 in the oil well, so there's no third party.

10 THE WITNESS: Yeah.

11 ARBITRATOR BAKER: I'm trying to focus solely  
12 on what your understanding is of the duty agency to  
13 whom the EV application is made.

14 THE WITNESS: Once an agency has an  
15 empowerment and has been--their door has been knocked  
16 by the--by the citizen for them to empower their  
17 duties, then public agencies become co-responsible.

18 Of course, if the developer lied when he said  
19 something that is so obvious that he was already  
20 drilling and said "No, I am not drilling," he would be  
21 criminally responsible.

22 But if SETENA does not inspect and comes to

1 the--and gets to know that three years afterwards that  
2 the drilling was already done, then SETENA is,  
3 obviously, co-responsible.

4 ARBITRATOR BAKER: And that's exactly the  
5 hypothetical I want to play out for you. So, let's  
6 assume, continuing in this same example, that the  
7 agency at some point, after having issued an EV, comes  
8 out and sees that there's an impermissible oil well  
9 that's on this property.

10 As I understand, what you're saying is their  
11 immediate remedy is not to file an injunction but to  
12 cancel the EV and render it null and void. Is that  
13 right?

14 THE WITNESS: No. Yes, they are--they may  
15 issue an injunction. Because this is another--another  
16 case. In this case, there would be an obvious--a false  
17 declaration. So, the EV will not cover oil drilling. I  
18 mean, if the developer distracts or deviates from the  
19 activities that SETENA has authorized, then the  
20 precautionary principle is applicable. Because it is  
21 not a damage that has already been controlled by the  
22 EV.

1           So, yes, it might--it is empowered to issue an  
2 injunction. But immediately after that--if SETENA  
3 deems that the EV is null and void because the  
4 declaration was false, immediately it has to initiate  
5 an administrative procedure or else file a judicial  
6 review, start that process, to annul the--the EV.

7           ARBITRATOR BAKER: You've done an excellent  
8 job of anticipating my very last question, and that's  
9 this. Let's change our hypothetical just a little bit  
10 and let's say that an owner of a property has made  
11 application because they want to build a two-bedroom  
12 house on a piece of property.

13           And the EV is issued without inspection by the  
14 agency. And at that point, the owner builds his house.  
15 And he decides, you know what? I really should have  
16 made this a 3-bedroom house, not a 2-bedroom house.  
17 And he never goes back to the agency. And the agency  
18 comes out just as he's finished and taken delivery of  
19 his house and says, "Oh, gosh. You built something  
20 that you were not supposed to do."

21           I'm trying to, obviously, explore the contours  
22 between the preventative principle where the actually

1 house was built, and that was the issuance of the EV,  
2 but the size of the house may have been slightly larger  
3 or the configuration. Is that the type of issue where  
4 a precautionary principle would be applied, or would it  
5 be something else?

6 THE WITNESS: That's a great question because  
7 it lets me explain that the precautionary principle is  
8 not what Don Quixote called the Báalsamo de Fierabrás,  
9 medicine he had for--for everything, for every hurt he  
10 had. While the precautionary principle is not the  
11 Báalsamo de Fierabrás and must not be, it is not valid  
12 to apply it in any case. Proportionality and  
13 rationality principles have to be taken into  
14 consideration.

15 So, if that is the case, a two-story house or  
16 a three-story house, I don't think technically that  
17 would make any difference in the harm to the  
18 environment. So, issuing an injunction because the  
19 person built a three-story house and not a two-story  
20 house would be definitely unreasonable. Unreasonable.

21 However, if this person built an office  
22 building of 15 floors, definitely the precautionary

1 principle would be reasonably applicable.

2 ARBITRATOR BAKER: Thank you very much. Thank  
3 you, Chairman.

4 PRESIDENT SIQUEIROS: I'll amuse your patience  
5 and that of the Court Reporters and Interpreters just  
6 for a few more minutes. I have two basic questions.

7 One deals with what I believe is one of the  
8 key issues in this proceeding. As I understand one of  
9 the allegations from the Republic of Costa Rica is that  
10 this project was a project that should be viewed as a  
11 whole, as one to be developed in different stages.

12 And you've heard the line of questioning, and  
13 you probably read in the materials in this arbitration  
14 that this project was one project to be developed in  
15 several stages. You may or may not be aware of the  
16 allegations that some of the alleged wetlands are  
17 located in the western--southwestern portion of the  
18 property which is, coincidental or not, located in the  
19 easements area.

20 If you look at the map that is behind me, you  
21 will see that the alleged wetlands are located,  
22 essentially, in the area where the easements are

1 located. And as I understand, one of the arguments in  
2 the arbitration by the Republic of Costa Rica is that  
3 the fragmentation of the property was done with a  
4 purpose, and the purpose was to avoid having an EV  
5 precisely because Costa Rican law would allow the  
6 fractioning of that property without the need to submit  
7 an EV.

8           Why? Because there was to be nine different  
9 fragmentations in different easements with eight lots.  
10 It's not an issue of whether it's eight or six lots.  
11 Let's keep that aside. And you have testified that  
12 this was a legitimate petition on the part of Claimants  
13 that they could receive a permit to develop these  
14 easements.

15           Now, the argument on the part of the Republic  
16 of Costa Rica was that this was not and should not be  
17 viewed as a valid application nor permit and avoidance  
18 of an EV because, precisely, Article 94 of the  
19 Biodiversity Law requires that the Project be viewed as  
20 a whole, which would mean that at the time that even  
21 the easement section was applied for, they should  
22 have--"they" meaning the developers--should have

1 presented the complete picture and the issues under a  
2 D1 to secure an EV, even though viewed in a fragmented  
3 manner the easement section did not require one.

4 Please construe--interpret Article 94 in this  
5 context. Well, first of all, did you follow me? Did I  
6 make myself clear when I described what I interpret  
7 this particular dispute to be?

8 THE WITNESS: Yes. Okay. Let's see.

9 On the wetland, even though it is a casualty  
10 that it's in the--in the same part of the property as  
11 the--as the easement, what is true--

12 PRESIDENT SIQUEIROS: And just for purposes of  
13 the record, when you say "the wetland," I assume you  
14 refer to the alleged wetland because--

15 THE WITNESS: Exactly.

16 PRESIDENT SIQUEIROS: --our counsel has--

17 THE WITNESS: Yeah, the alleged wetland. The  
18 supposed wetland. The hypothetical wetland.

19 What is true is that SETENA--when you file the  
20 request for the EV, you have to file what is called--I  
21 don't know if I'm going to translate this well or  
22 not--a cartographic map. The government of Costa Rica



1 has alleged that everybody knows that there are  
2 wetlands or that there are alleged wetlands or supposed  
3 wetlands in Esterillos. And it is obvious that there  
4 are wetlands.

5 Well, with this cartographic map, SETENA must  
6 have--had raised the flag because it is so obvious that  
7 there are wetlands in Esterillos. That Municipality  
8 made inspections in the whole project.

9 PRESIDENT SIQUEIROS: Yes. But my question  
10 relates more on the interpretation--a legal  
11 interpretation of Article 94 in the context of this--

12 THE WITNESS: Okay. I got you. Yes. I'm  
13 sorry.

14 PRESIDENT SIQUEIROS: --lack of understanding,  
15 this dispute existing among the parties.

16 THE WITNESS: Okay. I'm sorry for my  
17 deviation.

18 What I said at the time where the--when the  
19 easement was executed, it was a reasonable  
20 interpretation because there were at least three  
21 resolutions by SETENA that exempted VAs from certain  
22 kinds of projects. And I would say that delegated

1 the--the acknowledgment of the project to each of the  
2 municipalities to determine if, in fact, it needed a VA  
3 or it did not.

4           And under that reasonable interpretation was  
5 that the developers decided or interpreted that just  
6 for the execution of the easements--not for the  
7 execution of the Project itself or the construction  
8 itself, or the initiation of the activities--it was not  
9 necessary, a VA. So, they decided to submit their  
10 application to the municipality who also determined  
11 that there was no need of a VA.

12           So, my position is that it was a reasonable  
13 interpretation that was, in fact, confirmed by the  
14 municipality, by INVU, at least by those two. Also,  
15 bear in mind that the municipality had made inspections  
16 all over the place, all over the project, and that  
17 SINAC had already released its reports stating that  
18 there was no wetland in the--in the property.

19           So, I think it was a reasonable interpretation  
20 based on resolutions that were in place during that  
21 time by SETENA that exempted certain kinds of projects  
22 from going to a VA and that there were--and this is to

1 me the most important part of all this case--there were  
2 not one but several reports from SINAC which is  
3 empowered to view--to overview wetlands.

4           That said, there are not wet--no wetlands  
5 here.

6           PRESIDENT SIQUEIROS: And this would--because  
7 one of the issues also in dispute is whether or not  
8 these EVs that had been issued had been issued under  
9 lack of information that had been disclosed by  
10 developers.

11           This is--one of the parties  
12 alleges--naturally, the Republic of Costa Rica alleges  
13 that it was the responsibility of developers to have  
14 disclosed the existence of whatever information there  
15 was and whether these could be flooded areas that  
16 should not be considered as wetlands, but somebody  
17 could take the position that they were, that this is  
18 the information that should have been disclosed.

19           Your testimony as legal expert is that it was  
20 the responsibility, then, of SETENA, SINAC, and even  
21 the municipal authorities to make the inspection and  
22 ascertain whether or not there was a wetland. And the

1 fact that they did not, then this was a--following a  
2 response you gave to Mr. Baker--this was an acquired  
3 right of the developers.

4 Did I interpret this correctly?

5 THE WITNESS: Yeah. And, moreover, what  
6 information was missing on the part of the developer if  
7 SINAC had issued at least three reports in which it  
8 said there were no wetlands? So, what is the lack of  
9 information? I mean, the public entity that is  
10 empowered to overview wetlands had said there is no  
11 wetland.

12 And from my attorney point of view, I think it  
13 is not easy to determine where is a wetland and where  
14 there is just a flood. I mean, my backyard sometimes  
15 floods, and it is not a wetland. So, it is not an  
16 obvious--

17 PRESIDENT SIQUEIROS: I agree. I don't  
18 have--I think you and I as lawyers can apply the terms  
19 of the regulations that establish what the three  
20 elements under Costa Rican law that are required to  
21 deem that there is a wetland.

22 But I understand that wetlands might be

1 temporary in nature. This is that they do not need to  
2 be permanent. This is that the presence of water does  
3 not need to be permanent. It can be temporary. And  
4 maybe this is--during the wet season there is water;  
5 during the dry season there is no evident presence of a  
6 wetland.

7 I am not saying that that is the case because  
8 I have not visited the property. But that's what the  
9 regulations, in my understanding, do provide, that the  
10 conditions might be temporary or permanent in nature.

11 If an application is made during a dry season  
12 and during the wet season then the flooding exists and  
13 the conditions to deem that there is a wetland, how  
14 would that change the responsibilities of the  
15 developer, or do the responsibilities of the developer  
16 change in light of the fact that there was an  
17 inspection, say, during a dry season?

18 THE WITNESS: Once again, I would have to go  
19 with what I--with what I just told you. To me, the  
20 important part here is that there were reports from  
21 SINAC and that it was not obvious, neither for the  
22 developer, neither for the agencies. SINAC, INTA, the

1 PNH, and many other agencies issued contradictory  
2 reports. And there are many more reports that say that  
3 there is no wetland there, and there are reports that  
4 say that there is a wetland.

5 So, it is a technical issue that I don't--I  
6 cannot go and hypothesize if--if--if it is, in fact--if  
7 it floods in the--in the--invierno, it does flood in  
8 the--in the verano. If--if the developer could have  
9 had determined if there is a wetland or not. To me,  
10 the important part here is that there were reports of  
11 the empowered and the competent agencies that said  
12 there are no reports and that SETENA had the exact  
13 localization of the Project.

14 And if it was very obvious that there are  
15 wetlands there, then SETENA had the duty to go and  
16 inspect every time. In every project SETENA has the  
17 duty to go and inspect. So, that is--that is--that is  
18 my position.

19 PRESIDENT SIQUEIROS: Okay. I have one last  
20 question, and this deals with what I construed you to  
21 say, that the Constitutional Court in Costa Rica has  
22 ruled on the subject of the treatment of nationals and

1 nonnationals in a different manner.

2           And perhaps this was during your presentation  
3 yesterday evening or earlier this morning, but--I think  
4 it was the former--where you--where at least I  
5 understood you to say that even the requirement of  
6 having a majority of Costa Rican national participation  
7 in the capital stock of a company in a Terrestrial  
8 Maritime Zone should be deemed to be unconstitutional.  
9 Was this your position?

10           Is it your argument that if an authority  
11 should come in and say that it was unlawful for  
12 somebody like Mr. Aven to hold more than 50 percent in  
13 the capital stock of La Canícula that, that should be  
14 treated by the Constitutional Courts in Costa Rica as  
15 unconstitutional because an American citizen, or  
16 Italian for the matter, whatever nationality one would  
17 have, should not be treated differently than a Costa  
18 Rican national?

19           THE WITNESS: To me, that is unconstitutional  
20 because we are dealing here with free Enterprise and  
21 other--and other fundamental rights.

22           And I have to make two positions. First of

1 all, the Constitutional Chamber has been--well--or the  
2 parties--certain parties have submitted four  
3 Constitutional rights against this article. The  
4 Constitutional--

5 PRESIDENT SIQUEIROS: Which article? I'm  
6 sorry.

7 THE WITNESS: The article that states that  
8 Costa Ricans have to have majority of the shares.

9 PRESIDENT SIQUEIROS: ZMT.

10 THE WITNESS: Exactly. ZMT.

11 PRESIDENT SIQUEIROS: Okay.

12 THE WITNESS: The Constitutional Chamber has  
13 rejected but for procedural reasons. So, the  
14 Constitutional Chamber has not issued any--at least  
15 not--from 2000 to today has not issued any ruling on  
16 that.

17 And it's important--remember, our--our Civil  
18 Code states that the laws have to be interpreted in the  
19 context of history.

20 If you study Costa Rican ZMT Concessions--we  
21 have Marriott hotels. We have Four Seasons. We have  
22 Spanish hotels. Do you think that Costa Ricans are



1 really the owners of the 51 percent of the shares?

2           PRESIDENT SIQUEIROS: Well, remember that many  
3 hotels only manage rather than own the asset.

4           THE WITNESS: Yeah, but--

5           PRESIDENT SIQUEIROS: Many of these hotel  
6 chains manage and not own because of capital reasons.

7           THE WITNESS: Exactly. But in many of those  
8 cases, they are really the owners. At least the  
9 experience I have with my clients, those two--one of  
10 those it's my--it's my client, but not the--not the  
11 Four Seasons, but the experience I have with my  
12 clients.

13           I mean, you have to interpret the law in the  
14 context of history. That--perhaps in 1965 when the  
15 sovereignty of the countries was very empowered and  
16 people may have had something, some rationale. But  
17 today we are a global world in which there is no  
18 rationale in having discrimination amongst foreigners  
19 and Costa Rican citizens. I mean, not even in  
20 political rights at a local perspective.

21           PRESIDENT SIQUEIROS: That's outside of the  
22 scope of this arbitration.

1 THE WITNESS: Sorry. I'm a little passionate  
2 about that topic.

3 PRESIDENT SIQUEIROS: Thank you very much. Is  
4 there any clarification that the parties may wish to  
5 make on the topics addressed by the questions of the  
6 Tribunal?

7 MR. BURN: No, sir.

8 MS. BOUCHENAKI: I think we may have just a  
9 few follow-up questions and clarifications that we can  
10 ask on his responses.

11 PRESIDENT SIQUEIROS: Would it be more than a  
12 couple of minutes? The reason--I failed to notice that  
13 we haven't granted the Court Reporters and Interpreters  
14 a break. But if it's a very short questioning--

15 MS. BOUCHENAKI: Yeah, I'll keep it short.

16 PRESIDENT SIQUEIROS: Okay.

17 RECROSS-EXAMINATION

18 BY MS. BOUCHENAKI:

19 Q. So, one clarification. It is not Costa Rica's  
20 position that everyone knew or everyone should have  
21 known that there were wetlands located on Las Olas.  
22 So, I think that is a misunderstanding on the part of

1 Mr. Ortiz.

2           Then if I could please point you very quickly  
3 to Article 44. If you can put it on the screen of the  
4 "reglamento general sobre los procedimientos." It's  
5 the--regarding the assessment, the Devaluation Impact  
6 Assessment.

7           And I just wanted to ask you if you confirm  
8 and if you maintain your position that SETENA has a  
9 duty to inspect, because this article, in fact, rather,  
10 says that SETENA--that is not--it is not a compulsory.

11           A. If I may have my law with me, I can answer.

12           Q. It's right there.

13           A. I need the law--the Organic Law. Not  
14 the--those are the regulations.

15           Q. So, the Organic Law should be in Tab--

16           A. I have it here. If I--

17           Q. No, it's in your binder. But it's really  
18 the--Tab 1. It is--

19           MR. BURN: Just for the record, can I just  
20 check what exhibit number the document is that you've  
21 handed up?

22           MS. BOUCHENAKI: It's R-238.

1 MR. BURN: Thank you.

2 PRESIDENT SIQUEIROS: This is a true exercise  
3 in eyesight.

4 BY MS. BOUCHENAKI:

5 Q. Isn't it the case, though, that the site  
6 visits are not compulsory and that there are a--

7 A. Yes, may I have my--my law? I need my law  
8 because it--

9 PRESIDENT SIQUEIROS: I think that,  
10 unfortunately, you have to rely on the documents that  
11 have been submitted, as they have been submitted in the  
12 proceedings.

13 THE WITNESS: Okay. So, give me just a second  
14 so I can verify.

15 BY MS. BOUCHENAKI:

16 Q. The question, to clarify, is, isn't it the  
17 case that the site visits are not compulsory for SETENA  
18 in this process of environmental assessment?

19 A. If you read that article, that's what it says.  
20 But the Organic Law of the Environment says otherwise.  
21 And another executive decree, that it's the  
22 reorganization of SETENA says otherwise.

1 Q. So, you disagree with this particular article?

2 A. Yeah.

3 Q. And we can move on.

4 A. That's a regulation and it's contradictory  
5 with the law that has a higher hierarchy.

6 Q. We'll just move on.

7 PRESIDENT SIQUEIROS: Do you recall which  
8 article of the Organic Law it is?

9 THE WITNESS: I cited yesterday the article  
10 and the regulations, the executive decree.

11 PRESIDENT SIQUEIROS: If it's part of your--

12 MR. BURN: Sir, if I could be committed to  
13 lead on this one point, I think I can suggest a number.

14 PRESIDENT SIQUEIROS: If it's a number, I  
15 don't think there is an objection on the part of the  
16 Tribunal.

17 MR. BURN: Fine.

18 Mr. Ortiz, would the article of the law be  
19 Article 84?

20 THE WITNESS: Let me check.

21 Yes. Article 84 states, "Duties of the  
22 Technical Secretariat. The duties of the National

1 Technical Environmental Secretariat are the following:

2           "(d) Carry out the in situ inspections  
3 corresponding--the corresponding in situ inspections  
4 before issuing its resolutions."

5           BY MS. BOUCHENAKI:

6           Q.    This describes the competencies, right? So  
7 "las funciones"; right? It does not say what the  
8 obligations of the authorities are. Are we--do we  
9 agree on this?

10          A.    In administrative law, we are not--we talk  
11 about "potestades" or competencies.

12          Q.    That's right.

13          A.    Obligations are for particulars. So, when you  
14 have precisely Article 66 of our Administrative Act  
15 states that competencies or empowerments are  
16 indelegable. So, our competence means because of the  
17 rule of law, because of the legality principles, means  
18 an obligation by the government agency.

19          Q.    So--yeah, and we will probably have to  
20 disagree on this because "potestades" is what an  
21 administrative body can do, not what it shall do.

22                   And I believe the--wouldn't you say that the

1 formulation would be different?

2 A. Well, you can also read Article 13(20) of  
3 Executive Decree 36--36153. That it's the  
4 reorganization of SETENA, in which it also states that  
5 it is an obligation. It's a must.

6 Q. Let's move on.

7 So, would you say that the--the suspension of  
8 a--of an EV rather than a revocation actually gives the  
9 developer the avenue to correct the conduct that gave  
10 rise to the suspension and then continue once the  
11 conduct is corrected rather than--you know, you're  
12 suggesting that it should have been revoked. Wouldn't  
13 that--wouldn't that then entail that once the conduct  
14 is corrected, the developer would have had to restart  
15 everything, the whole Environmental Viability process,  
16 anew?

17 MR. BURN: Sir, can we just put down a marker.  
18 These are questions that perfectly--that Ms. Bouchenaki  
19 could have put in the original cross-examination and  
20 really ought to have done. I'm not going to object on  
21 this occasion. But if it continues, I reserve the  
22 right to object.

1           PRESIDENT SIQUEIROS: I think it should only  
2 be clarifications to the issues addressed by the  
3 Tribunal.

4           MS. BOUCHENAKI: Right. It was just going to  
5 the question--his response to the question of Mr. Baker  
6 where he was asking whether he was--what his attack  
7 against this was that it was a revocation--it was a  
8 suspension rather than a revocation.

9           PRESIDENT SIQUEIROS: Okay. Then that's fair.

10          THE WITNESS: Should I answer?

11          BY MS. BOUCHENAKI:

12          Q. Yes.

13          A. Yes. You're getting it wrong. What I said is  
14 that injunctions may be ordered. A principle,  
15 procedure either to sanction the party or either to  
16 declare null and void the Administrative Act has to be  
17 initiated within a reasonable time, which our  
18 Constitutional Chamber has stated in 15 days. To me,  
19 to my personal opinion, 15 days. It could be two  
20 months. But it's a reasonable time.

21                 Because remember that the injunctions are  
22 instrumental. Injunctions are not a procedure. So,



1 once you have ordered an injunction, you have to  
2 initiate either a judicial review or either an  
3 administrative proceeding.

4 And, yes, while the administrative proceeding  
5 is taking place, if the developer considers that it has  
6 to adjust to another plan or it has to--I don't know  
7 how you called it--he might. He might. It is not that  
8 the cancellation or the revocation or the annulment of  
9 the act, it's immediate. It would take at least one  
10 year. And that's why the injunctions are ordered.

11 Q. Okay. Thank you.

12 Now, just--my last question. Are you  
13 aware--you mentioned, in response to one of the  
14 questions of the Tribunal, that there would be damages  
15 awarded for the situation that you were describing  
16 regarding, you know, the revocation.

17 And are you aware of damages awarded for  
18 situations where an agency took too long to initiate a  
19 process, for example?

20 A. Sure. At least the four cases I cited from  
21 the Constitutional Chamber, the Constitutional Chamber  
22 also condemned the agency to pay damages.

1 Q. So, if the circumstances warranted, there are  
2 procedural avenues for the developers to seek damages  
3 in Costa Rica; correct?

4 A. Well, as a general principle, I don't know if  
5 in Costa Rica or in arbitration or wherever.

6 Q. I mean, what you're saying is--

7 A. Yes, the substantial law, once the agency has  
8 been condemned, is that he can claim damages.

9 Q. And, likewise if the--in relation to the  
10 questions on the Concession, if the developers--if  
11 Mr. Aven considered that the--that Article 47 was--was  
12 of the ZMT Law regarding the 51 percent rule  
13 ownership--the 51 percent ownership rule--if he  
14 considered it to be unconstitutional, he did have an  
15 avenue to raise its lack of constitutionality, did he  
16 not?

17 A. No. In that case, there is no avenue because  
18 you have to have--to go to the Constitutional Chamber  
19 and challenge a law, you have to go--you have to have  
20 what we call a precedent case.

21 So, the issue should be--have been discussed  
22 either by way of a judicial review or either because

1 the Municipality initiated the proceeding to cancel  
2 that Concession. And that is not the case. The  
3 Municipality has never even raised the issue. So,  
4 Mr. Aven does not have a precedent case which he can  
5 use to go to the Constitutional Chamber and challenge  
6 the law.

7 Q. And in this case, are you aware that Mr. Aven  
8 never disclosed his dealings in relation to the  
9 ownership of the Concession to the Municipality?

10 A. I'm not aware of that.

11 MS. BOUCHENAKI: Thank you. No further  
12 questions.

13 PRESIDENT SIQUEIROS: Okay. Thank you very  
14 much. And appreciate, as always, the patience of the  
15 Reporters and Interpreters.

16 So, we should take a 15-minute break. And we  
17 will continue with Mr. Jurado.

18 Thank you.

19 (Brief recess.)

20 MR. BURN: There is a procedural matter before  
21 we begin.

22 PRESIDENT SIQUEIROS: Please, sir.

1           MR. BURN: Last night we sent over to counsel  
2 for the Respondent three documents we wish to put in as  
3 new exhibits. We haven't had the response back as to  
4 their acceptability yet, but I'd like to tender them  
5 just to make clear what they are.

6           One is an article from the Costa Rican  
7 Commercial Code pertaining to trusts. It's a very  
8 short, one-page. One is an opinion issued recently by  
9 the Attorney General of Costa Rica. And one is the  
10 field indicators from the United States Department of  
11 Agriculture, which is referred to by the environmental  
12 experts on both sides.

13           We would suggest that, as regard to the first  
14 two, these are materials that are familiar to everybody  
15 in the practice of Costa Rican law and are not to cause  
16 any difficulty. And as regard to the third, as I say,  
17 the experts on both sides refer to them. So that,  
18 again, there ought not to be any difficulty.

19           MR. LEATHLEY: Mr. President, yes, I can  
20 confirm we have no objection to them going on the  
21 record. We will reserve the right, if we may, sir, to  
22 submit some documents in response, perhaps during the

1 course of today. But, yes, just with that reservation,  
2 sir.

3 PRESIDENT SIQUEIROS: Okay. That's fine.

4 ARBITRATOR BAKER: Could I ask, Chairman,  
5 where we stood on the compilation that Dr. Weiler had  
6 been putting together, where that is?

7 MR. LEATHLEY: Thank you, sir. Yes. We are  
8 reviewing it. It's a very comprehensive document. And  
9 so, we want to take time. And we thought that our  
10 resources were best spent during the hearing to focus  
11 on the matters in hand. But we will turn to it as soon  
12 as these proceedings are over on Monday.

13 JULIO JURADO FERNÁNDEZ, RESPONDENT'S WITNESS, CALLED

14 PRESIDENT SIQUEIROS: So, if we're ready to  
15 proceed, then I will advise Mr. Jurado of how the  
16 hearing shall be conducted.

17 Mr. Jurado, I understand that you will be  
18 making a presentation and you will be subject to  
19 examination in Spanish; correct?

20 THE WITNESS: Yes, sir.

21 PRESIDENT SIQUEIROS: However, I simply wanted  
22 to clarify a few points regarding the procedure,

1 although you may be aware of them. But we have to  
2 record them, set them in the record.

3           You have offered--you are here as an expert  
4 witness offered by the Respondent, the Republic of  
5 Costa Rica, regarding the laws of Costa Rica.

6           As such, the procedure we will follow is that  
7 the Respondent will ask a few questions to confirm your  
8 Statement, your Witness Statement, and then you make a  
9 presentation. And after that, there will be cross-exam  
10 by the Claimant. And after that, the party that has  
11 offered a statement will be able to ask a few questions  
12 regarding the topics covered by the Claimant during its  
13 cross-examination.

14           Would you be so kind to ensure that before you  
15 answer, that the question has been made fully and that  
16 you answer the--answer specifically the question that  
17 has been asked. If you have any clarification to make,  
18 you will later have the opportunity to do so. Any  
19 questions that you have on any question, please say so  
20 before answering.

21           The Arbitration Tribunal can also ask  
22 questions at any time, even though, as you will be able

1 to see, normally the questions by the Tribunal are  
2 asked after the Parties have done their examination.

3 And, finally, I would like to ask you to read  
4 this card that is before you, and I would like to ask  
5 you to read it, and that it's with regard to what you  
6 will be doing here.

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

10 PRESIDENT SIQUEIROS: Thank you very much.

11 And finally, even though your Statement--your  
12 Witness Statement is regarding Costa Rican legislation,  
13 you appear before this hearing as a witness. Because  
14 in the final analysis, local legislation for a  
15 procedure of this nature is topic of fact and not as an  
16 expert in Costa Rican law, even though the Tribunal is,  
17 of course, very aware of your high position.

18 Thank you.

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

20 And in that regard, if I can just clarify one  
21 thing for the record.

22 Mr. Jurado has asked me to clarify for the

1 record, and we would like to clarify for the record,  
2 that Mr. Jurado has not been looking at the facts of  
3 this case in the sense of the specific Las Olas  
4 Project. So, he will be dealing with the fact as Costa  
5 Rican law is a fact in this matter.

6 Thank you, sir.

7 DIRECT EXAMINATION

8 BY MR. LEATHLEY:

9 Q. Mr. Jurado. Good morning. First of all, I  
10 would like to confirm--or could you confirm the copies  
11 of your statements that are in the binder.

12 You don't need to review them in detail.  
13 Simply confirm that under Tabs 1 and 2 that that's  
14 where your statements are.

15 Is that right? Is everything okay?

16 A. Yes, everything is okay.

17 Q. Thank you.

18 And, Mr. Jurado, I don't know if you can  
19 confirm what your position is now and your professional  
20 experience, very briefly, please.

21 A. Yes. My present position is Attorney General  
22 of the Republic. Recently I was appointed by the



1 Government Council of my country and ratified by the  
2 Legislative Assembly in October of this year.

3 Before that my work was as executive director  
4 of the National System of Conservation Areas. And I  
5 would like to clarify that there--I was there with a  
6 permit without salary because I am an attorney--a  
7 prosecutor. And since 2014 until 2016, I was acting as  
8 executive director of the National Council of  
9 Conservation.

10 And before that I had been in my normal  
11 position as a prosecutor in the environmental area  
12 within the Attorney General's Office.

13 Now, for a certain period of time, I was also  
14 a consultant for a program of the Costa Rican  
15 government financed by a loan of the Inter-American  
16 Development Bank, which was a program to prepare a  
17 cadaster at the national level of Costa Rica and to  
18 make reforms to the registration system of Costa Rica.

19 In addition to that, I'm a professor at the  
20 University of Costa Rica for over 20 years. I founded  
21 the master in environmental law at that university. I  
22 was the director since its foundation from 2004 to

1 2014. And I give courses on constitutional law at the  
2 University of Costa Rica at this point.

3 Q. Thank you very much.

4 We understand that you had a presentation.  
5 But before beginning that presentation, do you share  
6 the opinion of Mr. Ortiz? You were present here at the  
7 hearing during his presentation; correct?

8 A. Yes, I was. I was present. In some aspects,  
9 I do share his opinion, and in others I have certain  
10 differences or opinions that are divergent. Maybe  
11 throughout my presentation you will see where, and with  
12 all due respect to my colleague, I have these  
13 differences of opinion.

14 Q. Thank you very much.

15 So, if we can ask you to begin your  
16 presentation, please.

17 DIRECT PRESENTATION

18 THE WITNESS: I would like to first ask a  
19 question to the Tribunal. I have a few corrections to  
20 make to my statement. Is this the point where I should  
21 make them or is the moment over?

22 PRESIDENT SIQUEIROS: No. This is the exactly

1 the moment in which you should make these amendments.

2 A. In the Second Statement, I would like to make  
3 a change to Paragraph 11.

4 In this paragraph, I say, "It is worth  
5 highlighting that the Environmental Viability granted  
6 by SETENA constitutes a prior requirement, a previous  
7 requirement, or an act of a merely formal nature. This  
8 is subordinated to the issue of a final act which is  
9 materialized with the construction permit."

10 I would like to add after "final act" to say  
11 "that, for instance, is materialized with the  
12 construction permit."

13 So, this is an only an example which, for  
14 instance, is materialized with a construction permit  
15 because there can be other final acts.

16 Then in Paragraph 20--

17 BY MR. LEATHLEY:

18 Q. Mr. Jurado, I would like to clarify to see if  
19 the English translation came out well. So, where would  
20 you introduce this in Paragraph 11? For example, it  
21 would come after "which"?

22 A. "Which is," for example, yes.

1           And in Paragraph 20--and I would like to  
2 change the word to "precautionary" by--and replace it  
3 by "preventive."

4           Where it says, "The function of the  
5 Environmental Viability is to serve as the preparatory  
6 act ensuring that the work or project has been analyzed  
7 from the"--

8           COURT REPORTER: Could you read more slowly,  
9 please. Thank you.

10          THE WITNESS: And from the beginning?

11          COURT REPORTER: Yes.

12          A. "Hence, the function of the Environmental  
13 Viability is to serve as the preparatory act ensuring  
14 that the work or project has been analyzed from the  
15 preventive principle perspective and not precautionary  
16 principle perspective."

17           And, finally, in Paragraph 31, it states,  
18 "Such procedure constrains the Public Administration to  
19 request the opinion of the Office of the Attorney  
20 General of the Republic, certifying that the nullity is  
21 absolute." We should add "evident and manifest."

22           And these are the corrections I wanted to

1 introduce.

2 BY MR. LEATHLEY:

3 Q. Thank you very much. Very well.

4 A. I would like to make a brief presentation that  
5 might help the Tribunal and the Parties to try to  
6 clearly show what is the role of the environmental  
7 legal system in Costa Rica as well as its importance.

8 I will deal with the following subjects very  
9 quickly. I will make a brief presentation of the model  
10 of environmental conservation in Costa Rica, what we  
11 have achieved up to now in the area of biodiversity  
12 conservation in my country. Then I would like to make  
13 reference to the legal and constitutional framework  
14 that is the basis for this conservation model.

15 I would also like to make specific reference  
16 to the environmental impact assessments, EIAs, as an  
17 instrument that operates in Costa Rica to reconcile the  
18 sustainable development goals with the economic goals,  
19 rather, with environmental protection within the  
20 framework of sustainable development.

21 I would like to make reference also to  
22 precautionary measures or injunctions that are adopted

1 in the environmental area, and I would also like to  
2 make reference to the Maritime Terrestrial Zone.

3           Costa Rica has been quite a successful model  
4 internationally in the area of environmental  
5 conservation. At this point we have 52.38 percent of  
6 the national territory comprised of forests. In  
7 addition, the country, because of the geographic  
8 position, it is--it has a share of 6 percent of the  
9 world's biodiversity. And it has allocated 26 percent  
10 of its land to be covered by a protection regime.

11           In other words, it has used, quite  
12 extensively, the instrument of creation of Wildlife  
13 Protected Areas or natural spaces to protect an  
14 extensive sector of the national territory. This is an  
15 instrument of what we call on-site conservation of  
16 biodiversity.

17           Of course, this model has been the result of  
18 the legal framework that has developed with time,  
19 especially starting in the '70s or, rather--yes, in the  
20 '70s.

21           We began to attack or to have extensive  
22 regulation for protection of the environment. Then we

1 started with the Wildlife Conservation Law, the Organic  
2 Environmental Law, and the Biodiversity Law.

3           These last two were established in the  
4 mid-'90s.

5           I should clarify that these are the essential  
6 laws. Of course, together with these laws, we have a  
7 whole set of regulations, extensive regulations, in the  
8 environmental area. And I'm saying that this is a  
9 process that began in the '70s but that still began,  
10 actually, before to--for illustration we should mention  
11 that one of the first areas or protected areas was  
12 created already in 1888. That's when the first natural  
13 space--or one of the first natural spaces for  
14 protection was established in the northern area of the  
15 Central Valley of Costa Rica in order to protect  
16 aquifers, thinking about crops and protecting also  
17 waterways.

18           This was a very visionary decision by the  
19 people governing in that time, and we protected quite a  
20 large territorial space.

21           But as I was saying, it is as of the end of  
22 the '60s, beginning of the '70s that we began this

1 environmental legal development which has been the  
2 basis for this model of conservation which I personally  
3 define, even with its fault, because nothing is  
4 perfect, a model that we can call successful regarding  
5 protection and conservation of biodiversity.

6           Of course, this set of laws grant a number of  
7 authorities and competence to a number of  
8 administrative departments. This is competence given  
9 to different areas of the Public Administration.

10           Obviously, since we're speaking of Public  
11 Administration, it practices its competence granted by  
12 these laws under the general law of Public  
13 Administration. Like any other sector of Public  
14 Administration, all is subject to the principle of  
15 legality established by Article 11 in the Constitution  
16 which states that a State and Public Administration  
17 cannot go beyond what is allowed expressly by law.

18           Within this development of regulations what is  
19 especially important is Article 50 of the Constitution.  
20 It is an article that was amended in the '90s--in 1994  
21 and which established two things. First of all, the  
22 right to a healthy and ecologically balanced



1 environment as a fundamental right. A fundamental  
2 right recognized for all inhabitants of the Republic.

3 In addition, it is a right due to  
4 constitutional case law protects a diffuse right, and  
5 that's why there's a lot of procedural regulations to  
6 implement this right, especially in jurisdictional  
7 entities, especially in the administrative litigation  
8 area.

9 But this Article 50, in addition to a right,  
10 also establishes a constitutional principle, a  
11 principle that the State is--has the obligation and  
12 duty to protect the environment.

13 On the basis of this principle or, rather, on  
14 the basis of this article, a number of important  
15 principles have arisen that govern environmental law in  
16 Costa Rica, especially thanks to the important  
17 work--the major work of jurisdiction--of jurisprudence  
18 development by the Constitutional Chamber.

19 The Chamber--

20 COURT REPORTER: I'm sorry. I don't want to  
21 interrupt. But could you speak a bit--somewhat slower?  
22 Could we ask you to speak somewhat slower?

1 THE WITNESS: Yes. Of course.

2 A. Out of Article 50 of the Constitution, a  
3 number of major principles have arisen regarding case  
4 law at the level of the Constitutional Chamber. The  
5 first one is the principle of sustainable development.

6 Well, on the basis of the concept of  
7 sustainable development, as such, as has been developed  
8 internationally, especially after the Rutland Report in  
9 the '80s and has been developed and contained in the  
10 Rio Declaration of 1992, this is a concept which  
11 establishes that development must be carried out on the  
12 basis--bearing in mind the environmental variable and  
13 always thinking that the use of environmental resources  
14 be a rational use that will not compromise, future  
15 generations who will also have to use these resources.  
16 The Chamber has said that this is set forth by Article  
17 50, and it is the basis of all of the actions of Public  
18 Administration on the public policies developed by the  
19 Costa Rican State.

20 In addition, it has developed the preventive  
21 principle that has been mentioned here and the  
22 precautionary principle as two basic principles of

1 environmental legislation. It has been said here, and  
2 it is true, and we can mention, that the preventive  
3 principle is one which compels the State to adopt  
4 measures for prevention based on the certainty that a  
5 given activity might generate environmental damage.

6 And the precautionary principle is one which  
7 compels the State in general and the Administration in  
8 particular to prevent any action on--regarding which  
9 there might be a question if they do generate or not  
10 environmental impact.

11 The decision is government under the  
12 precautionary or pro natura principle, and that is if  
13 there's any question on the impact it might generate,  
14 we have to abstain from authorizing that activity. In  
15 other words, the State has that obligation.

16 Here I would like to especially mention the  
17 evaluation of the environmental impact. And as I said  
18 before, this arises from Article 50 of the Constitution  
19 to the extent that the Environmental Impact Assessment  
20 is a naturalization of the preventive principle at its  
21 legislative level.

22 The Constitutional Chamber has shown that the

1 basis of Article 17 of the Organic Environmental Law,  
2 which is the article that establishes that all human  
3 activities that might alter or destroy elements of the  
4 environment or might generate toxic or dangerous waste  
5 require environmental assessment.

6           And that article is based on Article 50 of the  
7 Constitution. It is a legal article which is a direct  
8 development of Article 50 of the Constitution because  
9 it is a way to materialize the preventive principle.

10           What this means is that a set of obligations  
11 are developed by the State and by developers with  
12 regard to this idea of complying with the preventive  
13 principle.

14           We have an institution, a body of the  
15 environment, in MINAE's ministry which is the National  
16 Technical Environmental Secretariat which does the  
17 Environmental Impact Assessments. But the operation of  
18 this principle is one that presupposes that a private  
19 person also has obligations with regard to  
20 environmental defense and that he or she has the  
21 obligation to give the Administration the necessary  
22 information regarding his or her activities that

1 potentially could be damaging to the environment.

2           The Environmental Impact Study is simply an  
3 assessment of the possible damages that a given  
4 activity might produce on the environment where the  
5 developer does a diagnosis of these possible damages  
6 and offers solutions of compensation, mitigation, or  
7 relief to the--of these damages.

8           The Secretariat's role is to see if this is  
9 the correct diagnosis and if the commitments of  
10 mitigation of this damage reduction or compensation or  
11 relief correspond to the study that is being done about  
12 possible damages. Obviously, we use this point of  
13 departure that the developer is providing information  
14 on his activity in the area of possible damage, that is  
15 true, which is why he's asked to make the statement  
16 under oath.

17           And, as a matter of fact, there is trust by  
18 the State and a relationship of good faith with the  
19 Administration that the developer is providing  
20 information--the relevant information to be able to see  
21 if the compensation mitigation of the possible damage  
22 plan is adequate or not.

1           Of course, that legislation establishes that  
2 among the competencies of the bodies that have to  
3 process this assessment we have a fact that they  
4 couldn't go to see on-site if what the developer is  
5 saying is true or not. That is one of the  
6 competencies.

7           It is also an obligation because the National  
8 Secretariat--well, it's not an obligation.

9           MR. LEATHLEY: Excuse me, sir. There was a  
10 mistranslation.

11           INTERPRETER: It is not an obligation. The  
12 interpreter corrects. Thank you. Going fast. Thank  
13 you.

14           MR. LEATHLEY: Mr. President would have heard  
15 the English. I am listening to the English, and there  
16 was a misstatement that I think has been clarified.

17           PRESIDENT SIQUEIROS: It has been clarified  
18 now in the record? Or would you care to advise which  
19 is the correction we should make?

20           MR. LEATHLEY: The correction, if I may--and  
21 I'm happy to be opposed--is that Mr. Jurado was saying  
22 that it is not an obligation, and the translation just

1 miscorrected it. But the translator kindly followed  
2 up. Thank you.

3 A. To repeat, it's not an obligation. It's not  
4 even provided for in the regulations of SETENA. It is  
5 not established as an obligation. And that article and  
6 the regulations have stated that its one of its duties.  
7 And, of course, one of its duties is evidently to  
8 confirm if what the developer is saying is correct.  
9 But when there's some reasonable doubt about this or  
10 it's an important project or a cause of that kind. And  
11 it's not an obligation because it would be absurd to  
12 think that every application for a viability needs in  
13 situ inspection.

14 There are many applications made every year to  
15 SETENA. Many files that are processed. And if every  
16 application would necessitate an inspection, of course,  
17 the person has sworn that this is true, well, they  
18 wouldn't have them swear a statement, and there would  
19 not--the viabilities, of course, would be--would have  
20 to be credible.

21 So, of course, they have to decide which need  
22 inspection and which don't, and they would have to, of

1 course, do inspection if there's been a complaint.

2 But if they are basing this on sworn statement  
3 and there is a relationship with the developer, which  
4 has to give the truthful information about the impacts  
5 project, they're not going to go to every project to  
6 see if what they've said is correct or not.

7 Because if not, the system would be organized  
8 in another manner. There would just be an application  
9 filed and then SETENA would have to gather all the  
10 information.

11 And the system has been organized so that the  
12 developer provides information, biological studies,  
13 hydrological studies; all studies required are provided  
14 by the developer and the administrator--or the  
15 Administration accepts them under a relationship of  
16 trust.

17 Now, if they think there is some information  
18 that's not true, then they would make an inspection.

19 QUESTIONS FROM THE TRIBUNAL

20 PRESIDENT SIQUEIROS: So, the Parties have  
21 referred to this as the inversion of the burden of  
22 proof to show that it doesn't affect the environment



1 instead of the Administration having to prove that it  
2 affects the environment.

3 THE WITNESS: So, the burden of proof would  
4 imply this if we were trying to see if there's been  
5 harm to the environment. But in the case of an  
6 Environmental Impact Assessment, well, we have the  
7 supposition that there might be harm to the  
8 environment. And so, the inversion of the burden of  
9 proof--well, the developer has to say what could be the  
10 harmful effect of his or her project and what's  
11 developer going to do to mitigate this?

12 The Administration does not have to verify  
13 whether this project actually will generate this harm.

14 So, that's why the developer has asked for all  
15 the studies. If not, the Administration would do the  
16 studies. Rather, the developer is requested to provide  
17 the studies and the Administration supposes that  
18 experts have done these, that they're qualified, and  
19 that these are correct.

20 And so, the developer must be truthful about  
21 the conditions.

22 ARBITRATOR BAKER: If I may, sir, because it's

1 topical.

2           Could--I understand and hear your testimony  
3 about the reliance on the oath and on the developer's  
4 duties to come forward with information. But if that  
5 is the basis of the system, what is--help me understand  
6 how the agency then makes a determination about which  
7 ones to look at.

8           If everybody has signed a similar oath and if  
9 everybody is using experts and we all rely on the  
10 principle of good faith in that process, other than a  
11 complaint being made by an outside party, I haven't  
12 heard you tell us how the agency distinguishes between  
13 which projects to review and which ones not to review.  
14 Could you help me with that, please.

15           MR. LEATHLEY: I'm sorry to interrupt.  
16 There's been a translation issue that may have prompted  
17 your question, sir. Because "duties"--I also heard  
18 "duties." And the word in Spanish was "funciones." I  
19 only raise that not to impart whether it's a right or  
20 wrong interpretation, but I think the terminology here  
21 is very important. So, I just wanted to put that on  
22 the record.

1           PRESIDENT SIQUEIROS: It is. But I think the  
2 question from Mr. Baker is perfectly legitimate because  
3 it addresses regardless of the translation.

4           MR. LEATHLEY: Absolutely. No, of course.  
5 Understood. Thank you. Sorry to interrupt.

6           THE WITNESS: The agency in this case, SETENA,  
7 has qualified personnel to do the studies and to see  
8 whether the studies are good or not, whether they  
9 satisfy the requirements. And in practice.

10           And that's what I'm saying. This is  
11 describing a practice. And in practice, SETENA, does  
12 not do in situ inspections of all Environmental Impact  
13 Assessments. Just--it's a pragmatic problem. They  
14 would not have the capacity to process all of the  
15 applications.

16           And so, that's why there is this trust in the  
17 truthful information. They have teams of biologists,  
18 hydrologists that can evaluate the information. And if  
19 something raises a red flag or looks suspicious, then  
20 they can do an inspection. Or because of the magnitude  
21 and the size of the project, they could consider that  
22 they need to do an inspection. Or because of the

1 location of a project, they could consider that that  
2 project, because of where it's located, because it's  
3 near a WPA, or over an aquifer, that in addition to  
4 receiving all the information from the developer, well,  
5 that they should also inspect.

6 ARBITRATOR BAKER: That's very helpful. If I  
7 could just ask you to help me in one more regard.

8 And that is, do you have any feeling or  
9 understanding between the percentages of on-site  
10 reviews that are conducted by the agency because of the  
11 criteria that you just listed, like size or location to  
12 another environmentally sensitive area, versus the  
13 number of in-site inspections that are triggered by  
14 third-party complaints?

15 THE WITNESS: No, I don't have that  
16 statistical information. I can't give you precise  
17 percentages.

18 ARBITRATOR BAKER: Thank you.

19 THE WITNESS: May I continue?

20 ARBITRATOR BAKER: Please.

21 THE WITNESS: Well, I think that with  
22 this--well, I have talked about environmental impact

1 assessments, but I wanted to tell you that this is the  
2 result of or manifestation of preventive principle  
3 because it's to conciliate environmental and social  
4 development within a framework of sustainable  
5 development. That's what the purpose of the  
6 Environmental Impact Assessment is.

7           The preventive principle allows for social and  
8 economic development while protecting the environment  
9 and it is a vital importance for a country like Costa  
10 Rica. As I said previously, this is a country that has  
11 adopted or has bet on, if I could say that, on the  
12 protection of our environment. And a quarter of its  
13 territory is--it's used only for conservation and it  
14 cannot be economically developed. So, I think it's  
15 extremely important.

16           Now, within this constitutional and legal  
17 framework, there is a whole administrative structure  
18 which exists in one area of the Public Administration.  
19 The most important agency in this regard is, of course,  
20 the Ministry of Environment and Energy, MINAE.

21           This was created in the '70s in Costa Rica,  
22 and they were given the task of conserving

1 biodiversity. And in addition to being a very complex  
2 ministry--and that's why--well, it's because there are  
3 so many disciplines involved in the environment. But I  
4 wanted to point out important agencies under MINAE and  
5 that they actually are probably important in this case,  
6 although I don't know the details.

7           One is the National Technical Environmental  
8 Secretariat. They process Environmental Impact  
9 Assessments. And we have the National System of  
10 Conservation Areas, and I will talk about that system  
11 later. And then we have the Environmental  
12 Administrative Tribunal which deals with the penalties  
13 and also enforcement of norms or damages, for example,  
14 to the environment that may have been caused.

15           Now, the National System of Conservation  
16 Areas, or SINAC, is a deconcentrated body of MINAE as  
17 well as the TAA.

18           Now, I wanted to avail myself at this moment  
19 to explain what a deconcentrated body is.

20           Mr. Ortiz referred to how the Public  
21 Administration is organized in Costa Rica, and he  
22 mentioned the difference between the central government

1 and what we call the lower-level  
2 agencies--decentralized agencies.

3           Now, the basic relationship between the Public  
4 Administration and a decentralized body is that the  
5 decentralized bodies have autonomy, at least  
6 administratively speaking. Those are autonomous  
7 agencies, which is a decentralization of the State from  
8 a functional point of view.

9           Now, then we also have the autonomy of local  
10 governments. They--not only the decentralization of  
11 these local governments, they have governance autonomy.

12           So, they have more autonomy as compared to the  
13 autonomous agencies, which are the product of  
14 decentralization of functions.

15           Now, the relationship between the executive  
16 branch and these decentralized bodies is a relationship  
17 which takes place under the idea of administrative  
18 protection.

19           Now, they--the central government can only  
20 issue guidelines for these decentralized bodies. They  
21 cannot tell them exactly what to do.

22           Now, within each of the agencies there are

1 deconcentrated bodies. It's a kind of decentralized  
2 structure, but it's a little less because they don't  
3 have--they're not legal entities or they don't have  
4 legal personalities.

5           And so, they are given certain competencies,  
6 and within these competencies, they have some  
7 independence with regard to the lead agency.

8           Now I want to make this distinction because I  
9 want to distinguish between deconcentrated bodies and  
10 decentralized bodies because it's a question of degree.

11           The deconcentrated bodies are under other  
12 agencies like MINAE. And one is SINAC. But they--they  
13 have the idiosyncrasy that this is a regionalized body.  
14 It's divided into 11 conservation areas throughout the  
15 country.

16           One of these areas is involved in this case,  
17 which is the Pacific Central area. And so, the  
18 services that are provided by SINAC and the  
19 competencies that are exercised by SINAC, it does this  
20 in a regionalized way with offices that are dispersed  
21 throughout the country. Furthermore, SINAC, is one of  
22 the few bodies of the executive branch that has



1 presence throughout the entire country. It's one of  
2 the few.

3           And it's very useful. When there's a national  
4 emergency, for example, the hurricane that we were just  
5 hit by, one of the great advantages of SINAC is it has  
6 public servants throughout the country.

7           And so, there are regional offices throughout  
8 the country. And it's a specific characteristic of the  
9 system. But the important thing about the system puts  
10 Costa Rica in the vanguard of environmental protection  
11 in many senses is that the competencies with regard to  
12 wildlife, with regard to protecting forest resources,  
13 also water resources and also protected areas, all of  
14 these are exercised by one single body. That's not  
15 very common.

16           In almost all countries there's a Department  
17 of Forestry, of Fishing and Wildlife, for example, like  
18 here in the United States, National Parks, Fishing and  
19 Wildlife, et cetera.

20           So, we have all those functions in one. And  
21 that's SINAC. And there's been an effort made, that  
22 was very large in the '90s, with regard to the

1 conservation areas in Latin America. It's been a model  
2 that's been copied or others have inspired themselves  
3 to protect the environment.

4 Now, why do I mention this issue? Because I  
5 want to give a different image of my country than what  
6 has been stated with regard to how the State protects  
7 the environment.

8 Why? Because it wants to promote sustainable  
9 development. And it is invested in an administrative  
10 apparatus to do so, not to hinder what developers do or  
11 to stop development, rather to protect the environment  
12 and harmonize this in keeping with the sustainable  
13 development of the country and betting on conservation  
14 and biodiversity.

15 It is important to bear in mind what is a WPA,  
16 a Wildlife Protected Area. And this has been used  
17 without defining it clearly. This is a geographic  
18 area. It is delimited. And so, the State decides, for  
19 reasons of conservation, that it is going to have a  
20 special conservation regime.

21 There are different categories of management  
22 for this. This is a general category. There are

1 specific categories of WPAs in our Administration.  
2 There are forest reserves, national parks, and there  
3 are wetlands.

4           And wetlands can be subject to a special  
5 regime as a WPA. But that doesn't mean all--all  
6 wetlands are WPAs, just those through decree or law  
7 have been subject to the WPA.

8           Now, the other wetlands are not subject to  
9 WPA. However, they are protected because the  
10 Constitutional Court has made it clear that it's the  
11 ecosystem of wetlands that is protected. So, they do  
12 enjoy special protection because they are subject to  
13 protection because we are trying to protect the  
14 ecosystems. But some need stricter protection for  
15 whatever reasons there may be. It has been decided  
16 that it will be subject to wildlife protected area as a  
17 wetland.

18           Now I'd like to talk a bit about the  
19 injunctions. When we talk about precautionary  
20 measures, when we call them environmental precautionary  
21 measures, they are administrative precautionary  
22 measures. We are talking about acts of the

1 Administration and that sector of the Administration  
2 which is devoted to protecting the environment, the  
3 Environmental Public Administration.

4 I don't want to go into detail, but this has  
5 legal basis not only in Article 50, to the extent that  
6 that contains the precautionary and preventive  
7 principles which is important in adopting precautionary  
8 measures, it also is based on other articles of the law  
9 and the environment and the law on biodiversity.

10 And those precautionary measures can be issued  
11 by the different bodies I mentioned.

12 Now, there is legal grounds for precautionary  
13 measures from SETENA, also legal basis for those from  
14 the TAA, and also legal grounds for SINAC's  
15 precautionary measures. This year the Constitutional  
16 Court has said that Article 99 of the Environmental Law  
17 is the legal basis for precautionary measures that  
18 SINAC may and should issue as a body.

19 Precautionary measures with regard to the  
20 environment have the same requirements as  
21 administrative measures. There's no doubt about that.  
22 Precautionary measures have always had these

1 requirements. They have been developed in the  
2 Administrative Code, which went into force in 2008, if  
3 I'm not mistaken.

4           These characteristics that are regulated in  
5 this code also prevail administrative proceedings  
6 because there's no specific norms under that. So, the  
7 Administrative Procedural Code is followed and, for  
8 example, no delays, weighing the different interests.  
9 The same requirements exist here, as Mr. Ortiz  
10 mentioned, I believe, when we talk about this in  
11 Spanish, the danger of delay, the appearance of justice  
12 and weighing of interest.

13           I also wanted to mention the weighing of  
14 interest because this plays an important role with  
15 regard to what is talked about in the law as the public  
16 interest in the environment. And it is recognized  
17 specifically in the law. And it gives it a special  
18 weight when a precautionary measure is decided upon.

19           This is a provisional measure. It is  
20 instrumental. It is not in and of itself a proceeding  
21 or--it's instrumental.

22           And it is limited in time. I see here a

1 debate, and I see that there's some--well, there's no  
2 established period with regard to administrative  
3 Precautionary Measures. The Constitutional Court has  
4 talked about the same period for Precautionary Measures  
5 ante causam, which are placed upon the Claimant before  
6 they file--well, then, this 15-day period is ante  
7 causam and afterward.

8           So, the Precautionary Measure is temporary,  
9 but it is to stop imminent harm to the environment,  
10 because in Environmental Law, it would not--make no  
11 sense to see if harm is already inflicted, because then  
12 it would be--damage would already have been done by the  
13 time this measure would be issued.

14           So, to be speedy, the administration issues  
15 Precautionary Measures, and it has a certain period of  
16 time to then launch the main proceeding. This is the  
17 proceeding which may lead to the nullification of the  
18 permits issued by the administration. It's not that  
19 the administration has two different ways to go--or it  
20 imposes the Precautionary Measures or nullifies the  
21 permits; it doesn't have two ways to go.

22           To avoid the harm, it must act swiftly. And

1 to do this, it issues Precautionary Measures, then it  
2 has a period of time, which we can debate whether it's  
3 15 days or more to adopt this main proceeding, which  
4 can nullify the permit or not. Then it has this  
5 period.

6           What I want to say is that the 15-day  
7 period--the constitutional case law has made an  
8 exception for the environment, and it doesn't strictly  
9 apply the 15-day period.

10           In other cases in which the TAA, based on my  
11 experience as a prosecutor--because I've had to defend,  
12 for example, administrative decisions, the TAA has  
13 issued a Precautionary Measure and it has not initiated  
14 the penalty phase, which is the main proceeding that  
15 the Precautionary Measure depends on, then the  
16 Constitutional Court has given longer periods of time.  
17 And that's in its case law.

18           Why? Because sometimes the adoption of this  
19 main proceeding requires study by the administration  
20 with regard to the environment, which requires more  
21 time and to know what it needs to do.

22           Now, the Court has been more flexible in this

1 regard. More flexible; it has not created a situation  
2 where it's "sine die," no deadline. It's more  
3 flexible, though.

4 And that's why my point here--and I  
5 want--this--Mr. Ortiz mentioned this, that this is not  
6 strictly applied. The Constitutional Court has not  
7 applied the 15-day period strictly.

8 I would like to reflect on the Maritime  
9 Terrestrial Zone and provide a short explanation. The  
10 Maritime Terrestrial Zone is a strip on the coast 200  
11 meters measured from the normal pleamar; in other  
12 words, inside--or in the ocean. The first 50 meters  
13 belongs to the State. Those first 50 meters belong to  
14 the State, and then cannot be granted to anyone under  
15 any circumstances, not in any Concession. But there  
16 are some exceptions, perhaps to build something with  
17 regard to the poor, but they're very exceptional, only  
18 necessary works, but they cannot be granted in  
19 Concession, the first 50 meters.

20 The 150 meters can be granted in Concession.  
21 They're not given to anyone--they can't be granted to  
22 anyone to allow them to be owner. The State grants



1 these in Concession. And it awards this to an  
2 individual for a certain period of time in Concession.  
3 And there is a contract with the individual where you  
4 establish the terms of the Concession, the use fee, and  
5 other provision.

6           The law has established a limitation with  
7 regard to Concessions to foreigners, and one of these  
8 limitations or restrictions is that corporations whose  
9 capital--well, the majority is owned by foreigners,  
10 they cannot have these Concessions, and that is some  
11 discrimination there, but this is a public good.

12           We're not talking about private property.  
13 This is--it belongs to the public, and it has  
14 particular aims, vis-à-vis the State. It's for  
15 national security. It's to protect the environment.  
16 And it's to promote tourism.

17           So, the legislators decided when they approved  
18 that law that they were going to restrict foreigners  
19 from having these Concessions--or being granted these  
20 Concessions.

21           And so, there's been questioning of the  
22 constitutionality of this provision; and with all due

1 respect, and without getting into theoretically whether  
2 that's constitutional or not, this has been upheld, and  
3 not because of technicalities; rather, that based on  
4 the merit, that this is constitutional to--to have this  
5 discrimination for the reasons that the Court  
6 developed, because it is public good, et cetera, and  
7 the Court has upheld its constitutionality.

8           Now, of course, legislators could change the  
9 law later without any problem. But they haven't done  
10 so. And so, the Court has said that the decision of  
11 the legislators is in keeping with the Constitution; it  
12 is not unconstitutional.

13           Now, with that, I'd like to end my  
14 presentation.

15           I'd just like to reflect, if I may, on the  
16 Environmental Impact assessments.

17           I said that the Environmental Impact  
18 assessments are basically a way to handle potential  
19 damage that a developer might foresee that his  
20 activities could cause to the environment.

21           So, there's going to be an assessment of the  
22 possible effects--harmful effects of an activity on the

1 environment and a program and a proposal of how to  
2 handle these harmful effects, how to mitigate them,  
3 eliminate them, if possible, or compensate for them.

4           From this perspective, the Environmental  
5 Viability--and I said that in my presentation. I want  
6 to clarify this--is an act that does not provide the  
7 right to do any activity with viability. A developer  
8 cannot begin construction immediately of his project,  
9 whether it is real estate or a factory. Without  
10 viability, they can't do anything. It is a  
11 requirement.

12           So, that the administration then provides the  
13 permits, whatever the permits may be, to be able to  
14 then undertake the activity. Without the Environmental  
15 Viability, the administration will not hand out the  
16 permit. But with the Environmental Viability, it's not  
17 for sure either. They could be denied the permits for  
18 other reasons.

19           So, the Environmental Viability is not  
20 granting a developer a construction permit--well, the  
21 developer needs specific real estate developer permits  
22 from INVU, if it's a subdivision, well, et cetera.

1           And so, the State cannot provide those permits  
2 without a viability. They cannot authorize the  
3 developer to begin to construct if SETENA has not  
4 looked at the plan to manage any harmful effects on the  
5 environment.

6           And that's what the viability is. It's--it is  
7 the approval for the plan to manage Environmental  
8 Impacts. That's all.

9           In order to be able to conduct it, other  
10 permits have to be obtained as authorizations that will  
11 be based on other requirements and the criteria before  
12 they can conduct their activity. If there are many or  
13 few, will depend on the type of activity.

14           I wanted to say this, and that's why I stated  
15 that the granting of Environmental Viability is a  
16 preparatory formality, part of a procedure before  
17 granting other authorizations. It's not the final act.  
18 The final one is the one that entitles somebody to do  
19 something. It's a formality. It doesn't per se grant  
20 the authority to conduct the activity.

21           And I also said--well, it's--it's already  
22 there. The presentation states this. This is

1 something that, in principle, is a formality that  
2 doesn't allow for act, per se.

3           What I was interested in my presentation was  
4 to show that Environmental Viability is a requirement  
5 for a developer of any productive activity, for that  
6 activity to be carried out, but it's not an  
7 authorization to be able to perform it.

8           There are circumstances where an EV, where  
9 even if just a formality, may have its own effect,  
10 despite not being the final act.

11           My thesis, for instance, is that if the EV is  
12 denied, this could have productive effect. Why?  
13 Because the developer can no longer do anything if they  
14 are--he is not granted an EV, and this, yes, could be  
15 challenged, et cetera.

16           And also, when talking about the declaring  
17 null and void, an EV, and let me be clear on this. It  
18 has been said it's a contradiction on the thesis, but  
19 that's not exact--absolutely true.

20           When declaring an EV null and void, the  
21 Constitutional Chamber has said that administration  
22 cannot do it on its own.

1           In order to do it, it has to either follow the  
2 procedure of 173 of the Public Administration law,  
3 which is a procedure for annulment via administration,  
4 where the administration itself declares its wish to  
5 declare something null. It has to create the right  
6 file, and tells the entity there will be the  
7 beneficiary of that act, gives them the right to defend  
8 themselves.

9           After this procedure, the outcome of the  
10 process is then sent to the prosecutor--the  
11 prosecutor's office, which then issues a criterion to  
12 say if the due process has been followed. And if the  
13 alleged nullification, in addition to being absolute,  
14 if it is evident and manifest.

15           The only way to nullify an act  
16 administratively, when it is a formality, or if it is a  
17 final act that entails a right, is for that  
18 nullification, in addition to be absolute--it has to be  
19 also evident and manifest.

20           If it is not evident and manifest, then  
21 administration has to declare the admissibility of the  
22 act and challenge its own act. It's not going to ask

1 the private person deriving from that act that was,  
2 perhaps, erroneous. No, it has to go against its very  
3 own act and seek its elimination in the contentious  
4 litigious body. And then, by presentation of evidence,  
5 they have to see if that act has been nullified or not,  
6 obviously informing the individual that derived the  
7 facts from the act.

8           The difference of doing it administratively or  
9 judicially is whether the absolute nullification can be  
10 seen without any problem, without the need for  
11 presenting evidence. If, from simply reading the file,  
12 one can see that that nullification is absolute and  
13 manifest.

14           Otherwise, if it has to go through a different  
15 body, where there will be presentation of evidence and  
16 have a broader examination of whether the default  
17 exists or not, and as alleged by the administration  
18 concerning the act and based on which they want to  
19 nullify the act, saying that it is harmful to public  
20 interest.

21           Well, the Office of the Attorney General has  
22 to approve this administrative process. And it has

1 done so for EVs. Because the Constitutional Chamber  
2 has indicated that it has to be according to 173, and  
3 the Office of the Attorney General has to abide by it  
4 by law. It has no other way of doing it. It has to  
5 follow this method.

6 But in administrative litigious cases, where  
7 there is a challenge against an EV that, for instance,  
8 has been granted to a private individual, that this act  
9 cannot be challenged because it is a mere formality  
10 that does not generate estoppel, and this has been  
11 accepted by the courts, because this is an act that  
12 cannot be challenged.

13 So, there are two kinds of case law and two  
14 kinds of practices. One is what is done at the  
15 contentious litigious thing, alleging it's a defense  
16 and the acts cannot be challenged and therefore it  
17 cannot be seen by that jurisdiction, where the  
18 tribunals has asserted the right even in the Cassation  
19 Court, which is the highest body.

20 And then something quite different is what's  
21 done when it's a matter of declaring the acts null and  
22 void. There, they do have to participate and they have



1 to explain why, and there have been many explanations.  
2 I have issued such criteria in looking at the manifest  
3 annulment of an EV.

4           There is a Constitutional Chamber that forces  
5 administration, if they want to nullify an EV  
6 administratively, they cannot do it on their own, but  
7 they have to go through this process. This has  
8 resulted in two positions and has resulted also in the  
9 discussion that we have heard here in the--what I  
10 support and what has been supported by the Claimants'  
11 legal expert.

12           And this is really a small difference, because  
13 ultimately, well, yes, if it's a question of nullifying  
14 an EV, it is necessary to go either to the harmfulness  
15 or go through the procedure provided by the general  
16 law. And the nullification does have an effect because  
17 the private individual no longer has the possibility of  
18 developing what they planned.

19           But another line of jurisprudence has denied  
20 it. It's not that they've denied it, but they say  
21 there's no estoppel if it is a challenge of the  
22 administrative contentious law. The thesis that I've

1 tried to explain here is that EVs is an act--or the act  
2 approving the EV--the act approving that EV has no  
3 effect on the private individual.

4 It neither gives nor takes from him. It  
5 doesn't generate any right for that individual, no  
6 license to do what that individual wanted to do. It is  
7 an essential requirement. It is needed before seeking  
8 other permits. But the viability per se doesn't  
9 authorize the individual to do anything.

10 And with that, I conclude.

11 MR. LEATHLEY: Thank you, Mr. President. We  
12 have no further questions.

13 PRESIDENT SIQUEIROS: Considering the time,  
14 which is roughly 10 past 1:00, would you prefer that we  
15 take the break at this point, as scheduled for lunch,  
16 and recommence thereafter?

17 MR. BURN: I think that's prudent, sir. Yes.

18 PRESIDENT SIQUEIROS: Okay. So, we will  
19 restart--let's try to be punctual one hour from now,  
20 considering the pressure on time.

21 Mr. Jurado, given the need for a rest required  
22 during this proceeding, we're now going to have a

1 one-hour recess for lunch.

2           As a legal expert, witness, knowing about the  
3 Costa Rican law, you don't know the facts; you're not  
4 aware of them. You have maybe heard about some of them  
5 in this process. But let me inquire if there is any  
6 objection on the part of Claimants that Mr. Jurado have  
7 contact during this period with representatives of the  
8 Respondent?

9           MR. BURN: It does raise the sort of twilight  
10 character of Mr. Jurado's status as a semi-fact,  
11 semi-expert witness.

12           PRESIDENT SIQUEIROS: It's actually--the  
13 only--there are no facts as have been identified by Mr.  
14 Leathley at the commencement of the examination, but I  
15 think that he was not offered, indeed, as an expert but  
16 rather as a witness of fact, fact being Costa Rican  
17 law.

18           MR. BURN: Mr. Leathley was absolutely right  
19 to say that. But our point is, as has been made clear  
20 before the hearing began, is that the duties that bind  
21 all the other expert witnesses who appear in these  
22 proceedings do not bind Mr. Jurado.

1           And indeed--in the time between his First and  
2 Second Statements, he was elevated to High Office of  
3 State, and so, his position is even harder in terms of  
4 his duties to the Tribunal and the process.

5           But I mean, I think--to be honest, I think we  
6 would be fairly relaxed about, during the lunch break,  
7 him being able to sit with those representing the  
8 Respondent.

9           But our observations about his position and  
10 the fact that he doesn't--can't--it's not a criticism  
11 of him at all--he can't give evidence in the same--with  
12 the same duties in mind as the--all of the other  
13 experts on both sides, that remains an observation on  
14 our side.

15           PRESIDENT SIQUEIROS: Understood, and that's  
16 why your views were requested.

17           But I am sure that counsel to Respondent would  
18 simply--

19           MR. LEATHLEY: Entirely relaxed, sir.  
20 Entirely in your hands. Whatever you prefer.

21           PRESIDENT SIQUEIROS: There being no  
22 objection, the Parties--I think the Tribunal feels the

1 same way. There's no facts on which he could be  
2 influenced by the Parties. His statements are going to  
3 be exclusively with respect to local law.

4 We'll continue, then, in one hour, Mr. Jurado.  
5 Thank you very much.

6 (Whereupon, at 1:12 p.m., the Hearing was  
7 adjourned until 2:10 p.m.)

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AFTERNOON SESSION

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2 PRESIDENT SIQUEIROS: If the Transcribers,  
3 Court Reporters, and Interpreters are ready and the  
4 parties are ready, then we may proceed.

5 We will continue, Mr. Jurado, with the  
6 examination to be done by the Claimants' team.

7 MR. BURN: Sir, just before I hand over to my  
8 colleague, Mr. Roger Guevara, who will be examining the  
9 witness, can I just return as a matter of logistics to  
10 the question of speed of delivery.

11 It's fascinating to listen to what Mr. Jurado  
12 has to say; and clearly, he has a lot to say. But it's  
13 very dense in terms of its content, and it's being  
14 delivered in a very rapid way. And I observed behind  
15 in--in the screens behind, that the Interpreters, who  
16 are doing an absolutely superb job, but it's very  
17 challenging for them to keep up. And I know that will  
18 transmit to the Transcribers as well, who are, of  
19 course, dependent, to a large extent, at least, on the  
20 English side.

21 So, if Mr. Jurado could just keep the speed  
22 down a little so that we're not missing things from the

1 record from what is important testimony.

2 THE WITNESS: No problem. Thank you. Will be  
3 glad to.

4 MR. BURN: So, at this point, I will hand over  
5 to Mr. Guevara.

6 CROSS-EXAMINATION

7 BY MR. GUEVARA:

8 Q. Good afternoon. First of all, we would like  
9 to congratulate you for your recent appointment as  
10 Attorney General of the Republic of Costa Rica.

11 A. Thank you very much.

12 Q. And also thank you, because with the  
13 presentation you made during your first intervention,  
14 the fact is that you decreased the time of our  
15 examination. You made a number of clarifications we  
16 were interested in discussing with you.

17 You made three corrections to your Second  
18 Witness Statement, very specific amendments. And with  
19 your presentation, you accepted other clarifications  
20 that I would like to study in greater detail to  
21 understand, and so that the Tribunal is clearer about  
22 what your opinion is regarding the subjects in which



1 you make your statements.

2 MR. BURN: The English LiveNote transcript is  
3 not connected at the moment.

4 (Off the record.)

5 BY MR. GUEVARA:

6 Q. You have been given a binder, folder. Please  
7 look at your First Statement, which is under Tab 1.  
8 Please go to Paragraph 11.

9 Could you please read the last three lines,  
10 beginning with the word, "Accordingly."

11 A. Aloud?

12 Q. Yes, please.

13 A. "Accordingly, SETENA is a technical body  
14 legally designated to analyze and resolve"--

15 THE INTERPRETER: --oh, no, rather--sorry.

16 The Interpreter corrects herself.

17 A "Similarly's, the law clearly provides  
18 that both private and public institutions must comply  
19 with SETENA's resolution in relation to these  
20 environmental impact assessments."

21 Q. Now we go to Tab 2 of your Statement,  
22 Paragraph 62.

1 A. Yes.

2 Q. Could you also read that last paragraph, where  
3 it is essentially saying, "Environmental Viability  
4 compels"?

5 A. "Viability subject complied with by  
6 individuals and the public bodies and entities."

7 Q. Will you agree with me on the basis of  
8 this--these paragraphs that you read that Environmental  
9 Viability is compulsory for public employees as well as  
10 for public entities and individuals; correct?

11 A. Yes, correct.

12 Q. This means that the other entities and bodies  
13 of the administration do not have to notify acceptance  
14 of Environmental Viability to SETENA so that this EV be  
15 binding; correct?

16 A. What do you mean by "acceptance"?

17 Q. In other words, just the fact that SETENA  
18 issues it, a public employee **doesn't have** to say, oh,  
19 yes, I agree. I'm letting SETENA know that I agree  
20 with what you issued. You simply have to comply with  
21 it; correct?

22 A. Yes.

1 Q. Do you agree, then, that public  
2 administration, including municipalities, the Ministry  
3 of the Environment, and its other offices, such as  
4 SINAC, cannot ignore the impact of an Environmental  
5 Viability issued by SETENA?

6 A. No, it could not.

7 Q. Could you confirm--or rather, do you agree  
8 when I say that a prosecutor of the Republic is a  
9 public employee?

10 A. Of course.

11 Q. Do you also agree that a criminal judge of the  
12 Republic is a public employee?

13 A. Yes.

14 Q. An EV issued by SETENA would also be binding  
15 for them, right, since they are public employees?

16 A. Yes, whatever it affects in their--whatever  
17 their effects.

18 (Court Reporter interruption.)

19 THE INTERPRETER: With the effects it may  
20 have.

21 BY MR. GUEVARA:

22 Q. That is a yes, with the effects it may have;

1 correct?

2 A. Yes. Yes.

3 Q. And this basically would also be due to the  
4 fact that Article 11 of the political constitution just  
5 as Article 34 and Constitutional Chamber opinions,  
6 et cetera, all of this is binding for a prosecutor and  
7 a judge also in the criminal area; correct?

8 A. Yes.

9 Q. During your presentation, you made a  
10 difference between "final acts" and "preparatory acts";  
11 correct?

12 A. Yes.

13 Q. Could you go to Paragraph 6 of your Second  
14 Statement? Tab 2, that is.

15 Both in Paragraphs 6 of this Statement--well,  
16 in Paragraph 6, you say, "The preparatory acts are  
17 those that do not have the ability to impact in the  
18 sphere of the interest of those administrative, nor do  
19 they generate legal effects; is that correct?

20 A. Yes, that is what it says.

21 Q. In the next paragraph of that same statement,  
22 you state as follows: "It is worth mentioning--it is

1 worth mentioning that the result of a final act is the  
2 creation of a relationship between the administration  
3 and the individual, establishing rights and obligations  
4 for the Parties as well as the possibility to modify  
5 and terminate previous legal situations."

6 Correct?

7 A. Correct. That's what it states.

8 Q. So, on the basis of this, do you agree with me  
9 when I say that a preliminary--or previous act does not  
10 create a relationship between the individual and the  
11 administration?

12 A. In principle, it does not.

13 Q. In what principle does it?

14 A. Well, there might be exceptions in some cases,  
15 but basically in principle, no.

16 Q. In Paragraph 113 of your First Statement,  
17 which is under Tab 1, you indicate in that  
18 Paragraph 113 that Environmental Viability is merely a  
19 preparatory act of procedure subordinate to a final  
20 act. It is the same thing that you set forth in  
21 Paragraph 11 which you corrected today, which is in  
22 your Second Witness Statement.

1           So, you're saying that the Environmental  
2 Viability, you want to establish here that it does not  
3 grant any right to the individual.

4           A.     The Environmental Viability does not grant  
5 rights.

6           Q.     To the administered person.

7                     It does not create any binding right regarding  
8 any other public entity.

9           A.     No, it does not grant the right because it is  
10 not an authorization nor a permit.

11          Q.     That was not my question. Does it create an  
12 obligation regarding other public entities?

13          A.     Obligation? Well, that's what I was saying  
14 when you asked the question originally, that it is with  
15 regard to the effects it may have, but an Environmental  
16 Viability does not effect on individuals. It does not  
17 grant them rights.

18          Q.     Yes, but previously when reading the articles,  
19 Article 119 of the Organic Law of Public  
20 Administration, you said that it does grant rights to  
21 individuals.

22                     Could you go to Tab 23.

1 Article 19, in its second paragraph says--and  
2 I will read--"Both for the individuals and for the  
3 public entities and organizations, they will be  
4 obligatory." It is mentioning individuals  
5 specifically--

6 A. Yes.

7 Q. --that preparatory act would not have the  
8 capacity, according to what you said.

9 A. Yes, the thing is that Article 19 speaks about  
10 resolutions in general terms, and SETENA adopts other  
11 types of resolutions that are not part of the  
12 environmental authority.

13 Q. So, you say based on this article that it does  
14 not obligate the Environmental viability, that it  
15 doesn't appear in this Article?

16 A. In the general concept it could be, but the EV  
17 and the case law has said that clearly it is not an  
18 authorization to do anything. It does not grant any  
19 authorization to carry out an activity or to act.

20 Q. Could you go to Tab 5 in your binder. This is  
21 R-486. This is the decision of the Constitutional  
22 Chamber issued in October 2010.

1           Could you go to the "whereas" of the  
2 Decision 8, which speaks about the substance?

3           Could you read--going down about 16 lines,  
4 where it begins, "In the opinion of this Court"?

5           A.    Yes.

6           Q.    Could you read it aloud please until it says  
7 "its own acts"? The second mention of "own acts."

8           A.    "In the opinion of this Constitutional Court,  
9 that situation, since it has to do with the  
10 license--see the general rule--grossly harms the  
11 principle of intangibility of the own acts in annulling  
12 in a unilateral manner an administrative act, but  
13 confer the license of an environmental license to  
14 request the rest of the permits to the competent  
15 authorities. Consequently, we anulate the Resolution  
16 R-28-2010--

17                   (Court Reporter interruption.)

18           THE WITNESS: "Consequently, one should annul  
19 the Resolution R-2010-MINAET of 11 hours of June 2,  
20 2010, of the Ministry of the Environmental Energy and  
21 Telecommunications because it harms the principle of  
22 intangibility of own acts."



1 BY MR. GUEVARA:

2 Q. Do you agree with me based in this statement  
3 that the chamber is using as an argument, as a  
4 Constitutional argument, to make a decision the  
5 violation of the Principle of Intangibility of Own  
6 Acts?

7 A. Yes.

8 Q. And would you agree with me that the  
9 intangibility or the Principle of Intangibility of  
10 these acts arises from Article 34 of the political  
11 constitution, Article 34 of the constitutional--it does  
12 protect the retroactive position of acts?

13 So, do you agree that that Principle of  
14 Retroactivity of the law applies when subjective rights  
15 have been given to the individual that is grossly  
16 violated with these cases?

17 A. Yes.

18 MR. LEATHLEY: Excuse me. I apologize for  
19 interrupting. I actually need to repeat the same  
20 request that Mr. Burn made earlier. I'm following the  
21 English, and I think we're getting about 50 percent of  
22 it, I'm afraid, both from your questions and from your

1 answers. So, both sides are being prejudiced at the  
2 moment.

3 Sorry, Mr. President, for interrupting.

4 MR. GUEVARA: I will try and speak slower to  
5 make the work easier for all the people.

6 PRESIDENT SIQUEIROS: I'm sure  
7 Spanish-speakers are able to follow the conversation  
8 much better. The problem, however, is that not only is  
9 there a transcription of the conversation in Spanish,  
10 but in addition, it has to be then interpreted into  
11 English, and then the English is also transcribed by  
12 the Court Reporters.

13 BY MR. GUEVARA:

14 Q. Mr. Jurado, could you please go to Tab 4 in  
15 the binder before you.

16 This is a Resolution of the Attorney General's  
17 office of--in the Republic. I'd like you to please  
18 refer to the last page of this document.

19 No, I do apologize. Tab 3, please. This is a  
20 decision by the Attorney General dated 10 December  
21 2013. Could you inform this Tribunal who signed this  
22 decision?

1 A. I did.

2 Q. Could you please go to Page 2?

3 A. Which Page?

4 Q. Page 2 of the decision there's a last  
5 paragraph beginning in sentence number in--begin--could  
6 you read it from the beginning of decision.

7 A. Decision Number 2010, 17,237 of October 15,  
8 2010, the Constitutional Chamber--

9 Q. As far as that. That's all. Thank you.

10 Could you ensure whether this decision that  
11 you issued in 2013, does it--is it the same  
12 number--just a moment, please.

13 The number that appears in an annex under  
14 Tab 5?

15 A. It is the same decision, yes.

16 Q. The one that used the Principle of  
17 Intangibility of Estoppel to declare that an action to  
18 annul an EV has been annulled; is that correct?

19 A. Yes, that's correct. However, may I clarify,  
20 please?

21 I believe that in my presentation, I clearly  
22 established that in the case of these processes of the

1 173 in which there has to be a decision as to whether  
2 the nullification is absolute and manifest, then they  
3 have to be processed when it's an EV because the  
4 Constitutional Chamber has determined that to be the  
5 case, and that's why you need this kind of a decision.

6 Q. Yes, but the clarification is that it has been  
7 established that it breaches the Principle of  
8 Inviolability of Estoppel?

9 A. Yes, because that's the only way it can be  
10 done. Using Article 134 of the constitution, I don't  
11 know if it mentions the article, but it's the  
12 intangibility.

13 Q. That derives from 134, you agree with me?

14 A. Yes, yes.

15 (Court Reporter interruption.)

16 BY MR. GUEVARA:

17 Q. You'd agree with me that the Principle of  
18 Intangibility under Estoppel according to the law  
19 derived by this Constitutional Chamber opinion comes  
20 from Article 134 of the Constitution.

21 A. Yes, sir.

22 Q. And Article 134 of the Constitution provides

1 the principle of the fact that the law and  
2 administrative acts cannot be retroactive; is that  
3 correct?

4 A. Yes, sir.

5 Q. Could you please go to Paragraph 13 of the  
6 Second Report?

7 A. Yes.

8 Q. Would you please read it?

9 A. "In other words, obtaining the Environmental  
10 Viability alone does not generate any legal effects  
11 since this creates no rights in favor of the  
12 individual, but it is part of the authorizing process,  
13 and therefore, it can be catalogued as a proprietary  
14 act without inherent effect."

15 Q. Could you please go now to 134 of your Second  
16 Report. Could you please read it.

17 A. "In lieu of a declared subjective right, by  
18 definition, the principle of actos propios could be  
19 invoked, since we would not be before an act with  
20 inherent effects."

21 Q. Would you agree with me that this paragraph is  
22 contrary to what the Constitutional Chamber decided

1 based on your decision?

2 A. Yes, I stated this in my statement.

3 Q It doesn't agree with the thesis of the  
4 Constitutional Chamber when that body analyzed the  
5 environment--EVs for the purpose of annulling  
6 administrative acts.

7 A That's correct.

8 (Court Reporter interruption.)

9 MR. LEATHLEY: To add to that, we've noticed  
10 there was a transcription which didn't--missed the  
11 "not" in the sentence, so, it's actually quite material  
12 as well in many respects. Sorry to add to that.

13 PRESIDENT SIQUEIROS: There will be a process  
14 to confirm the consistency between the translation and  
15 the original language being used in the proceedings.

16 MR. LEATHLEY: Understood, sir. And I'm  
17 following in English, because it's very fast as well,  
18 and I'm sure others will appreciate that.

19 PRESIDENT SIQUEIROS: Yeah. So--

20 MR. BURN: Actually, looking back at the  
21 LiveNote transcription, I think you actually had it  
22 right. I don't think there is--that there is anything

1 wrong other than normal tidying up.

2 (Court Reporter interruption.)

3 PRESIDENT SIQUEIROS: Well, once again, I'd  
4 like to ask Mr. Guevara and Mr. Jurado to please speak  
5 a little bit slower in order to facilitate simultaneous  
6 interpretation of the conversation. Thank you.

7 MR. GUEVARA: Yes. And I formally apologize  
8 to you. And let me clarify to the President, quite  
9 respectfully, my name is Roger Guevara, not Rivera, as  
10 you said, sir. I just want that also to appear  
11 correctly on the record.

12 PRESIDENT SIQUEIROS: I do apologize. I was  
13 just seeing here.

14 So, Mr. Guevara, I do apologize.

15 BY MR. GUEVARA:

16 Q. With regards to what we've just been talking  
17 about, Mr. Jurado, would you agree that in the decision  
18 in 2010, the office that you are the head of, the  
19 Office of the Attorney General, in several decisions  
20 have said that there is a binding effect for all public  
21 entities that consult them--you. It has been  
22 determined that EV is a license for the benefit of the

1 individual, and, therefore, it is defined over as a  
2 proprietary effect with--effect with its own inherent  
3 effects?

4 A. Yes, that is correct. We have listened to  
5 what the Constitutional Chamber has said in that  
6 decision and others.

7 Q. And as an element of law in the Costa Rican  
8 legal system, that is the official criterion that  
9 prevails and must be obeyed by all inhabitants in Costa  
10 Rica; is that correct?

11 A. Well, the decision of the Constitutional  
12 Chamber do--have erga omnes effect as provided by  
13 Article 13 of the law regulating the constitutional  
14 jurisdiction.

15 Q. Then you'd agree with me?

16 A. In the practice, there is legal jurisprudence  
17 that does not follow that line of thought.

18 Q. Would you agree that that jurisprudence that  
19 is one trend, but judges are also bound by the  
20 decisions of the Constitutional Chamber as you  
21 described in a broad book that you wrote called Judges  
22 and Constitution in Costa Rica?



1           A.     Yes, sir, the jurisprudence of the  
2 Constitutional Chamber is binding upon judges.

3           Q.     It is then correct to say that in order to  
4 comply with Costa Rican legislation arising from the  
5 Constitutional Law, the correct official interpretation  
6 is that an act in the environment.

7           A       Sorry, in the environmental area is an act  
8 that we would call under the Principle of actos  
9 propios. That is--we have to abide by the  
10 Constitutional Chamber. That is the last word in that  
11 field.

12          Q.     Thank you. In your presentation earlier, you  
13 also explained a thesis that is presented and you also  
14 pointed out that you agreed that it is a--that  
15 Mr. Ortiz mentioned that if there is a precautionary  
16 measure, there is a constitutional duty to initiate a  
17 process within 15 days, and that's a general thesis is  
18 Costa Rican legislation; is this correct?

19          A.     Correct, that is the jurisprudence of the  
20 Constitutional Chamber.

21          Q.     And because it is the former thinking of the  
22 Constitutional Chamber, it has to be applied within the

1 Costa Rican legal system; is that correct?

2 A. Yes, that one as well as the thesis of that  
3 chamber, about--not operating the 15 days.

4 Q. And that thesis is the 15 days do not--is not  
5 applicable. What it--what it does determine is it has  
6 to be a reasonable term; is that correct?

7 A. Yes, correct.

8 Q. And a reasonable term, you'll agree, needs to  
9 have objective parameters in order to be established  
10 and to respect the proportionality and reasonability  
11 which is the guiding principle of Costa Rican  
12 legislation; is that correct?

13 A. Yes, correct.

14 Q. In your presentation this morning, you spoke  
15 about the Costa Rican legal system, and when it comes  
16 to the environment in your first presentation, you  
17 spoke about four laws: The Law on Biodiversity, the  
18 Forestry Law, the Wildlife Conservation Law, and the  
19 Environmental Organic Law; is that correct?

20 A. Yes, correct.

21 Q. Will you agree with me that this is the  
22 environmental framework that establishes the

1 relationship between the individual and administration  
2 when it comes to environmental issues?

3 A. These are the main laws. Well, it's the main  
4 rules but it's not all of them.

5 Q. Would you agree with me that these are the  
6 main laws that regulate the environment with regard to  
7 the relationship between an individual and the  
8 administration?

9 A. Well, many of those are substantive laws, but  
10 some of them have a procedural nature.

11 Q. Would you agree with me that the law that  
12 regulates the procedural aspects always within the  
13 framework of the public administration is this law,  
14 that's what creates this relationship with regard to  
15 the environment?

16 A. Yes, in general.

17 Q. Could you please go to Tab 17?

18 A. Which declaration?

19 Q. No. Tab 17.

20 Here in Tab 17, what you see is the procedural  
21 regulations for the TAA. Could you read Article 11 out  
22 loud, please.

1           A.    "Legal principles, the administrative  
2 environmental Tribunal will carry out"--

3           Q.    Please read slowly.

4           A.    "Legal principles, the administrative  
5 environmental Tribunal will carry out the normal  
6 administrative procedure established in the general law  
7 on public administration and subject to the principles  
8 of orality, officiality, solarity, and also that a  
9 judge is always present when proof is presented and in  
10 keeping with the procedural going forward of its own  
11 motion, the Tribunal will be empowered to also the  
12 process--this without anyone--or a party intervening."

13          Q.    So, you're saying that this is based on the  
14 general law of administration?

15          A.    Yes, that the--it will be under an ordinary  
16 administrative proceeding established in the general  
17 law of administration and that in the proceeding,  
18 processes will be--go forward of the Tribunal's own  
19 motion.

20          Q.    So, the Tribunal has the obligation to process  
21 and complete its processes of its own motion; is that  
22 correct?

1 A. Yes.

2 Q. Now, can you go to, please, Tab 18.

3 This is the Law on Biodiversity, which is one  
4 of the main laws you mentioned this morning. Could you  
5 confirm to this Tribunal whether this Article 64 also  
6 refers to the general law on administration with regard  
7 to processing and moving forward in the proceeding of  
8 its own motion?

9 A. What was the article?

10 Q. 64.

11 A. Could you please read.

12 Q. Excuse me. No, just confirm it. It's fine.  
13 That it expressly refers to the general on public  
14 administration with regard to procedures; is that  
15 right?

16 A. Would you like me to read it out loud?

17 Q. I want you to confirm that there is an express  
18 reference that is obligatory to use the general  
19 law--public administration with regard to procedures.

20 A. Yes, with regard to the technical processing  
21 in that regard, yes.

22 Q. Now, please, Article 106.

1           This article is in Chapter 9, which talks  
2 about procedures, processes, and penalties in general.  
3 Can you please read it?

4           A.    "Administrative procedure, unless regulated  
5 specifically otherwise in this law for all  
6 administrative processes which is required for the  
7 management of biodiversity, they will go forward under  
8 an ordinary or summary procedure that is regulated by  
9 the general law of the public administration."

10          Q.    And can you also confirm that Article 108 also  
11 refers to the fact that this is subject--strictly to  
12 the contentious administrative jurisdiction?

13          A.    Correct.

14          Q.    Could you please go to Tab 23.

15                Could you please read Article 110 of that law,  
16 which is the Organic Environmental Law? Please read  
17 it.

18          A.    "Promptness in processing of its own motion,  
19 the administrative environmental Tribunal should move  
20 the proceeding forward as well as the processing of  
21 steps of the matters under its competence with the  
22 rapidity required for the situation. The judgment

1 shall be issued within 30 days. In special cases, this  
2 deadline may be extended for 30 days more."

3 Q. And so, would you agree with me that  
4 promptness is established here with regard to the  
5 administrative environmental tribunal?

6 A. Correct.

7 Q. Now, the norms that you said were the main  
8 instruments for the environment refer to the general  
9 law on public administration; do you agree?

10 A. Yes.

11 Q. And there is a deadline of two months  
12 established to resolve any proceeding.

13 So, all the laws, all environmental laws that  
14 you mentioned as the principle ones, refer to a  
15 procedural law that establishes a period of two months  
16 to resolve disputes in an administrative proceeding; is  
17 that correct?

18 A. Yes.

19 Q. Now, the law that regulates the TAA reduces  
20 that to 30 days; is that correct?

21 A. Yes.

22 Q. Correct?

1 A. Yes, yes. It's referring to the procedure.

2 Q. What you just read in Article 110 said in  
3 exceptional cases it could be extended.

4 So, we have the environmental norms establish  
5 the necessary--the fact that there must be--this must  
6 be swift, this must be prompt, that it must be of the  
7 Court's own--the Tribunal's own motion, it must be  
8 within a certain period of time, and this refers to a  
9 maximum period of two months.

10 Do you agree with me?

11 A. Yes, sir.

12 Q. Would you agree with me that this reasonable  
13 period that the Constitutional Court objectively  
14 provided for--well, and--is framed in these provisions  
15 that I have read and that falls within proportionality  
16 and reasonability, now would you consider that a  
17 precautionary measure that lasts without actually  
18 completing the administrative procedure depends on and  
19 has gone on for two years or three years, would you  
20 agree that that violates guarantees and rights of the  
21 Constitution?

22 A. Yes, a precautionary measure without a



1 convenient administrative proceeding, yes, and  
2 Costa Rican law offers to those who are affected by  
3 that, procedural measures in order to go forward.

4 For example, there is a power of appeal.

5 Q. Well, but there's a direct violation by the  
6 public bodies that work in the environment with regard  
7 to these principles; do you agree with that?

8 A. In the hypotheses of a precautionary measure,  
9 that's too broad, that's not justified, yes.

10 Q. Could you please read Paragraph 114 of your  
11 First Witness Statement.

12 Could you please read the first paragraph  
13 beginning with "This is consistent"--well, there are  
14 two versions. There's one in English and one in  
15 Spanish. This is the first declaration--statement?

16 A. Yes.

17 Q. Could you please read the first paragraph?

18 A. "This is consistent with the statement of the  
19 Office of the Public Prosecutor citing the  
20 Constitutional Court considering that the conduct of  
21 the Environmental Impact Study prior to the initiation  
22 of the work is one of the Constitutional parameters or

1 guiding principles including environmental law which  
2 together with Principle of Prevention guarantees the  
3 effective protection of this right."

4 Q. Here, you mention a statement of the Office of  
5 the Public Prosecutor, or--rather, of the Office of the  
6 Attorney General--that cites a decision of the  
7 Constitutional Court. It's in Tab 19. And this is  
8 R-488.

9 Could you please go to Page 13. You will find  
10 the number at the bottom.

11 Could you please read the last paragraph and  
12 the last line, and it says, "Por ello," in Spanish,  
13 "for this."

14 Please, could you read that?

15 A. Up to where?

16 Q. To where it says, "Elements of the  
17 environment."

18 A. "For this reason, this principle of doing it  
19 subject to the Environmental Impact Study is a  
20 corollary of the prior principle and has special  
21 importance--its realization for all human activities  
22 that alter or destroy elements of the environment."

1 Q. And so, this--middle of the fifth line, where  
2 it says "por ello," if you could go down. Could you  
3 read that part?

4 A. "For this reason, the need to have an  
5 appraisal of the impact on the environment which,  
6 according to the general regulations on the procedures  
7 for the environmental impact assessment consists of a  
8 scientific technical administrative procedure that  
9 allows for the identification and to say beforehand  
10 what will be the effects on a medium and activity,  
11 works, or project quantifying them and weighing them in  
12 order to make a decision."

13 Up to there?

14 Q. Please.

15 And finally, I'm going to ask you to go back  
16 to Page 13 and read the second paragraph which begins  
17 in Spanish "De tal forma".

18 A. "In this way, the Precautionary Principle, it  
19 can be applied to the extent that it lacks certainty  
20 with regard to the damage to be produced and the  
21 measures of mitigation and reparation that can be  
22 implemented. If there is certainty about the kind and

1 magnitude of environmental damage that might be caused  
2 and the measures that must--or shall be adopted at that  
3 moment, then there is no doubt. And, therefore, it  
4 would not be proper to apply the Precautionary  
5 Principle.

6 "Said in another way, the Precautionary  
7 Principle should be applied in cases of reasonable  
8 doubt or there's no certainty. When there is certainty  
9 about the kind of damage or the measures to be adopted,  
10 then the nature of it makes it unfeasible or cannot be  
11 applied"--"this principle cannot be applied.

12 "As a consequence, in keeping with the  
13 declaration of Rio, which recognized the existence and  
14 co-relation of the Precautionary Principles--or the  
15 Principle of--Precautionary Principle, and that of  
16 human sustainable development, at every moment, it  
17 should be ensured that there is compliance with a  
18 reasonable weighing of the circumstances that allows  
19 for due respect and application of both principles such  
20 that the activity that are going to be appraised in  
21 keeping with the Environmental Impact and also its  
22 contribution to sustainable human development."

1 Q. So, it says that the kind of impact--well, the  
2 Precautionary Principle as such has not been applied as  
3 you described; is that correct?

4 A. In my opinions?

5 Q. Well, yes, the opinions that you have issued  
6 or the reports you have issued, the ones presented  
7 here.

8 A. No, I made a clear distinction that is in  
9 keeping with what it says between the Preventive  
10 Principle and the Precautionary Principle.

11 Q. The last paragraph you read is clear that if  
12 there is determination of the damage or it's clear that  
13 there is no damage or it's clear what the damage is,  
14 then the Precautionary Principle does not apply?

15 A. And that's what this last paragraph, the  
16 Constitutional Court has stated and--yes, because it's  
17 the Preventive Principle that applies. And once the  
18 Preventive Principle is applied and there is certainty  
19 about the damage or no damage, the Precautionary  
20 Principle does not apply.

21 Q It does not apply in what sense?

22 A. Not for the Environmental Viability.

1 Q. And this is clear, that it's the Precautionary  
2 Principle. There is no justification for using the  
3 Precautionary Principle if it is known--it's certain  
4 what the damage is or that there's no damage.

5 A. With regard to what has been appraised under  
6 the Environmental Viability, yes. But if other  
7 circumstances arise related to other possible damages,  
8 then we might have to apply the Precautionary Principle  
9 if we have no certainty about the damage that could be  
10 caused.

11 Q. Correct.

12 Do you remember the statements that you made  
13 with regard to--one moment.

14 (Pause.)

15 BY MR. GUEVARA:

16 Q. Do you know about the CITES Convention?

17 A. Yes, sir.

18 Q. Do you remember the statements that you made  
19 with regard to this convention and the--when you were  
20 director of the SINAC, you made statements about the  
21 hammershark--this--

22 A. When was this?

1 Q. In 2015. Do you remember?

2 MR. BURN: Just to clarify, CITES is the  
3 International Convention relating to Endangered  
4 Species.

5 MR. LEATHLEY: I dare say so, but I think when  
6 one of our experts is being cross-examined, we're  
7 entitled to know what he's being cross-examined about,  
8 and to see it--and to see it in advance.

9 PRESIDENT SIQUEIROS: If this is not within  
10 his Witness Statement, then there's no way that he  
11 could have been prepared to respond today to any of  
12 those issues.

13 (Pause.)

14 MR. BURN: I haven't had cause to check this,  
15 but, apparently, the Respondent cites--oh, no, the  
16 Rejoinder Memorial, Paragraph 320. In any event--I  
17 think we'd be happy to move on. But just for the  
18 record.

19 BY MR. GUEVARA:

20 Q. Mr. Jurado, with regard to the regulation of  
21 wetlands in Costa Rica, in Paragraphs 54 and 60 of your  
22 First Statement, 54 and 60, basically, of your First

1 Statement, you describe several definitions contained  
2 in different legal instruments of Costa Rican law,  
3 including at different points in time--

4 A. Which paragraphs?

5 Q. From 54 to 60.

6 A. Yes.

7 Q. Could you please read out loud Paragraph 59 in  
8 that first declaration?

9 A. "The foregoing gives rise to the conclusion  
10 that in spite of the existence of various definitions  
11 of the wetland ecosystem in the legislation, the law is  
12 clear in its interest in protection of this type of  
13 ecosystem and the legislation is consistent in  
14 describing a similar notion, each one of its laws, for  
15 the purposes of harmonizing the usual characteristics  
16 of the wetlands, Executive Decree 35803 MINAE  
17 established the ecological characteristics that permit  
18 its identification in Article 6, which provides as  
19 follows: The fundamental ecological characteristics"--

20 Q. That's fine. Up to there.

21 Could you now please read Paragraph 60. Well,  
22 the entire paragraph.



1           A.    "It is important to note"--that's an error.  
2 It should be decree, not opinion--"35803 MINAE offers  
3 guidelines of characteristics that may be found in a  
4 wetlands ecosystem and that provide a basis for their  
5 identification. But that must be comprehensively  
6 analyzed.

7           "Each wetland is composed of a series of  
8 physical, chemical, and biological components that  
9 include considerations relating to the type of soil,  
10 presence of water, animal species residing therein,  
11 vegetation, and concentration of nutrients. Not all of  
12 the characteristics are present in each wetland and not  
13 all carry out their function in the same manner.

14           "The strict interpretation of these criteria  
15 would make it significant the broad protection that  
16 both the national and international legislation and  
17 also case law."

18           Q.    Well, this decree, 35803, that you mention--

19           A.    Well, there's a reference here and says that  
20 it's from 2010.

21           Q.    Would it be fair to say that you have defined  
22 in your First Statement that these criteria could be

1 used--these five definitions can be used to define  
2 wetlands in Las Olas--well, the definition according to  
3 the Ramsar Convention, the one in the law on the  
4 biodiversity, the one in the Fishing Law 8436, the  
5 definition of wetlands in the Organic Law on the  
6 environment, and also the definition under Executive  
7 Decree 35803-MINAE?

8 A. That is the basic legal framework that would  
9 allow for the identification of wetlands, but advising  
10 that the decree must be broadly interpreted and in  
11 keeping with the definitions that are made by law,  
12 which are the ones that are most harmonized with the  
13 Ramsar Convention.

14 Q. So, let's say there are four definitions that  
15 you describe--the Ramsar Convention, the law on  
16 biodiversity, the law on fisheries and aquaculture.  
17 So, do all these definitions apply?

18 A. Well--and--yes, and an effort must be made to  
19 interpret them and to integrate them to define a  
20 wetland.

21 Q. So, would you agree that is the function or  
22 the purpose of Executive 35803 to provide for this

1 effort to establish a clear definition of a wetland?

2 A. That is the purpose, and the decree must be  
3 interpreted in that sense, so it cannot restrict the  
4 ambit that was established in the law.

5 Q. So, based on your experience, that number of  
6 definitions that--the decree must not be followed in a  
7 reduced scope?

8 A. Well, you'd have to--explain this to me what  
9 you meant by is this in keeping with rights and  
10 guarantees of the Constitution, but these are in  
11 keeping with the Ramsar convention, and what the  
12 convention says--well, all bodies of water are  
13 wetlands. That is basically what the convention  
14 provides for and the Environmental Law repeats that,  
15 and the other laws also.

16 Q. Based thereon, there would be no technical  
17 criteria to be applied?

18 A. Yes, there are technical criteria, but the  
19 application thereof cannot be restrictive vis-à-vis the  
20 general concept, because by regulation, you cannot  
21 restrict what is established in the law.

22 The laws cannot be restricted by a regulation

1 that is inferior to it.

2 Q. So, there is, wouldn't you say, a clear  
3 uncertainty about what law to apply or technical  
4 criteria or any body of water?

5 A. No, it's what the law provides. And yes, the  
6 technical aspects in the regulations can be used if  
7 they're read clearly or in the correct manner. For  
8 example, climate condition, the kind of soil, the kind  
9 of vegetation cover that can be used to improve the  
10 concept. But they cannot be--you can't restrict the  
11 Ramsar Convention, and you cannot restrict the  
12 Environmental Law either.

13 Q. Would you agree that if the Executive Branch  
14 establishes a methodology, that is the will of the  
15 Executive Branch to follow that methodology to  
16 establish a criterion as the decree says in a  
17 consistent way, if there's a will to do so?

18 A. Yes, of course. The decrees have to be  
19 interpreted. Decrees have to be interpreted.

20 Q. And if you establish an--and if it establishes  
21 a methodology to be followed, that has to be respected?

22 A. Yes, the political bodies would have to

1 respect it.

2 Q. Do you agree when I say--since you know about  
3 Costa Rican law--that Article 7 of the Law of Wildlife  
4 Conservation, which can be found in Tab 8, which is  
5 C-2020--Exhibit C-2020--sorry, 220--

6 A. Yes.

7 Q. --that this article, as of September 2009, was  
8 an article that was in effect, and it included an  
9 obligation that had to be followed by public bodies  
10 that established that wetlands had to be created and  
11 governed through an executive branch? Is that correct?

12 A. Why as of September 2009? Why this time  
13 limit?

14 Q. Because the Constitutional Chamber declared it  
15 constitutional, this thing about being created.

16 A. Yes.

17 Q. So, you do agree with me?

18 A. I would like to state what the decision is.

19 Q. But could you reply? Do you agree that until  
20 September 2009 there was an obligation of creating them  
21 by decree?

22 A. I wouldn't say that there was an obligation.

1 Even the Constitutional Chamber itself stated that that  
2 obligation to understand that there is a wetland never  
3 existed.

4 Q. Yes. But before that decision existed, there  
5 were no erga omnes effects until September 2007--'9.  
6 That is an effective law that established the  
7 obligation. Article 7, before the waiver or the word  
8 "creation."

9 A. Which paragraph, if I might read it then?

10 Q. You won't find it there because it already has  
11 been deleted because of a constitutional decree.

12 A. But I don't remember the wording of that  
13 standard.

14 Q. What did the waiver consist of? I'm saying  
15 that if the article established the obligation of  
16 creating it by an executive decree, that obligation  
17 was--it had to be--it had to be complied with.

18 A. You're speaking about a hypothetical  
19 situation. If you show me the article, the way it was  
20 worded--

21 Q. We're speaking about a hypothetical situation  
22 now. If a law establishes an obligation, that

1 obligation on the basis of the legality principle  
2 contained in Article 11 of the Constitution is  
3 compulsory for political bodies and individuals;  
4 correct?

5 A. Yes. If it establishes, it is so.

6 Q. And it is only starting the declaration of  
7 unconstitutionality. From there on, then that it stops  
8 being applied; correct?

9 A. Correct. But, as you know--well, not  
10 necessarily. Because the effects of the decisions of  
11 the Constitutional Chamber--since they are  
12 nullification chambers, they have retroactive effects.

13 Q. Not in all cases because the Chamber could  
14 contextualize them.

15 A. But it has to do so expressly.

16 Q. And it could also not violate acquired rights  
17 given under the mandate of a rule that was in effect at  
18 that point?

19 A. Yes, it would have to respect vested rights.

20 Q. Since you know Costa Rican law, you know that  
21 regulatory plans are determined by local municipalities  
22 in your territory--in each territory with the

1 assistance of INTA?

2 A. Correct.

3 Q. These urbanization plans determined by the  
4 Municipality are laws; correct?

5 A. They are laws. They have, actually,  
6 regulatory effects.

7 Q. So, these--

8 A. They have the rank of law.

9 Q. Yes. Yes. These regulatory effects establish  
10 a division of zoning that the Municipality carries out  
11 based on its analysis and studies and determines the  
12 zones and characteristics and soil uses; correct?

13 A. Yes, the regulatory plans do regulate the use  
14 of land and that is based on zoning.

15 Q. So, a municipality has a regulatory plan and  
16 issues these permits for use of land. It has to do  
17 that on the basis of that regulatory plan; correct?

18 A. What do you mean by--when you say "issues"?

19 Q. Issues Uses of land.

20 One of the requirements when somebody wants to  
21 carry out a project of any kind is to go and request a  
22 certification on the use of land?



1           A.     Speaking about certifications?

2           Q.     Yes.  So, the Municipality issues them on the  
3 basis of the regulatory plan if it exists?

4           A.     Yes.  What the certification indicates  
5 regarding a specific lot is what is the allowed use  
6 according to the zoning.

7           Q.     Do you know if the Parrita Regulatory Plan and  
8 its zoning plan describes that in the property of Las  
9 Olas Project--that it is in an area of a fragile  
10 environment or wetland?

11          A.     Sir, I think the principle is clear that I  
12 will not make reference to the specific facts of this  
13 case because I ignored them.  I don't know if the  
14 regulatory plans state so and if that specific project  
15 is located there or what the regulatory plan for that  
16 project provides.

17          Q.     But do you agree that if the Municipality  
18 issues a certification regarding the use of land, that  
19 that makes the municipal entity have to comply with it?

20          A.     The Attorney's Office has said that the  
21 certification of use of land, since it's just a  
22 certification, are declaratory acts.  They do not

1 constitute rights.

2 Q. But it declares a right in favor of the  
3 individual?

4 A. It certifies what is in the regulatory plan.  
5 That certification can be amended, of course, if it  
6 certifies things incorrectly. It has not generated a  
7 right in particular because these are simply  
8 declaratory acts.

9 Q. But if a person carries out--does the building  
10 based on a certificate of use of land and then there's  
11 a change in that, that right has to be respected;  
12 correct?

13 A. If there's a change in the use of land.

14 Q. Towards the future that changes the regulatory  
15 plan?

16 A. Yes. The regulatory plan, like any standard,  
17 cannot be applied retroactively.

18 THE REPORTER: Counsel, if you would just  
19 pause between the question and answer, I would  
20 appreciate it.

21 MR. GUEVARA: I would be glad to do so.

22 THE WITNESS: May I ask the Tribunal a

1 question?

2 PRESIDENT SIQUEIROS: Yes, Mr. Jurado.

3 THE WITNESS: Well, basically, I have no  
4 problem making reference to the issue of regulatory  
5 plans, but I made no observation of this type in my  
6 statement, neither in the first one or in the second  
7 one.

8 PRESIDENT SIQUEIROS: I think it was a comment  
9 that was simply a side comment giving a hypothetical  
10 case.

11 But I do not think or I cannot imagine  
12 necessarily what the line of questioning is of the  
13 Respondent, but I don't think that that necessarily is  
14 the line of questioning.

15 INTERPRETER: It's the Claimants. The  
16 Interpreter corrects. Not the Respondent.

17 BY MR. GUEVARA:

18 Q. Could you please, Mr. Jurado, go to Tab 18,  
19 the Law on Biodiversity.

20 In this paragraph, you indicate, according to  
21 Article 109 of the Biodiversity Law, that the burden of  
22 proof corresponds to whoever is charged with creating

1 an environmental damage; correct?

2 A. In which paragraph, sir?

3 Q. Paragraph 86. It's--yes, Paragraph 86 of your  
4 second statement.

5 A. You told me to look at the Biodiversity Law  
6 under Tab 18. That's where I am at.

7 Q. Yes. And that is Article 109 to which you  
8 make reference in your Paragraph 86 of your second  
9 statement.

10 A. Could I read the paragraph? Which paragraph?

11 Q. Paragraph 86.

12 A. 86?

13 Q. Paragraph 86. It states, "According as to  
14 Article 109 of the Biodiversity Law, the burden of  
15 proof corresponds to whoever is accused of causing  
16 environmental damage"; correct?

17 A. Correct.

18 Q. Now, during your presentation, you spoke of  
19 the Maritime Terrestrial Law and of the jurisprudence  
20 of the Constitutional Chamber in 2010; correct?

21 A. Yes.

22 Q. I think separately you have there as evidence

1 C-298, Exhibit C-298.

2 Now, with reference to this decision of the  
3 Constitutional Chamber, you stated that the  
4 constitutionality of Article 47 was not under  
5 discussion because the Constitutional Chamber had  
6 already decided with regard to the constitutionality or  
7 nonconstitutionality of that article; is that correct?

8 A. Yes, that's what I understand.

9 Q. Now, I would like to give you the opportunity  
10 to--

11 PRESIDENT SIQUEIROS: Mr. Guevara, could you  
12 give us a bit more of the context of this question to  
13 understand why you're asking it?

14 MR. GUEVARA: Well, when referring to the  
15 rules of 51 percent regarding the holding of shares of  
16 corporations that own a Maritime Terrestrial Area,  
17 Mr. Ortiz this morning stated that from his point of  
18 view it is not constitutional to discuss this. Well,  
19 it is something we are discussing because our position  
20 is that that standard was never violated.

21 So, Mr. Jurado stated that in his opinion,  
22 this was a subject that should not be discussed.

1           PRESIDENT SIQUEIROS: I understand.

2           The problem is since for us this is the  
3 document, I wanted to know what the context of this  
4 document is with regard to which you're asking  
5 questions.

6           MR. GUEVARA: Yes, because this allows me to  
7 establish the context, and it will allow you to  
8 understand this better.

9           BY MR. GUEVARA:

10          Q. This decision by the Constitutional Chamber,  
11 if you read it, Mr. Jurado, and the whereases that have  
12 to do with the admissibility, you only make specific  
13 reference to Article 47(a).

14           That first subparagraph regulates the  
15 limitation for foreigners who have been in Costa Rica  
16 with a valid residence for less than five years. It  
17 does not regulate the holding of shares.

18           In other words, so you agree with me when I  
19 say that the assertion by Mr. Ortiz that the Chamber  
20 has not spoken about the substance of Article 47(d),  
21 which regulates the rule of 51 percent regarding the  
22 holding of shares, has not been resolved in substance

1 by the Constitutional Chamber?

2 A. Well, specifically that subject, no. But the  
3 subject of discriminating between nationals and  
4 foreigners for the purposes of granting concessions in  
5 the Maritime Terrestrial Zone, this decision is  
6 applicable, much more than the one of the  
7 Inter-American Court to which Mr. Ortiz made reference  
8 to maintain the country.

9 Q. I'll give you a few minutes. Because the  
10 Constitutional Chamber--the only thing that it analyzed  
11 in that decision--and that's why I want to ask--was the  
12 reasonability of demanding a period of five years of  
13 valid residence in the country, not of the  
14 discrimination between nationals and foreigners--was  
15 inadequate or improper, but, rather, if the period for  
16 physical persons was based on the principles of  
17 reasonability and proportionality.

18 Do you agree with me that that was the  
19 analysis?

20 A. Yes, that was the analysis.

21 Q. Do you agree with me that they did not analyze  
22 if the holding of shares of a company established

1 legally in Costa Rica in accordance with Costa Rican  
2 law could be in the hands--that is over 50 percent  
3 could be in the hands of foreigners?

4 A. As I said, that was not what it strictly  
5 analyzed. The principle that it analyzed is applicable  
6 and it is the subject of discrimination between  
7 foreigners and nationals in the area of granting it or  
8 not--that is granting concessions in the Maritime  
9 Terrestrial Zones.

10 Q. Now, that decision, it has a minority vote  
11 written by Judge Calzada Miranda, who was actually the  
12 president of the Constitutional Chamber.

13 A. Excuse me. The thing is that what we see here  
14 as--

15 Q. Exhibit C-298.

16 A. --is an opinion of the Attorney General's  
17 Office. It is not a decision of the Chamber. I  
18 haven't--I don't have that decision.

19 Q. I apologize. It was my mistake. I was told  
20 that it is not part of it. I made reference to it  
21 because you made specific reference to that decision in  
22 your presentation.



1 I apologize also with the Tribunal. In  
2 effect, it is C-228 that is the decision by the  
3 Attorney General's Office to which I'll make reference  
4 in a moment.

5 This decision that you mentioned of the  
6 Constitutional Chamber has a minority opinion by  
7 Dr. Calzada. She establishes that in her opinion, the  
8 restriction or the difference, per se, between  
9 nationals and foreigners, in general terms, is  
10 unconstitutional because it violates the principle of  
11 transparency. And basically what she criticizes is  
12 that that law, the only thing it imposes, is a formal  
13 obligation of holding shares and that that violates the  
14 principle of transparency, which is the principle she  
15 says of international rank.

16 MR. LEATHLEY: Excuse me. Could you give a  
17 reference regarding the case; that is, to which case  
18 does this refer? You're referring to a document that  
19 refers to a specific case.

20 MR. GUEVARA: It is a reference to the opinion  
21 of the Constitutional Chamber that he used to say that  
22 this had been resolved based on the substance. We'll

1 be glad to provide it because this would be very good  
2 so that the Tribunal could use it to determine if the  
3 Constitutional Chamber has settled or not regarding the  
4 substance of the constitutionality of Article 47(d) of  
5 the Maritime Terrestrial Zone.

6 MR. LEATHLEY: Yes. But the question is not  
7 if there's a reference; it's if it is part of the  
8 record.

9 MR. GUEVARA: It is not part of the record  
10 because Dr. Jurado only today made reference to that  
11 opinion. So, during the break, we decided to review  
12 it, but we will be glad to submit it as evidence.

13 I think for the benefit of the Parties that  
14 would be very good.

15 MR. LEATHLEY: Could you then refer us in your  
16 statement to that reference.

17 MR. GUEVARA: Which statement are you talking  
18 about?

19 This morning.

20 MR. LEATHLEY: I'm sorry. Yes. I made a  
21 mistake.

22 THE WITNESS: May I answer?

1           PRESIDENT SIQUEIROS: Let us wait to see what  
2 is the question.

3           BY MR. GUEVARA:

4           Q. Do you believe with the reasoning used by  
5 Judge Calzada, with the minority opinion?

6           A. No, I don't recall. I don't remember it in  
7 detail. But my position is that that discrimination is  
8 not necessarily unconstitutional.

9           But I would like to clarify something here  
10 before the Tribunal. The Attorney General's Office,  
11 based on procedure, must always provide a report to the  
12 Constitutional Chamber of actions of  
13 unconstitutionality that appear before the Chamber.  
14 This could be the object of an action of  
15 unconstitutionality. And I, as Attorney General, am  
16 the one who needs to provide that report. I would not  
17 like to get ahead of myself regarding the  
18 constitutionality of that standard.

19           PRESIDENT SIQUEIROS: We take note of that.

20           THE WITNESS: Thank you.

21           BY MR. GUEVARA:

22           Q. Based--

1 MR. LEATHLEY: He doesn't have to express himself  
2 on that because the fact of it being unconstitutional  
3 or not is not something that has been mentioned up to  
4 now.

5 MR. GUEVARA: One moment to review my notes.

6 BY MR. GUEVARA:

7 Q. During--or in your statement or your  
8 presentation this morning you stated that SETENA did  
9 not have the obligation of carrying out an inspection;  
10 and your argument, basically was a lack of budget, if I  
11 understood correctly or of resources.

12 A. No, you understood incorrectly, sir.

13 Well, there are two reasons. One is the legal  
14 reason. No standard establishes expressly that  
15 obligation. The standards that have been mentioned  
16 here, the regulations and legal standards, speak about  
17 jurisdiction of SETENA, not an express obligation that  
18 it has to carry out this kind of verification on-site.

19 It speaks about the role of SETENA, and among  
20 its roles or duties it can carry out on-site  
21 verification. And that is logical because it might  
22 want to check to see if any of the information that is

1 being submitted is correct or not.

2           And it must have the opportunity of carrying  
3 out these inspections. That is the legal reason and  
4 that is the practical reason. And that is why the law  
5 is drafted as such. And that is why the law does not  
6 provide for that obligation.

7           And the practical reason is that that would  
8 make the procedures of SETENA very long, which by  
9 themselves already are overburdened and they take  
10 longer than they should take in order to be able to  
11 provide an EV.

12           So, if in addition to everything it has to do  
13 it has to carry out inspections for all the requests  
14 for EV, well, then the time--the periods would be too  
15 long. And I think you, as an attorney of individuals,  
16 would understand perfectly why that is important.

17           MR. LEATHLEY: Mr. President, just one  
18 observation on the translation. It's the same that  
19 came up before. I'm not suggesting it's wrong, but I  
20 just think there needs to be very careful observations.

21           There's a reference by Mr. Jurado to  
22 "funciones," and it's being translated as "duties."

1 Maybe subtle distinctions, but, again, I want to make  
2 note of this.

3           PRESIDENT SIQUEIROS: It is indeed the issue  
4 precisely. So, it's not only a subtle distinction,  
5 it's a relevant distinction.

6           MR. LEATHLEY: Thank you, sir. Sorry to  
7 interrupt, Mr. Guevara.

8           MR. GUEVARA: No problem.

9           BY MR. GUEVARA:

10          Q. Could you go to Tab 23 that refers to the  
11 Organic Environmental Law.

12                   Go to Article 84(d).

13                   That article states that one of the functions  
14 of the Technical Environmental Secretariat is to carry  
15 out field inspections before issuing its decision.

16                   I understand that that is a power but not an  
17 obligation; correct?

18           A. Correct.

19          Q. Now, could you go to Article 89 of that law.  
20 That article regulates inspections. And it states,  
21 literally, as follows: "The members of the National  
22 Environmental Technical Secretariat must carry out

1 inspections to check on the compliance of the legal and  
2 regulatory provisions."

3 In other words, if there's a legal provision  
4 that establishes the authority to carry out  
5 inspections, this article says that it has to be a duty  
6 because it says they "must," not that they "should."

7 A. I'm sorry. But I would not interpret it like  
8 that. That obligation to carry out the--to verify the  
9 compliance of legal and regulatory provisions in that  
10 area has to do with the environmental/legal provisions  
11 that have to be complied with by individuals.

12 Q. That too?

13 A. Yes. In general law. But especially  
14 individuals who go before SETENA for their procedures.

15 Q. Yes, it says in part. But it has an  
16 obligation because it says to check on the compliance  
17 of legal and regulatory provisions.

18 Here there's a legal provision. The only part  
19 that establishes flexibility in this area is the  
20 regulation. But here we have a law.

21 You said, now, that the regulation regarding  
22 wetlands had to be interpreted on the basis of

1 standards--certain standards?

2 A. Yes. But the law that we--right before--we  
3 looked at before clearly states "functions of the  
4 Technical Secretariat," and the expression "functions"  
5 can be translated as competencies of the Executive  
6 Secretariat.

7 Q. Among these competencies is that of carrying  
8 out field inspections before issuing its decisions.  
9 And Article 89, would you agree with me, that it  
10 regulates inspections?

11 A. Yes, it regulates inspections, of course. But  
12 they're determining why inspections are carried out.  
13 They're carried out to check on the fact that  
14 individuals are complying with regulatory and legal  
15 provisions in this area.

16 Q. It does not say it can. It says it will. Do  
17 you agree?

18 A. Well, yes. But read the whole article. It  
19 states, "Those resolutions decided by the Secretariat.  
20 These inspections should be carried out periodically or  
21 when the competent authorities consider it advisable."

22 This is referring to inspections that



1 presumably should be carried out by SETENA  
2 periodically. They should program inspections to see  
3 how the projects underway are being carried out.

4           The standard tempers that obligation a little  
5 bit by saying--or when it deems it advisable, bearing  
6 in mind there may be some practical limitations or  
7 budgetary ones, et cetera, for SETENA to be able to  
8 conduct inspections.

9           That's it. But it is not saying that for each  
10 EV that passes through it, it needs to inspect  
11 concerning each one of those EVs. That makes no  
12 practical sense for an office of this nature,  
13 especially an office that by law clearly receives  
14 information from the individual that is provided under  
15 oath.

16           In other words, they work based on the trust  
17 that they have in the information that is provided to  
18 them. It is not where SETENA becomes the police to  
19 verify everything that's been done and whoever--that  
20 when they are issuing these EVs, who is based on their  
21 own studies. No, they accept the studies conducted by  
22 the developer.

1           Obviously, they need to have the basic skills  
2 as to what is provided in this law and in the different  
3 articles in order to conduct inspections.

4           This rule says that they have to be conducted  
5 periodically. In other words, over the year, they have  
6 to plan certain inspections. But they have to--don't  
7 have to be doing inspections for all of the EVs and all  
8 the steps or to--that each EV is going to depend on an  
9 inspection.

10           But they have to have periodic or regular  
11 inspections or whenever they deem it necessary. And  
12 this is for all the projects being carried out  
13 throughout the country.

14           So, SETENA will have to see over time. It's  
15 based on its technical/financial capacities, how many  
16 inspections they can do, with what frequency,  
17 et cetera, et cetera.

18           Q.    Would you please now, yes, turn to the  
19 decision that you have. It's the document C-298 that  
20 you've been given. Would you please read the date of  
21 this decision, please, so that it will be on record.

22           A.    It is dated 2 September, 2016.

1 Q. Please now turn to page 4 of 11.

2 A. Yes.

3 Q. Could you please read the third paragraph.  
4 It's in quotes, and it's in italics.

5 A. And it says that--"argument"--the whole  
6 paragraph?

7 Q. Yes, please.

8 A. "This argument is manifestly inapplicable  
9 whenever Public Administration has the power to annul  
10 their own acts when they believe that they run against  
11 their own interests. And this authority is limited  
12 when it is a declarative act of events--of rights."  
13 I'm sorry.

14 But for this it will have to go through the  
15 process of harm contained for this purpose in  
16 Articles 10 and 35 of the law regulating their  
17 administrative litigious jurisdiction as provided in  
18 Article 173 of the General Law of Public  
19 Administration, provided there is not an absolute  
20 nullity that is both manifest and obvious, in which  
21 case it would be declared ex officio.

22 Declaratory act of rights can only be declared

1 null by the Administration itself when in presence of  
2 absolute nullity that is manifest and evident. In  
3 other words, it's not an absolute nullity, but a  
4 nullity that is accompanied by a special and aggravated  
5 note. Absolute nullity has to be easily perceived,  
6 which is equal to saying that the circumstances don't  
7 force this conclusion.

8           These two paragraphs--and this is now for  
9 clarification of the Tribunal, two quotations that were  
10 given by the Office of the Attorney General.

11           Q. This decision--now I would ask you to please  
12 read its conclusion. It is on page 9.

13           A. Yes. It reads as follows. "Conclusion: As  
14 there are serious defaults in the decision of the  
15 administrative process that has an impact on the right  
16 of defense, we are unable to issue the decision  
17 requested."

18           Q. Will you agree with me that this decision to  
19 reject from MINAE the possibility of annulling an  
20 Environmental Viability because there was a violation  
21 of due process?

22           A. Please explain yourself better, sir. In this

1 decision--and I have not been able to read it in its  
2 entirety. But from what I see, there was apparently a  
3 rejection in the admissibility phase of the query--or  
4 let me correct myself. It was rejected because the due  
5 process was not followed during the--the process for  
6 the annulment.

7 Q. Yes, it was due--because there was no due  
8 process and there was no right to defense, then--

9 A. Yes. It was then decided on administratively  
10 nullified.

11 Q. Could you please read the paragraph just above  
12 "conclusion"?

13 A. "It is important to point out that this  
14 decision doesn't prejudge the legality or illegality of  
15 other aspects that were not brought in the process,  
16 such as the lack of field inspection, prior  
17 construction, and lack of consultation to SINAC.

18 Administration will have to assess whether  
19 there is any nullification required by the decision on  
20 harm of the resolution granted by the viability or any  
21 firm declaratory administrative act having to do with  
22 rights.

1 Q. So, in this paragraph that you just read, it  
2 says, "Despite there not having been a field inspection  
3 by SETENA and no prior construction and no consultation  
4 to SINAC," these were the arguments put forward by the  
5 Ministry of the Environment to seek the special process  
6 to annul an EV. It was rejected because it violated  
7 the due process and right to defense principles?

8 A. What this paragraph says is that they're not  
9 going to express an opinion as to the legality of the  
10 process. What there was here is an incorrect  
11 presentation of the reasons or the defects in the act.  
12 That was incorrect.

13 And they mention a number of things that were  
14 not taken into account. One would have to know about  
15 the specific case to be able to assess how important  
16 those elements were in this specific case.

17 CROSS-EXAMINATION

18 BY MR. BURN:

19 Q. Mr. Jurado--forgive me for breaking the  
20 pattern. I just want to ask you a few questions to  
21 finish on.

22 I just want to go back to issues relating to

1 Concession and the Maritime Zone Law and so on.

2 Now, if you could just accept for the purpose  
3 of a couple of questions a hypothesis. If you have  
4 somebody who breaches the 51 percent rule, to accept  
5 that as a fact--it's not relevant to this case  
6 particularly, but just accept that as a fact.

7 But the period of time for which that person  
8 is in breach is short: one day, two days, five days,  
9 something like that.

10 And as a matter of procedure, is the period of  
11 noncompliance, does that, first of all, give the right  
12 to public agencies, interested public agencies, such as  
13 the local municipality or the Defensoría or other  
14 agencies, a right to take action to have the Concession  
15 declared invalid?

16 A. If the provisions of Article 47 are  
17 breached--I don't remember the subparagraph--but it's  
18 the one that regulates this issue of the percentage of  
19 shareholding--then, yes, the municipality has the  
20 obligation, based on the procedures, to cancel the  
21 Concession. It has the obligation of doing that.

22 Q. Thank you.

1           And is there a time limit for doing that?

2           A.     There ought to be one, but--there must be a  
3 time in which--well, let me think this through. We're  
4 talking about Concessions granted on public goods or  
5 public area.

6           The constitution and the contentious litigious  
7 administrative law--and we should really focus really  
8 on constitution here--has said that with regards to  
9 such property, the actions having to do with the  
10 protection of that heritage do not prescribe. There  
11 could be perhaps a time prescription of that nature  
12 since this is public land--public area.

13          Q.     And in Costa Rican procedural law, is there a  
14 **De Minimis** rule such that the type of very short breach  
15 that I described--one day, two days, five days--is  
16 considered not to be enough to revoke something like a  
17 Concession?

18          A.     In the legal system governing the Maritime  
19 terrestrial zones, I don't know. I do not believe  
20 there is a provision, or at least I don't know of a  
21 provision that covers that.

22          Q.     So, you think it is possible that a



1 municipality the day after a breach happened that  
2 day--the municipality could initiate action to--for the  
3 Concession to be annulled? Is that right?

4 A. That is right.

5 Q. What happens if the action brought by the  
6 relevant agency--let's carry on using the municipality  
7 for the sake of argument--initiates its action after  
8 the relevant breach has been cured, i.e., there is no  
9 longer a breach even if there was a breach for a few  
10 days?

11 A. One would have to be clear as to the  
12 seriousness of the defect that meant that there was a  
13 change in the shareholding percentage. I think that  
14 the flaw is absolute and would result in annulling the  
15 Concession.

16 And once that has occurred, it would have  
17 to--one would have to cancel the Concession even if the  
18 percentage were restored at a later moment.

19 Q. Do you have authority for that proposition?

20 A. What do you mean by "authority"?

21 Q. Can you cite a decision of a competent court  
22 or a law or regulation which would bear out that

1 a--wait, let me finish the question--

2 A. No, sir.

3 Q. --that a brief and De **Minimis** and cured breach  
4 would be enough to revoke a Concession? Is there  
5 anything you can point to that would justify your  
6 previous assertion?

7 A. I don't have any legal authority to offer you  
8 because your own--this is something only--that I'm only  
9 just hearing. It's just my own personal opinion that  
10 I'm coming out with. I thought you were asking me for  
11 my opinion.

12 Q. Indeed I am, sir.

13 Last question. If there is going to be any  
14 sort of revocation of a Concession, it would have to be  
15 done through a procedure respecting rights of due  
16 process; is that correct?

17 A. Yes, sir.

18 MR. BURN: Thank you. No further questions on  
19 our side.

20 PRESIDENT SIQUEIROS: Before we go to  
21 redirect, if there is going to be a redirect, perhaps  
22 this is a good time to take a short break unless--

1 MR. LEATHLEY: We have no further questions,  
2 sir.

3 PRESIDENT SIQUEIROS: No further questions.  
4 Do you have any questions?

5 Okay, please.

6 QUESTIONS FROM THE TRIBUNAL

7 ARBITRATOR NIKKEN: Mr. Jurado, I would like  
8 you to explain to us a bit the relationship between  
9 Environmental Viability and the criminal types when it  
10 comes to crime against the environment. Let me explain  
11 myself.

12 This covers two questions. First, is it  
13 indispensable that there be a breach of the rules  
14 having to do with the Environmental Viability, either  
15 it wasn't obtained or its terms were not complied with,  
16 for that to result in it being an environmental crime?

17 And reversely, does it suffice to have the EV  
18 to exclude that there has been an environmental crime  
19 that is referred to by the EV? Does it--is there an  
20 exoneration, meaning that once you have the EV, or is  
21 it a valid defense to have the EV?

22 A. Let me make it clear, first, that my field--my

1 special field is not criminal law. So, what I would  
2 like to say is that I'm not doing it as a criminal  
3 lawyer because that is not my specialization.

4 With regards to your first question,  
5 Mr. Nikken, I don't know if there is a criminal figure  
6 that would include noncompliance with an EV.

7 Quite honestly, perhaps it exists but I could  
8 not tell you about it.

9 As to your second question, the granting of an  
10 EV, it has not been used at the courts for a case of  
11 justification or exculpation in the commission of a  
12 crime such as the felling of trees or the one that  
13 talks about wetland drainage.

14 To have an EV is not a cause nor a  
15 justification, nor does it exclude from guilt.

16 ARBITRATOR NIKKEN: Thank you very much.

17 PRESIDENT SIQUEIROS: Mark.

18 ARBITRATOR BAKER: Thank you, Chairman. Very  
19 briefly.

20 I think I understand your position on the EV  
21 not creating any rights in its recipient holder. What  
22 happens if an EV is issued and then at the next stage a

1 construction permit is issued by the municipality? Do  
2 those two things together rise to the level of a  
3 conferred right, in your view, on the holder of those  
4 permits? Or is it just the same as the EV in that  
5 it's--it exists but it doesn't confer any right at all  
6 and can be terminable at any time by the agency?

7 THE WITNESS: When the EV has been the basis  
8 for an action that does generate rights, such as the  
9 permit, the EV then can be challenged, not directly,  
10 but challenging the permit or perhaps challenging the  
11 denial of a permit, for example. If the agency would  
12 like to cancel the construction permit, it can cancel  
13 it and at the same time can cancel the EV.

14 Now, if somebody wants to challenge a  
15 construction permit for any reason, a permit given to  
16 an individual and that they believe is harmful to  
17 themselves--and this has a lot to do with an EV--then  
18 you can combat the EV by combating the construction  
19 permit, with that being the final act.

20 ARBITRATOR BAKER: So, I'm right in my  
21 understanding, then, it sounds like, that once the  
22 permit has issued, it, in effect--I don't know that

1 "supersedes" is the right word, but it becomes the  
2 operative document rather than the EV, and a permit  
3 itself does create and carry rights; is that correct?

4 THE WITNESS: It is correct. The permit does  
5 confer rights.

6 ARBITRATOR BAKER: And if the rights which are  
7 represented by a permit are going to be attacked, can  
8 that be done only in the Administrative Tribunal that  
9 issued the permit or in a court proceeding or where?

10 THE WITNESS: Well, if it's an individual who  
11 is fighting the construction permit given to another  
12 individual, it would--he would have to do it in front  
13 of the Administrative Tribunal. If it is  
14 Administration that wants to terminate that  
15 construction permit for whatever reason, they can do it  
16 in the Administrative Tribunal if the defect that is on  
17 the construction permit is total evident, manifest  
18 nullity.

19 If it is not absolute evident of manifest  
20 nullity, then it has to declare it harmful to public  
21 interest, challenge the permit before the  
22 Administrative Tribunal, in other words, take it before

1 a judge. And that judge is the one that would have to  
2 adjudicate the nullification. In all cases under all  
3 hypotheses, the person on whom rights are conferred by  
4 that act must appear.

5 ARBITRATOR BAKER: Last question--or  
6 second-to-last question. In order for something to be  
7 evident and manifest, I assume that is a standard that  
8 it must be very clear and convincing. It must be at a  
9 much more than just--to put it in simple terms, much  
10 more than a 51 percent children's teeter-totter in  
11 weighing the scale. Am I correct about my impression  
12 and the way in which "evident" and "manifest" is being  
13 used?

14 A. Yes, that is correct. Evident and manifest  
15 means that the defect--the flaw of the act can be  
16 clearly seen without any doubt whatsoever. If there is  
17 a doubt, then it cannot be deemed evident and manifest.

18 ARBITRATOR BAKER: So, if you have a situation  
19 where there are two experts who take a view on a  
20 particular subject, both of whom have reputable  
21 credentials, and they completely disagree, you could  
22 never have an evident and manifest decision in that

1 situation. It would always have to be decided through  
2 an adjudication; is that correct?

3 THE WITNESS: What do you refer? What do you  
4 mean by an "adjudication"? It could be an  
5 interpretation problem.

6 ARBITRATOR BAKER: Yes. So, what I'm trying  
7 to get at is that in whatever Tribunal, whatever  
8 adjudicative body is going to study the situation, it  
9 would have to be of a court or an administrative  
10 proceeding nature in order to resolve the fact that I  
11 have two opinions from experts who disagree completely  
12 on an issue.

13 I mean, I'm having--I don't see--and if I'm  
14 wrong, I want you to tell me where I'm wrong--how  
15 something could ever be evident and manifest and meet  
16 that standard if I have dueling experts who are equally  
17 qualified but have equal--equally different conclusions  
18 on the very same subject.

19 A. Let me see if I'm understanding you correctly.  
20 We're talking about a process whereby the  
21 Administration is going to annul an act that that very  
22 same Administration issued and that generates rights



1 that benefit an individual.

2 Under that hypothesis, the Administration  
3 alleges that the act has flaws, legal defect. And  
4 because of that, because of those flaws, it will annul  
5 the act, thereby harming the individual that--on whom a  
6 right was confirmed by that act. Those flaws, those  
7 defects have to result in absolute nullification, which  
8 is a concept of our administrative law.

9 That means that the flaw is so major that it  
10 cannot be remedied, cannot be fixed in any way.  
11 Furthermore, the flaw must be something that can be  
12 perceived simply without there being any need for  
13 evidence or for studies or for legal interpretations of  
14 a complicated nature. Quite clearly, it has to be an  
15 absolute nullification without any effort to interpret  
16 it.

17 The Administration that nullifies it has a  
18 process, and in that process alleges that the person  
19 who has conferred rights from that act--that person is  
20 informed so that they can express an opinion. And  
21 the--to that individual, the Administration says that  
22 they're going to annul the act because it has an

1 evident and manifest flaw. The individual can object,  
2 but the Administration goes ahead and accepts the  
3 process for the nullification.

4 Before the final decision is made to declare  
5 it null, it's sent to the Office of the Attorney  
6 General, the office that I now head.

7 And an official in that office reviews the  
8 file and ratifies that the nullification is evident and  
9 manifest.

10 If the Office of the Attorney General says  
11 that annulment is evident and manifest, then the body,  
12 the organ, can void the act and issues an  
13 administrative document of annulation that obviously  
14 can be discussed at the Administrative Tribunal.

15 The Office of the Attorney General can  
16 say--and it has often been done. I have done it on  
17 occasion--that that nullification is not evident and  
18 manifest and return the file to the Administration and  
19 say that if you want to annul it, you have to have a  
20 trial for harm.

21 Then it is the Office of the Attorney General  
22 that will be ultimately deciding on it but going

1 through the administrative litigious process.

2 ARBITRATOR BAKER: Extremely helpful. Thank  
3 you very much for that.

4 Finished, Chairman.

5 PRESIDENT SIQUEIROS: I have a question that  
6 may or may not fall within the ambit of your  
7 specialization. You will tell me whether it is or not  
8 and whether or not you can answer. At some point  
9 during the process, it has been said that sometimes  
10 foreigners acquire an Enterprise that has a Concession  
11 in a Maritime Terrestrial Zone. And they appoint a  
12 Costa Rican national as temporary holder of 51 percent  
13 of the shares. And perhaps there is no purchase by the  
14 Costa Rican, but the Costa Rican is merely providing a  
15 service.

16 Situations such as this, are they assessed by  
17 the office you head? And what Costa Rican law would  
18 govern in cases such as this?

19 THE WITNESS: Yes, they are assessed by my  
20 office. And I would like to explain that by law  
21 concerning these areas. We are the legal controller of  
22 compliance of the Maritime Terrestrial Zone law. We

1 have a special mandate for that. And it has issued  
2 many opinions about it, including--except criteria such  
3 as this. When I say "criteria," it is because we play  
4 a double role. The Office of the Attorney General is  
5 the superior advisory organ for Public Administration.  
6 And it issues criteria that are binding for Public  
7 Administration when it seeks the opinion of the  
8 Attorney General.

9           And it defends the State in the administrative  
10 litigation. When I say "the State," I mean Central  
11 Government.

12           In this advisory role, it has issued many  
13 opinions from municipalities when they consult matters  
14 having to do with the Maritime Terrestrial Zone, so one  
15 has been this topic. And the office has said that this  
16 practice is what is called a legal fraud.

17           In other words, using a legal procedure, what  
18 they are doing is evading from something set forth in a  
19 different law. And what's happening here is that there  
20 are Costa Ricans who act as trustees for others in  
21 order to ensure that the right number of shares are  
22 held by a Costa Rican allowing foreigners to have

1 Concessions that pursuant--or foreign companies,  
2 rather.

3 Foreign companies can have Concessions when  
4 the law for the Maritime Terrestrial Zone expressly  
5 indicates a percentage shareholding, that 51 percent  
6 has to be held by a Costa Rican in order to be a  
7 Concessionaire.

8 That is a way of avoiding that law. It's by  
9 using this mechanism. So, I give shares to Costa Ricans  
10 who, obviously, have absolutely nothing to do with the  
11 activity that has been carried out in the Concession.  
12 They're not involved. They just lend their name for  
13 the operation. And this is legal fraud. This has been  
14 pointed out to the municipalities because this is a  
15 criterion used by our office.

16 PRESIDENT SIQUEIROS: Do you know whether a  
17 similar matter has been questioned or reviewed by Costa  
18 Rican courts?

19 THE WITNESS: No, sir. I couldn't tell you if  
20 there has been a case brought before a Tribunal in  
21 which this has been discussed.

22 PRESIDENT SIQUEIROS: During your professional

1 experience, have you ever had a case in this regard?

2 THE WITNESS: No. I've never dealt with this  
3 issue.

4 PRESIDENT SIQUEIROS: Thank you very much,  
5 Mr. Jurado.

6 I'm not sure if there are any other follow-up  
7 questions on the part of Claimants or Respondent.

8 MR. BURN: No, sir.

9 MR. LEATHLEY: No, sir. Thank you.

10 PRESIDENT SIQUEIROS: Thank you, Mr. Jurado.

11 Let's take a 10-minute break. And if we could  
12 discuss right now timing.

13 (Brief recess.)

14 PRESIDENT SIQUEIROS: Then if we are ready to  
15 continue and the Parties are ready to continue, then we  
16 will now proceed with the examination of Ms. Rosaura  
17 Chinchilla Calderón, who is an expert witness that has  
18 been offered by Respondent.

19 ROSAURA CHINCILLA CALDERÓN, RESPONDENT'S WITNESS,

20 CALLED

21 THE WITNESS: Good afternoon.

22 PRESIDENT SIQUEIROS: I'd like to give you

1 some instructions about how the questioning will take  
2 place. You will have an opportunity as an expert in  
3 criminal law to make a presentation. That will be  
4 followed by some questions with regard to your  
5 statements.

6 These will be taken--carried out by the  
7 representatives of Costa Rica, and then there will be  
8 questioning that can take place on the part of the  
9 Claimants. And then, finally, the Respondent can make  
10 very specific questions. Then the members of the  
11 Tribunal may pose questions to you at any time.

12 Since we do have simultaneous interpreting  
13 going on from English to Spanish and vice versa, if  
14 there is a question, I would ask you to wait for it to  
15 be finished before you respond. Please speak at a  
16 reasonable pace so that the interpretation and  
17 transcription can take place.

18 If you are posed a question, we would ask you  
19 to please answer the question first. And if you  
20 consider it appropriate, then you can clarify it.

21 THE WITNESS: Very well.

22 PRESIDENT SIQUEIROS: And you have a card

1 before you. And as an expert, I would ask you to state  
2 this. Thank you.

3 THE WITNESS: It says, "I solemnly declare  
4 upon my honor and conscience that my statement will be  
5 in accordance with my sincere belief."

6 PRESIDENT SIQUEIROS: Thank you very much.

7 DIRECT EXAMINATION

8 BY MR. LEATHLEY:

9 Q. Good afternoon, Judge Chinchilla.

10 Please--can you please confirm the statement  
11 that is contained in the file before you? Can you  
12 confirm for me that it--this indeed is your statement?

13 A. Yes. That's correct.

14 Q. Thank you very much. Briefly, before you  
15 begin your presentation, can you confirm for us your  
16 experience professionally speaking?

17 A. I work as an appeals judge in the criminal  
18 justice system in San Jose, which is the capital of my  
19 country. My job consists of reviewing criminal  
20 judgments from inferior courts to see if there are any  
21 defects that are alleged by the defense or by the  
22 Office of the Prosecutors or if of my own motion I see



1 any defects. I've been working in the courts for 23  
2 years.

3 I've also been appointed by the Costa Rican  
4 judicial branch to be on evaluating Tribunals to select  
5 those who will then become judges at different post of  
6 guarantee or trial or those that review judgments.

7 Q. And have you written any books? Have you  
8 published anything on criminal law?

9 A. Yes. I have some ten books that I have  
10 written with regard to criminal procedural law,  
11 constitutional law, applied to criminal law basically.

12 Q. Thank you very much.

13 So, I understand you have a presentation.  
14 Well, with the risk of perhaps offending you, I'm going  
15 to have to stop you after 10 to 12 minutes because  
16 that's all the time we have. But please continue with  
17 your presentation.

18 A. Before, I'd like to make some statements with  
19 regard to some errors I saw in my statement. For  
20 example, Paragraph 34, it says "committed" and should  
21 be "committing." And then in 79--

22 PRESIDENT SIQUEIROS: If you could just give

1 us a little time to be sure that we're taking correct  
2 note of what you're saying. And where are they? Did  
3 you say 34?

4 THE WITNESS: Yes, sir. Instead of  
5 "committed," "committing." And then we have  
6 Paragraph 79.

7 It says, "Two times arrest."

8 INTERPRETER: In Spanish.

9 THE WITNESS: "De captura 1" should be  
10 eliminated. And then 81--there's actually a spelling  
11 mistake in Spanish. The "n" is missing in the word  
12 "extranjera."

13 Now, with regard to some of the issues about  
14 which I was asked to study with regard to the criminal  
15 proceedings in Costa Rica and statements made here, I  
16 just wanted to avail myself of this opportunity.

17 And yesterday I looked at what Mr. Ortiz said.  
18 And I wanted to focus on one of the basic elements of  
19 the organizational chart, which has to do with the  
20 judicial branch, which Mr. Ortiz did not discuss in  
21 depth yesterday.

22 And I wanted to also discuss Precautionary

1 Measures that can be issued by the judicial branch,  
2 which are different from the Precautionary Measures  
3 that are administrative.

4           And to frame that--well, I would indicate that  
5 in Costa Rica, we have a trial system that is based on  
6 the European Continental system, the Roman-German  
7 system, which is different from the one that is  
8 followed in the U.S. by the common law. The rules are  
9 quite different.

10           In Costa Rica, with regard to the legitimation  
11 or the judicial branch is not only composed of judges,  
12 but administratively it has the public defenders; it  
13 also has the Office of the Public Prosecutors and the  
14 OIJ. But this is only for administrative purposes,  
15 because the courts of justice are independent, which is  
16 a fundamental principle for the Court's job. And the  
17 Office of the Prosecutor is autonomous with regard to  
18 the decisions it makes as far as prosecuting is  
19 concerned.

20           Now, with regard to the courts, what I wanted  
21 to point out, that there is a difference between the  
22 administrative matters or litigious administrative

1 matters, which is where we have acts appealed against  
2 the administration, and then we have the criminal  
3 courts where the state--well, can try someone for  
4 criminal behavior.

5           Now, with regard to criminal law, what we have  
6 to keep in mind are two different areas, what is  
7 procedural and what is substantive. And I'm not going  
8 to delve into that because the expert yesterday delved  
9 into it very well. But I do want to address some  
10 points in Mr. Morera's statement, and these are some  
11 things that I want to point out.

12           With regard to procedural law, there are five  
13 principles which are called political principles of  
14 procedures. They are called political principles  
15 because they have to do with the model of trying  
16 someone in a democracy.

17           And these are indelegable. In other words,  
18 they cannot be negotiated because they protect not only  
19 the parties and not just the accused but also the  
20 victim to the Office of the Prosecutor, of the Claimant  
21 and Respondent, and any party that might intervene in a  
22 proceeding. Also, they also protect the legitimacy of

1 the administration of justice vis-à-vis society.

2 Now, these principles are those of  
3 concentration; in other words, the acts in the  
4 proceedings, especially of the trial, should be done in  
5 a specific period of time. Well, we've been talking  
6 about 10 days.

7 And as Mr. Martínez said, these are ten  
8 working days. We don't count Saturdays, Sundays,  
9 institutional vacation days, or holidays or Christmas  
10 holidays.

11 Now, the adversarial principle, which ensures  
12 the right to defense--what's called "inmediación" in  
13 Spanish, which means that the judge must be present at  
14 all stages so that he can analyze what goes on, not  
15 only what is said, but also body language and also  
16 orality, the oral nature, and that it must be  
17 publicized.

18 Now, when we look at the rule of ten days, it  
19 was questioned: Why couldn't this be provided for if  
20 there was an agreement or if the defendant agreed with  
21 extending these ten days? Just as a defendant might  
22 not agree with--or might agree with the trial being

1 secret, but Costa Rican society must oversee what is  
2 decided by a judge, so this must be accessible to  
3 society.

4           With regard to the rule of ten days, what is  
5 being protected is to avoid a situation where there are  
6 delays, even if that's agreed upon by the parties, that  
7 the Court will forget about what the elements of proof  
8 are.

9           So, none of these political principles can be  
10 done away with for the parties. There has been a case  
11 law discussion about if you extend the period one or  
12 two days, if that means that the trial must be  
13 invalidated, and there have been different opinions  
14 from different courts.

15           But one of the statements made by Mr. Morera  
16 in his first statement as well as the second statement  
17 and one--many of the inexact things that he said, among  
18 many, in my opinion, is that there is a provision to  
19 interpret this conflict.

20           And keeping with the laws of my country, there  
21 are standards of interpretation and, in the last  
22 opinions, have actually invalidated trials in this

1 sense.

2           There is no rule in the criminal law--there is  
3 no rule in the criminal law that establishes which of  
4 the statements have greater value.

5           The only jurisprudence in Costa Rica that is  
6 binding is that arising from the Constitutional  
7 Chamber. However, the decision that the Constitutional  
8 Chamber has made reference to was issued on the basis  
9 of a legislation that was already waived, which is the  
10 Criminal Procedural Code which was repealed in '96.

11           And that is what I'm saying with the footnotes  
12 in my statement. So that--at first glance, I wanted to  
13 explain this subject, which I think Mr. Morera did not  
14 cover appropriately.

15           Now, there are other principles that are  
16 important, the subject of evidentiary freedom and in  
17 dubio pro reo. Mr. Morera, for instance, points out  
18 that in Costa Rica, there is--we don't have a similar  
19 rule when you judge someone and when you declare his  
20 responsibility beyond a reasonable doubt. And there I  
21 wish to indicate the reference in Paragraph 24 of his  
22 first statement.

1           That is not true. Article 39 of the Political  
2 Constitution establishes the principle of innocence.  
3 And arising from the principle of innocence, Article 9  
4 of the Criminal Code establishes the principle in dubio  
5 pro reo, which means that if there's a doubt in the  
6 factual questions, judges must favor the defendant.

7           In other words, to convict a person, the Judge  
8 or the Court, because courts can be made up by one or  
9 three people, the Court must have certainty. So, if  
10 there's a doubt on the facts, it must acquit.

11           And the principle of evidentiary freedom  
12 includes the subject of intentionality--of intention.  
13 And now I will speak a bit about the subject which I  
14 think is also not well explained in Mr. Morera's  
15 statements and has generated, I think, some confusion.

16           As for the stages of the process, there are  
17 five of them and not three, as Mr. Morera states in his  
18 statements. But I don't wish to devote too much time  
19 to that because Mr. Martínez did make reference in his  
20 very extensive statement. Both here and in writing he  
21 spoke about that. And I fully support what he said  
22 about that.



1           But I do wish to point out that from this  
2 point of view from the initial stage, which is under  
3 the Public Prosecutor's Office, up to the level of  
4 remedies, where in Costa Rica you have a number of  
5 remedies against a decision--once a decision can go to  
6 appeal, then to cassation, and then to review, if  
7 necessary--or throughout this process, we also have the  
8 criminal Precautionary Measures which are different  
9 from Precautionary Measures that you have spoken about  
10 or, rather, that Mr. Ortiz and Mr. Jurado spoke about  
11 that actually have to do with administrative matters.

12           In the criminal area, Precautionary Measures  
13 tend to protect the legally protected good; and,  
14 therefore, from the initial stage and until the remedy  
15 stage, they can be issued. They're not subject to  
16 deadlines except for the principle of proportionality.

17           And the only requirement established under  
18 Article 10 is that they be established by law. It can  
19 be the Criminal Procedural Code. It can be any other  
20 regulations as long as it is a law.

21           After that, there are also other articles that  
22 develop and speak about other Precautionary Measures,

1 preventative, imprisonment, et cetera, home arrest and  
2 so on, that are related to other factors, but they're  
3 not relevant to this situation here.

4           Now, we wish to mention, because I said so a  
5 moment ago when we spoke about evidentiary freedom,  
6 that evidentiary freedom, contrary to some systems  
7 where the number of evidence is important, what that  
8 means is that a court can base its certainty on just  
9 one piece of evidence even though there may be ten on  
10 the other side if that evidence, it believes, is  
11 credible.

12           And in order to determine that it is credible,  
13 it must express a reasoning for why it is so. For  
14 instance, we have a witness who saw the homicide where  
15 there are ten who said that that act was not committed,  
16 but those ten contradict one another or they make  
17 reference to different times, et cetera.

18           But this one witness would withstand  
19 questioning, and he has additional elements of  
20 credibility, et cetera. So, on the basis of that  
21 principle, we can--and it is also constitutionally  
22 legitimate that the trial base its conviction on just

1 that one evidence.

2           And that evidentiary freedom means that one  
3 can also show in that way, with any evidentiary  
4 element, the aspect of intentionality. And this is  
5 where I wish to speak for a few minutes about that.  
6 Intentionality, called "dolo" in Spanish, in other  
7 words. In the Anglo-Saxon law, it is called  
8 intentionality. But in the Roman system, it has a  
9 different meaning.

10           When we speak about a crime for the European  
11 Continental System, what we mean is that the act has to  
12 be an action, and that action has to be  
13 typical--typically anti-juridical and culpable. When  
14 we speak about the definition as a crime, this has two  
15 aspects.

16           The objective one--that is, the description of  
17 the crime under the law, for instance, to dry a  
18 wetland--or simply the description under the law. And  
19 then we have the subjective element, which in this case  
20 for the crimes being considered here, they are of an  
21 intentional nature.

22           Intentionality can be of three types.

1           A direct intentionality: "I wanted to kill A,  
2 and I killed A."

3           Then intentionality as a necessary consequence  
4 of what we call eventual intentionality: "I did not  
5 want to kill everyone who was around A, but I chose a  
6 means of killing that necessarily would make me think  
7 that in this way I would kill everyone around A. I  
8 wanted to kill A. I put a bomb there, knowing that he  
9 was surrounded by 20 other people who I did not want to  
10 kill. The bomb exploded and killed everyone else." In  
11 that case,, we speak about necessary consequence  
12 intentionality.

13           And then we have what we call eventual  
14 intentionality. What that means is that the person has  
15 had a number of warnings that show that an event will  
16 happen, and he accepts the possibility of committing  
17 that act.

18           So, in that case, for this case, the  
19 relationship of the warnings is given through the  
20 wetlands reports of the alleged existence of report--of  
21 wetlands and that, in spite of that, the person still  
22 carries out the various works that are allegedly--that



1 Q. Could you please--you were given a binder, a  
2 folder could you go to paragraph 4 of your statement  
3 under Tab 1.

4 A. Yes, sir.

5 Q. In that paragraph in the last line, you  
6 clearly say, "And I will consider the veracity or lack  
7 of veracity of the facts narrated therein."

8 A. Yes, sir.

9 Q. I would like to--well, when you speak about  
10 the ten-day rule, you say that this rule is due to four  
11 fundamental principles that are aimed to maintain the  
12 basis and the law?

13 A. I said five.

14 Q. Yes. I apologize. Five.

15 And that has an objective. Would you agree  
16 with me when I say that the ultimate objective is to  
17 ensure due process on the basis of the principles of  
18 concentration, presence of the judge, mediation, and it  
19 also is aimed at guaranteeing this principle--these  
20 fundamental principles, but always aimed at the  
21 constitutional guarantees of the defendant, mainly--and  
22 of the victim who is party to the process?

1           A.     No, sir, I do not agree when you say that.

2           Q.     So, then the basis is merely formalistic? Or  
3 what principles protect the defendant and the  
4 victim--forgetting now about the Public Prosecutor's  
5 Office--have to do with the ten-day rule of Article 336  
6 of the Criminal Code?

7           A.     Well, as I indicated, it is--it has a  
8 political democratic foundation. It does not--it is  
9 not only for due process in guaranteeing rights of the  
10 defendant and victim, but it is also a question of  
11 legitimacy before the society.

12                    If the parties agree to carry out a secret  
13 trial, maybe there is no injury, but society would not  
14 find out.

15           Q.     Well, but this is not a secret trial. The  
16 availability--I'm speaking about the availability of  
17 continuing with the trial after ten business days.  
18 It's not a secret trial.

19           A.     Yes. But I'm speaking about one of the  
20 principles, and they all have the same rank.

21           Q.     Yes, but what is the main principle which,  
22 according to you, has been violated?

1           A.     Violated by what?

2           Q.     By extending.  What would be the main  
3 principle that would be violated, according to your  
4 opinion?

5           A.     The principle of concentration which I spoke  
6 about a moment ago.

7           Q.     That principle of concentration, thus, is  
8 allow the parties in the process, basically, to be able  
9 to have access to evidence at a given point of time or  
10 at the moment when it was provided; right?

11          A.     No, sir.  It is not only to protect the  
12 parties but to protect the court and society.

13          Q.     And that's what I wanted to get to.

14                 So, amongst these parties who are party to the  
15 criminal case, in an agreement to be able to extend the  
16 oral and public trial after the ten-business day--let's  
17 say on the 11th day--the only thing we would be leaving  
18 aside is society according to what you have  
19 established.

20                 Because the Court would agree--the Court says,  
21 "I agree."

22                 "I won't forget what I had heard.  I will come



1 here one day before, one day after. I am better  
2 rested."

3 And the defendant says, "I agree."

4 The civil party says, "I agree."

5 And the Prosecutor's Office says, "I agree."

6 So, based on that, the only concerned party,  
7 according to you, is the society, which has been  
8 excluded?

9 A. On the basis of that hypothesis which is not  
10 the one having to do with this case, yes.

11 Q. So, what participation does society have in  
12 the reconciliation in a criminal process exactly like  
13 this one?

14 A. Through the Public Prosecutor's Office or the  
15 Attorney General's Office, who see to reconciliation,  
16 that the purpose is to make sure that the  
17 reconciliations in those cases where the legislature  
18 does not authorize this. Of course, these are limited  
19 cases where public interest is not affected but simply  
20 specific individual.

21 Q. So, the guarantors are the Prosecutor's Office  
22 and the Attorney General's Office. And if the

1 Prosecutor's Office and the Attorney General's Office  
2 who represent a democracy say, "We agree to continue  
3 with the process on the 11th day, on the 11th business  
4 day, we agree," you would still be violating that  
5 Democratic participation?

6 A. Yes. Because, first of all, it's not a  
7 question of the Court having said so. And, second,  
8 it's not only the representative in the trial of the  
9 Public Prosecutor's Office who must be legitimate, but  
10 also his superiors and not only the public prosecutor  
11 who is involved in the trial but the general attorney.

12 Q. Okay. Let's knock on the door of his superior  
13 and of the Attorney General, and they say, "We do  
14 agree." So, this democracy--this participatory  
15 democracy would be represented in an agreement where it  
16 says, "Let us continue with the process on the 11th  
17 business day," according to your thesis; correct?

18 A. No, that is not correct because--since it is  
19 an absolute defect, the official who would at that  
20 point make the agreement--if that official is not in  
21 that position anymore, a new one could come in and say  
22 that there has been a flaw.

1 Q. But you said that there's a current that  
2 accepts--there's a school that accepts the possibility  
3 within the courts to--

4 A. Yes. Some have said--some jurisprudence lines  
5 have mentioned--some very old ones, not necessarily the  
6 most recent ones, and many of them under the previous  
7 code, which was basically inquiry and investigation  
8 line, written procedures, et cetera.

9 So, on the basis of that code, the basis of  
10 which was of an inquiry type, there that law existed.  
11 But in 1998, the code was modified based on a more  
12 accusatory line where they began to promote these  
13 political principles that we have mentioned, orality,  
14 the presence of judge and of evidence, making it  
15 public, et cetera.

16 They became strengthened with the accusatory  
17 or mainly accusatory principle that arose when the  
18 legislation was changed in '98--well, rather, in '96,  
19 but it came into effect in '98.

20 Q. So, there's more protection of principles than  
21 of persons and of interest of the process?

22 A. No. It's the protection of the Democratic

1 trial system so that anyone who at any time wishes to  
2 review a sentence or decision can have transparent  
3 access to something that has happened during the  
4 procedure and that there shouldn't be any agreements  
5 between the parties that could be detrimental to  
6 society.

7 Q. One last question. You made an assertion in  
8 Paragraph 4 that says, "I will speak about the veracity  
9 or not of what is stated there, the veracity or lack of  
10 veracity of the facts narrated therein."

11 A. Yes.

12 Q. So you, without being in the principle of  
13 concentration and of evidence, you were able--well, to  
14 say--even though you were not there, basically, you  
15 were able to give an evaluation of the veracity or lack  
16 of veracity of the facts narrated therein.

17 So, if you had that ability, then that  
18 principle of concentration would not be violated, nor  
19 that of immediacy or Democratic validity if you were  
20 able to do that years later. So, if the process  
21 continued on the 11th day, it would not matter. Thank  
22 you.

1           A.     May I make a comment?

2           Q.     No.    I think that for the interest of this--

3           PRESIDENT SIQUEIROS:   You have made a  
4 statement regarding a position by Judge Chinchilla.   I  
5 think it is permissible to ask her to answer.

6           THE WITNESS:   I was saying that I appreciate  
7 the reference you make because it allows me to clarify  
8 that when I say the veracity of what is mentioned  
9 there, I'm not speaking about the facts that are being  
10 judged or were being judged in the case but, rather,  
11 the description of the procedure and of the legal  
12 standards applied.

13          Q.     Thank you for that clarification.   You  
14 indicate that you read the memorial submitted by the  
15 Respondent, is that right, by the Claimants and the  
16 statements--

17          A.     In paragraph 4?

18          Q.     Correct.

19          THE REPORTER:   Counsel, could you slow down a  
20 little bit and pause between the question and the  
21 answer.

22          MR. GUEVARA:   Of course.   I apologize.

1 BY MR. GUEVARA:

2 Q. Yes. In paragraph 4, you say, "I have read  
3 the Memorial submitted by the Respondents in the  
4 arbitration and the witness statements of Mr. David  
5 Richard Aven, Jovan, Néstor, and Luis Martínez."

6 Did you read also the Memorials of the  
7 Respondent?

8 A. No. What I indicated in my document is what  
9 was given to me. And the idea was that I make  
10 reference to the fact, if I found a violation of due  
11 process or not, if I found some irregularity or some  
12 arbitrary situation in the statement of Mr. Luis  
13 Martínez and a--the descriptions that Mr. Néstor Morera  
14 made of the procedure were consistent with Costa Rican  
15 law or not.

16 Q. In paragraph 3 you indicate in the last two  
17 lines, "And to determine whether the actions taken were  
18 according to the due process and the applicable  
19 national/international laws of Costa Rica to the best  
20 of my belief."

21 A. Yes, sir.

22 Q. But if you were not able to read other parts

1 of the file, how can you do that review to decide if  
2 the reading of the file was comprehensive or not?

3 A. Because you're comparing it to paragraph 4  
4 regarding that request. If I had found any kind of  
5 arbitrary situation with regard to what Mr. Aven and  
6 Damjanac were alleging--and if the description of the  
7 process--and this is a statement of Mr. Luis Martínez  
8 and a declaration of the process--or a description of  
9 the process made by Mr. Morera was correct or not.

10 Q. The criminal file, did you review it, the one  
11 for this case?

12 A. Yes, I did. I did examine the file.

13 Q. The whole of it? The civil action, the  
14 Precautionary Measures, et cetera?

15 A. Yes; all in a digital version.

16 Q. The hearings, were you able to see them or  
17 hear them?

18 A. I would like to make a clarification here.  
19 When I reviewed the file, I noticed that there had been  
20 a trial that had been declared null. According to my  
21 country's law, when trials are annulled, recordings are  
22 of no interest because the subject of orality and

1 mediation are simply--in some districts and have no  
2 legal effect due to the annulment.

3 I reviewed the file. I saw what had happened  
4 at the different stages, what had happened in the  
5 trial, the ten-day rule, the subject of--the arrest  
6 order, et cetera, but I did not review the recordings  
7 themselves of the oral trials.

8 Q. Now, the fact that they're not valid for a  
9 future trial--they're not valid for your decision--they  
10 are valid because you are not looking at this as a  
11 criminal judge but as an expert.

12 A. Well, what I was asked to do was to check to  
13 see if there had been any violation to due process  
14 until the moment of the trial and then the action of  
15 extradition.

16 If I had noted any kind of arbitrary situation  
17 in the actions of Mr. Luis Martínez for taking the case  
18 to trial under these conditions and I did not--I did  
19 not see that anything was alleged in Mr. Aven's and  
20 Damjanac and Morera's documents regarding the content  
21 of the trial that would make me ask for the audio  
22 recordings.



1 Q. Taking the assertion where you said that all  
2 witness statements and all acts that happened during  
3 the hearings of the oral and public trial that was  
4 annulled due to the ten-day rule, if I may continue  
5 with my questions.

6 You indicated that you do not agree with  
7 Mr. Néstor's opinion--Mr. Néstor Morera's opinion that  
8 the Prosecutor's Office did this and did not go into an  
9 agreement to extend the term of the negotiation, and  
10 that was because it was a strategy by the Prosecutor's  
11 Office; correct?

12 A. I do not give an opinion on appreciations that  
13 I make. I simply analyze if the actions both by the  
14 Prosecutor and the Court are consistent with the  
15 criteria of reasonableness and the laws of the country.  
16 As for their reasons, I had no access to these reasons.  
17 I do not take them into account either.

18 Q. Based on this rule, do you agree that at a  
19 second trial, the Prosecutor's Office would have had  
20 the opportunity to decide not to call witnesses that  
21 had been accepted during the preliminary stage or that  
22 had been accepted during the preliminary stage as the

1 witness that could make the decision of not calling  
2 them?

3 A. No, sir, I would not agree with that assertion  
4 that you make because under Costa Rican law, there is a  
5 principle called the principle of community of  
6 evidence. Once a witness has been admitted as such for  
7 the trial, he is not party's witness. He is a witness  
8 for the whole procedure.

9 So, in order to be able to not use a witness  
10 who already was admitted in the opening part, all  
11 parties would have to agree--in this case, all the  
12 defendants and all the attorneys. And only with their  
13 agreement could we decide not to use an evidence--I'm  
14 speaking about a witness--but any kind of evidence that  
15 had already been admitted.

16 Q. You may know that during the first trial that  
17 was annulled, there were accepted witnesses who never  
18 got there?

19 A. Yes, sir.

20 Q. And you may know that during the second trial  
21 that was made against Mr. Jovan, one of the defendants,  
22 these witnesses did get there?

1           A.    I do not have knowledge of that.  I did not  
2 review the trial of Mr. Damjanac; simply the violations  
3 that were alleged regarding the arbitrary nature.  They  
4 had basically to do with the process that ended up in a  
5 request for extradition.

6           Excuse me.  Although I did find out that there  
7 was a decision that was appealed and annulled.  But as  
8 for the small--what the details were, I do not know.

9           Q.    Could you go to Paragraph 26 of your  
10 statement?

11          A.    Yes, sir.

12          Q.    Page 12, the first paragraph.  That would be  
13 number 26, fourth line.  It reads as follows, "There  
14 were multiple elements of proof witnessed," and here  
15 you have "awaiting"; is that correct?

16          A.    Yes, sir.

17          Q.    My question is, what is the basis or the  
18 evidence that allowed you to draw the conclusion that  
19 all of this evidence--testimony and evidence carried  
20 any weight?

21          A.    In the accusation and the pleadings of the  
22 defense and the prosecutor--all the different parties

1 have to provide a brief summary of the content as to  
2 what the contents of the evidence will be and  
3 summarized documents.

4 This summary is considered by the  
5 intermediate-level judge that isn't assessing the  
6 evidence but just saying that the witness will be  
7 providing evidence on this matter.

8 So, based on what was stated by the parties in  
9 their pleadings, I issued this opinion. And based on  
10 the assessment made by the judge of the intermediate  
11 step.

12 Q. So, in assessing the evidence in that  
13 Paragraph 47 that is on page 19, I'm talking about this  
14 paragraph of your statement.

15 A. Which paragraph, please?

16 Q. 47 on page 19. You say that, "As informed by  
17 Mr. Martínez and verified in several documents that I  
18 have observed, for the Claimant to obtain permits,  
19 several false documents were provided and relevant  
20 information was omitted."

21 A. Yes, sir.

22 Q. This--what was your basis to issue this

1 statement?

2 A. Well, basically--maybe there is a mistake in  
3 using the plural form here, but if there is a reference  
4 to a false document in which there was a request or a  
5 process was followed when there was a dismissal by  
6 stating that this document was false.

7 Furthermore, it was alleged that the different  
8 permits and actions that had been undertaken under oath  
9 and some data had been omitted. So, given that  
10 information, I made the reference to documents in  
11 plural. But when it's false, that reference is to one  
12 single document, not plural.

13 And, secondly, I'm saying that Mr. Martínez in  
14 his written document that I reviewed--and I was able to  
15 also see the accusation and all the copies that are on  
16 file.

17 Q. So it should be singular, one false document?

18 A. Singular. And a decision was made.

19 Q. So, what was the decision that was made  
20 concerning the false document?

21 A. Well, there was a dismissal in favor of the  
22 person whose name appeared as accused.

1 Q. And you said that relevant information was  
2 omitted. Was there any process that annulled the  
3 permit or that accused or perhaps confirmed that  
4 relevant information had been omitted?

5 A. I'd like to clarify something here. In my  
6 presentation, I referred to the contentious  
7 jurisdiction and the criminal jurisdiction. In the  
8 case of criminal, it is not subject to what may happen  
9 in other jurisdictions. Quite on the contrary.

10 Other jurisdictions actually have to see what  
11 happens in the criminal case. When there is a criminal  
12 process, it may generate prejudice--that's a technical  
13 term--to other processes, but not the other way around.

14 Therefore, it was not necessary to have a  
15 jurisdictional decision because, given the  
16 assessment--the principle to assess evidence and the  
17 principles that controlled the judicial process, it is  
18 up to the judge when conducting his analysis in the  
19 case before him.

20 Q. Excuse me for interrupting.

21 There was no accusation of not using relevant  
22 information? The crime was actually the drying of a

1 wetland?

2 A. No, there was no accusation, but there was  
3 reference made in the document to the fact that that  
4 information had been omitted.

5 Q. Well, let's look at the crime of which  
6 Mr. David Aven was accused. Do you know which article  
7 governs or typifies that crime of draining, drying,  
8 filling, or eliminating a wetland?

9 A. I mention it in my report. But off the top of  
10 my head, I do not know that nor most of the articles in  
11 my country.

12 Q. Well, allow me to read the first paragraph  
13 since you mentioned it. "It will be sanctioned with  
14 prison of one to three years whoever, without  
15 preauthorization by the National System of Conservation  
16 Areas, drains, dries, or eliminates--or fills or  
17 eliminates."

18 So this crime does make it mandatory to ensure  
19 in the criminal case that it exists because it says  
20 here "without prior authorization."

21 So, if there is a prior authorization, the  
22 crime then cannot be typified or determined as being

1 criminal?

2       A.    No, sir.  I don't share your opinion.  When I  
3 made a statement as to how crimes are judged in Costa  
4 Rica, I spoke about a typical anti-legal action.  The  
5 issue of anti-juridical, especially formally, makes it  
6 necessary to precisely look into such issues if in  
7 other parts of the legal system there may or may not be  
8 permits.

9               However, it's up to the criminal judge.  
10 He's--that is the one who has competence or  
11 jurisdiction.  The fact that there are permits and this  
12 is a matter of legitimate--of justification, legitimate  
13 defense, need consent of the right-holder, et cetera,  
14 there may be different permits given by the legal  
15 system.

16               That doesn't mean that you don't look into  
17 probability.  Because in order to reach a trial, all of  
18 this has to be reviewed during the trial, and it is up  
19 to the judge to consider it and weight it during the  
20 sentencing.

21       Q.    So will you agree with me that intent and  
22 knowledge of the prohibition must be proven in order to



1 find--to find and condemn somebody guilty?

2 A. It has to be--any element of proof has to be  
3 used given the probational freedom.

4 As I said, intent is part of the subjective  
5 nature. But the prohibition has to be looked at both  
6 anti-juridically and in culpability. But that is after  
7 the oral public trial takes place.

8 To get to the point of trial, it suffices that  
9 the--to have the probability that this is a typical  
10 fact and the accused committed it. Because all of  
11 these come from the existence of the evidence that can  
12 only be seen during the trial.

13 Q. Two final questions to conclude. If an  
14 authorization has been issued and there is draining,  
15 drying, filling, or elimination of a wetland, that  
16 would be a crime?

17 A. That would depend upon the circumstances under  
18 which it was granted. It depends on what impact this  
19 may have had on knowledge by the accused. And all of  
20 this is considered during the trial.

21 Given circumstances of what you described, we  
22 would have to look into the area of prohibition, which

1 is part of culpability. And this, in turn, could be  
2 vanquished or not. That means if it had been a permit  
3 or perhaps a mistake, an error, or a permit that had  
4 caused the individual to commit an error, that person  
5 is obliged to inform him or herself about it, either to  
6 have legal counsel or whatever. Then they can overcome  
7 the error.

8 But if they could not obtain information--so  
9 all of this impacts the level of culpability. It  
10 depends if they were able to obtain information or not.

11 Q. If this case were to move to trial and there  
12 were a sentencing phase and then it moved to appeals,  
13 would you be the judge competent as being part of the  
14 Court of Appeals to hear this case?

15 A. No, sir. As I pointed out at the outset, I  
16 work in the Court of San Jose. That territorially  
17 covers the 1st, 2nd and 3rd Circuit of San Jose as far  
18 as Court of Appeals. Because of territory, this  
19 individual would not come under the area covered by my  
20 court.

21 Q. Criminal rules. This--"ley penal en blanco"  
22 (phonetic). This is something that we see. It's

1 particular to our legal system. And this consists--and  
2 I'd like to see if you agree with me--that if there is  
3 a criminal type that prohibits an action that impacts  
4 the environment and provides something such as in this  
5 case to dry, fill, eliminate a wetland, that concept of  
6 wetland--that's a technical concept that necessarily  
7 means that we have to look at the environmental rules.

8 Do you agree with me?

9 A. No, sir. The concept of "ley penal en  
10 blanco" is an indetermination of the criminal offense,  
11 but it's not the same as the legal norms of crimes.  
12 When in a criminal case, if I want to understand what  
13 is brought to me, I need to have another term that  
14 describes the element.

15 So we need to see the legal assessment. But  
16 it's not the same as the legal description because the  
17 Constitutional Chamber has not said it's  
18 unconstitutional. What it means is a term, if a term  
19 is completed with another rule, but it's a much broader  
20 one than the mere definition.

21 Q. But you would agree with me that in order to  
22 determine if an accusation against the actions of an

1 individual, had it had an impact on a wetland, then it  
2 is necessary to resort to environmental rules in order  
3 to determine what a wetland consists of?

4 A. Well, these are the type of actions that use  
5 concepts coming from another legal or supra-legal area.

6 Q. And these standards, the ones that are  
7 enforced, have to be interpreted to understand what a  
8 wetland is?

9 A. The trial judge assesses the rank if there are  
10 standards of different rank, which is the later one, et  
11 cetera. But there has to be an exercise to interpret  
12 all of this. First of all, there are treaties that are  
13 above law and then law.

14 Q. With regards to Article 98, did you know that  
15 its current version--

16 A. Article 98 of which law?

17 Q. The Organic Law of Wildlife Protection that  
18 provides the crime against the wetlands, the drying  
19 draining, filling of wetlands. And it entered into  
20 force 9 June 2000. Did you know that?

21 A. Yes, sir.

22 Q. Do you know which was the punishment imposed

1 to this crime prior to the June 2009 reform?

2 A. I don't recall it exactly. It's not in my,  
3 the text before me. But if I recall correctly, it was  
4 a fine that could be turned into prison time, plus  
5 other penalties that are independent.

6 So these are the principal penalties, but  
7 there are additional ones.

8 Q. So that version prior to the one of  
9 9 June 2009 provided for fines that were a maximum of  
10 \$600 approximately. Based on that penalty, it was  
11 possible to issue--was it possible to issue an INTERPOL  
12 notice if the events occurred prior to June 2009?

13 A. Let me begin by saying that in my court, there  
14 is no crime that can be punishable with a dollar fine.  
15 This is a conversion that you have performed. It's not  
16 set forth by law. I don't recall precisely the amount  
17 of the fine. And I will be answering you, but I need  
18 to explain.

19 It is not possible for a crime that can be  
20 punished with a fine to issue a request for an  
21 extradition. Why? Because the Costa Rican extradition  
22 law provides the principle of specialty requiring that

1 one year of prison time is required. And most  
2 treaties, including the one with the United States, do  
3 normally have a similar rule.

4           What happened in this case, according to what  
5 I have been able to verify and have mentioned here, is  
6 that the crime of which they're being accused, which is  
7 the drying or emptying of a wetland, is  
8 conceptualized--and that's why I spoke about European  
9 continual crime--it is a continuous and permanent crime  
10 and not a continuing one.

11           So, what does it mean when we talk about a  
12 permanent, continuous crime? It is similar to what  
13 happens with kidnapping. It begins today--or to be  
14 clear, let me say--let me give an example.

15           An individual today kidnaps a person and  
16 releases them in a year's time. That is a single  
17 kidnapping, a single crime, despite the fact that it  
18 extends over 12 months.

19           What happens if halfway through that period  
20 there is an amendment to the law? That does not mean  
21 that the fact did not occur or that the crime can be  
22 split into two. It is still one crime. And,

1 consequently, what is taken into account is the time of  
2 the outcome; in other words, when the person is  
3 released or when the person is eliminated from that  
4 situation of being a captive.

5 MR. GUEVARA: Thank you very much.

6 MR. BURN: No further questions.

7 PRESIDENT SIQUEIROS: Thank you.

8 Mr. Leathley?

9 MR. LEATHLEY: We have no further questions  
10 either. Thank you, sir.

11 PRESIDENT SIQUEIROS: Mr. Nikken?

12 Mr. Baker?

13 We have no questions for you, Judge  
14 Chinchilla. Thank you very much.

15 MR. BURN: I forget whether we were looking at  
16 finishing at 6:00 or 6:30.

17 PRESIDENT SIQUEIROS: 6:00.

18 MR. BURN: 6:00. Okay. We have Mr. Barboza  
19 available but--

20 MR. LEATHLEY: I can estimate, sir. I would  
21 plan to cross-examine Mr. Barboza for no more than one  
22 hour. But it's whether you condemn him to a weekend of

1 solitude or whether we make the most of 15 minutes.

2 I'm in your hands.

3 MR. BURN: He's an expert.

4 MR. LEATHLEY: Oh, I beg your pardon. Yes, of  
5 course. Yes.

6 MR. BURN: You knew that.

7 PRESIDENT SIQUEIROS: We can commence on  
8 Monday. And there has been some suggestion that we  
9 could have an early start on Monday. I'm not sure  
10 whether you have had the opportunity to decide amongst  
11 yourselves whether you would wish that we proceed with  
12 an early start so that we can alert the team.

13 MR. BURN: No. We didn't have any further  
14 discussions because I think we're already in consensus  
15 on this. I think we need to start as early as possible  
16 on Monday in order that we can get through all of the  
17 environmental evidence.

18 PRESIDENT SIQUEIROS: Sure. The Tribunal  
19 would be willing to start--it has been suggested that  
20 8:00 o'clock.

21 And if the Court Reporters, Transcribers--I'm  
22 alerted to the fact that transcription to Spanish may



1 not be immediate on Monday, but that has been found to  
2 be no objection by the parties.

3           There would be interpretation starting at  
4 8:00 o'clock in the morning. So we can recommence.  
5 And my suggestion is to try to do it sharp at  
6 8:00 o'clock.

7           And we would continue. And we would request  
8 the understanding and anticipate our appreciation for  
9 Court Reporters, Transcribers, and Interpreters that it  
10 might be a long day and that we may go, indeed,  
11 through--tentatively it has been suggested that we  
12 could go until 8:00 o'clock at night.

13           From the Tribunal's perspective, we are  
14 willing to accommodate. And we hope that we will be  
15 able to complete the examination of all experts on  
16 Monday, then, and have time for the closing statements  
17 by the parties also on Monday.

18           MR. LEATHLEY: Thank you, sir.

19           MR. BURN: Thank you, sir.

20           PRESIDENT SIQUEIROS: Thank you.

21           (Whereupon, at 5:50 p.m., the Hearing was  
22 adjourned until 8:00 a.m. on Monday, December 12,

1 2016.)

CERTIFICATE OF REPORTER

I, Michelle Kirkpatrick, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

*Michelle Kirkpatrick*

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Michelle Kirkpatrick

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I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

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MARGIE R. DAUSTER